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Re/Descheduling Marijuana Through Administrative Action

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RE/DESCHEDULING MARIJUANA THROUGH ADMINISTRATIVE ACTION

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In October 2022, President Biden requested that the Secretary of Health and Human Services and the Attorney General initiate a procedure to review how marijuana is scheduled under the federal Controlled Substances Act ("CSA"). The announcement was historic. After more than fifty years of federal prohibition, decades of advocacy and litigation from reform groups, and dozens of stalled efforts in Congress, a President finally decided to wield the Executive Power with an eye towards rescheduling or descheduling marijuana. But just how far does that power go? Given President Biden's request, the question is in serious need of scholarly attention.

This Article accomplishes just that, diving deeply into the thicket of statutory and administrative law that dictates the scope of the President's power to unilaterally reschedule or deschedule marijuana. In doing so, we conclude that the CSA's administrative drug-scheduling procedure is broader than prior scholarship has let on. We identify several avenues for the President to move marijuana to a less restrictive schedule. The pathway to descheduling marijuana is, however, far narrower and more uncertain.

These findings are immediately relevant. They can help guide the Executive Branch as it reconsiders how marijuana is scheduled and will prove useful to courts when the Biden Administration's eventual decision is subjected to judicial review. Indeed, while this Article was in production, the Secretary of Health and Human Services recommended that the Drug Enforcement Agency ("DEA") transfer marijuana to Schedule III of the CSA. The DEA's decision of whether to accept that recommendation will, inevitably, be challenged in the courts.

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I. Introduction

In October 2022, President Biden released a statement requesting that the Secretary of Health and Human Services ("HHS") and the Attorney General initiate a procedure to review how marijuana is scheduled under the federal Controlled Substances Act ("CSA").[1] The announcement was historic. After more than fifty years of federal prohibition, decades of advocacy and litigation from reform groups, and dozens of stalled efforts in Congress, a President finally attempted to wield the Executive Power to reschedule or deschedule marijuana. But just how far does that power go? This question will almost certainly be subject to judicial review and may ultimately be decided by the Supreme Court.

Determining the scope of the President's power to reschedule or deschedule marijuana through administrative action, as it turns out, requires

1. *Statement from President Biden on Marijuana Reform*, THE WHITE HOUSE (Oct. 6, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/.

navigating a veritable thicket of statutory and administrative law. When Congress enacted the CSA, it created a statutory mechanism for the President—or, more specifically, for the President's subordinate officials—to move drugs between schedules or to remove them from the CSA's ambit entirely.[2] This statutory procedure is complicated. It involves two executive agencies, assessments of a drug's accepted medical use and potential for abuse, consideration of numerous statutory drug-scheduling factors, an administrative hearing on the record, and (as if these were not enough) an evaluation of the United States' international treaty obligations.[3]

If navigating this procedure sounds like it would make your head spin, you are not alone. Indeed, the public understanding of the President's authority to re/deschedule marijuana is all over the place.[4] Legal scholarship on the topic similarly does not provide a clear answer. Indeed, we found only one law review article that addresses the scope of the President's power to re/deschedule marijuana head on, and that article is a brief (by law review standards) symposium piece intended to respond to public perception that re/descheduling marijuana could be done with a stroke of the President's pen.[5] In *POTUS and Pot: Why the President Could Not Legalize Marijuana Through Executive Action*, Professor Robert A. Mikos argues that the CSA's procedure for re/descheduling drugs makes it "impossible" for the President

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2. *See* 21 U.S.C. § 811 (creating a procedure in the CSA for the Attorney General and Secretary of Health and Human Services to add, transfer, or remove drugs).

3. *See id.*; *see infra* Section II.A (detailing the CSA's administrative re/descheduling procedure).

4. *Compare* Tom Angell, *Bernie Sanders Pledges Legal Marijuana in All 50 States on Day One as President*, FORBES (Feb. 1, 2020, 10:15 PM), https://www.forbes.com/sites/tomangell/2020/02/01/bernie-sanders-pledges-legal-marijuana-in-all-50-states-on-day-one-as-president/ (quoting Senator Sanders as promising to "legalize marijuana in every state in this country" through "executive order" on his first day as President), *and* Ben Burgis, *Why the Hell Isn't Biden Ending the Federal War on Cannabis?*, THE DAILY BEAST (July 13, 2022, 8:00 PM), https://www.thedailybeast.com/why-the-hell-isnt-joe-biden-ending-the-federal-war-on-cannabis (asserting that "no one anywhere doubts" that the President can deschedule marijuana), *with Jake Tapper's Exclusive Interview with President Obama*, CNN (Jan. 30, 2014), https://cnnpressroom.blogs.cnn.com/2014/01/30/just-released-cnns-jake-tapper-exclusive-interview-with-president-obama/ (quoting President Obama, who declares that "what is and isn't a Schedule One narcotic is a job for Congress" and that "it's not something by ourselves that we [the Executive Branch] start changing").

5. *See generally* Robert A. Mikos, *POTUS and Pot: Why the President Could Not Legalize Marijuana Through Executive Action*, 89 U. CIN. L. REV. 668 (2021) [hereinafter Mikos, *POTUS and Pot*].

to end federal marijuana prohibition.[6] In stark contrast to Professor Mikos's position, a Congressional Research Service report and a report commissioned by an industry-reform group (co-authored by one of us) have both concluded that the President has far broader authority to change marijuana's scheduling.[7] Other legal scholars have addressed related questions—analyzing specific aspects of the CSA's re/descheduling procedure, reviewing that procedure at a general level, highlighting the re/descheduling procedure's (confusing) structure, or focusing on the Federal Drug Administration's ("FDA") options for regulating marijuana—but these writers do not delve into the threshold question regarding the scope of the President's power.[8]

That threshold question is thus in need of further scholarly attention. Our Article dives deeply into the weeds of statutory and administrative law that governs the President's power—through subordinate officials—to reschedule or deschedule marijuana. We analyze both the complex statutory re/descheduling scheme created by Congress when it enacted the CSA and the administrative law principles that are likely to apply on judicial review. Our analysis supports the conclusion that the CSA's administrative scheduling procedure creates plausible pathways for the President to *reschedule* marijuana, including to schedule III as the Secretary of HHS has proposed. We conclude that the pathway toward *descheduling* the drug is, however, far narrower and less likely to survive judicial review.

Given the significance of our conclusion to the Biden Administration's current rescheduling effort, a few words about its scope are necessary before diving into the analysis. First, our conclusion does not question prior case

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6. *Id.* at 681; *see also* Robert A. Mikos, *CRS Wrongly Suggests POTUS Could Legalize Marijuana on His Own*, MARIJUANA L., POL'Y & AUTH. BLOG (Nov. 4, 2021) [hereinafter Mikos, *CRS Wrongly Suggests*], https://my.vanderbilt.edu/marijuanalaw/2021/11/crs-wrongly-suggests-potus-could-legalize-marijuana-on-his-own/ (declaring that, at most, the President could move marijuana to schedule II—the same schedule as other serious drugs like cocaine).

7. *See* JOANNA R. LAMPE, CONG. RSCH. SERV.: LEGAL SIDEBAR, LSB10655, DOES THE PRESIDENT HAVE THE POWER TO LEGALIZE MARIJUANA? (2021), https://crs reports.congress.gov/product/pdf/LSB/LSB10655; *see also* SHANE PENNINGTON ET AL., SCHEDULINGREFORM.ORG, COALITION FOR CANNABIS SCHEDULING REFORM (June 2023), https://schedulingreform.org/report.

8. *See, e.g.*, Rebecca S. Eisenberg & Deborah B. Leiderman, *Cannabis for Medical Use: FDA and DEA Regulation in the Hall of Mirrors*, 74 FOOD & DRUG L.J. 246 (2019); David R. Katner, *Up in Smoke: Removing Marijuana from Schedule I*, 27 B.U. PUB. INT. L.J. 167 (2018); Sam Kamin, *Legal Cannabis in the U.S.: Not Whether but How?*, 50 U.C. DAVIS L. REV. 617, 646-50 (2016); Grace Wallack & John Hudak, *Marijuana Rescheduling: A Partial Prescription for Policy Change*, 14 OHIO ST. J. CRIM. L. 207 (2016); Alex Kreit, *Controlled Substances, Uncontrolled Law*, 6 ALB. GOV'T L. REV. 332 (2013).

law that rejected reformers' attempts to re/deschedule marijuana.[9] In those cases, private litigants tried to compel anti-marijuana administrations to change the drug's scheduling, and courts universally concluded that the administrations had discretion to keep marijuana on schedule I.[10] We do not disagree. Rather, our conclusions stem from the opposite scenario, one in which there is an administration that *wants* to re/deschedule marijuana. In that case, as we shall explain, the legal analysis is quite different.

Second, although we believe our analysis supports HHS's proposed transfer to schedule III, there are necessary and inherent uncertainties about how a case would play out on judicial review. A reviewing court could disagree with our conclusions about the CSA's procedure. Or it could take a decidedly more interventionist approach to reviewing agency action, as the Supreme Court has done in some recent cases, rather than the traditionally deferent approach.[11] And statutory interpretation contains inherent subjectivities; we cannot guarantee a reviewing court will see it exactly as we do.

Third and relatedly, the Secretary of HHS did not make the reasoning behind their rescheduling recommendation public until this Article was near publication.[12] Nor do we know what the Drug Enforcement Agency's ("DEA") reasoning will be in deciding whether to accept or reject the Secretary's recommendation. Without being able to consider those agencies' reasoning, we cannot fully analyze the merits of their specific actions.

Fourth, we emphasize again that the legal pathway to completely descheduling marijuana is far more arduous than the pathway to rescheduling the drug.[13] It depends considerably on three outcomes. First, the Attorney General's Office must modify its existing interpretations of the CSA's

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9. *See infra* Section III.C and cases cited therein.

10. *See infra* Section III.C.

11. *See, e.g.*, *infra* Section IV.B (discussing the Court's "major questions doctrine" and arguing that it should not apply on judicial review of a re/descheduling decision).

12. On January 12, 2024, HHS, in response to a lawsuit filed under the Freedom of Information Act by Texas-based attorney Matthew C. Zorn, released its medical and scientific evaluation and scheduling recommendation relevant to marijuana in its full, un-redacted form. *See* Matt Zorn, *HHS Releases Cannabis Recommendation*, ON DRUGS (Jan. 12, 2024), https://ondrugs.substack.com/p/hhs-releases-cannabis-recommendation. Although the release came far too late in our editing process to analyze HHS's reasoning in the context of this Article, much of the agency's reasoning, on first blush, appears consistent with our analysis of the CSA. *See* Shane Pennington, *The Unredacted HHS Docs*, ON DRUGS (Jan. 13, 2024), https://ondrugs.substack.com/p/the-unredacted-hhs-docs.

13. *See infra* Section III.B (acknowledging the comparatively narrower pathway for descheduling marijuana).

scheduling factors.[14] Second, a reviewing court must defer to the Attorney General's modifications.[15] Third, a reviewing court must accord significant deference to the Attorney General's understanding of how descheduling would affect the United States' international drug treaty obligations.[16] If the reviewing court displaces the Attorney General's interpretation of the CSA's key scheduling provisions with its own (less favorable) interpretation, it would likely foreclose the President's ability to completely deschedule marijuana. The Biden Administration does not seem primed to pursue complete descheduling at this time, but our descheduling analysis may well become relevant to future presidential administrations.

Finally, while our conception of the President's authority under the CSA is broader than Professor Mikos's, we certainly agree with his pushback against those who believe the President can re/deschedule marijuana instantaneously.[17] Needless to say, it is not that simple.

The body of this Article proceeds as follows: Part II provides the necessary background to contextualize the ensuing sections. This part offers an overview of the CSA and its re/descheduling procedure, details the policy disaster that is marijuana prohibition, highlights Congress's ongoing failure to rectify that disaster, and reviews Professor Mikos's claims about the limited scope of the President's power to unilaterally re/deschedule marijuana.

Part III forms the bulk of our analysis. It begins by unpacking the CSA's complex (and confusing) re/descheduling procedure and analyzing how that procedure applies to marijuana. Next, we address a potential limit to the President's power to change marijuana's scheduling: The Attorney General's statutory requirement to consider the country's drug-treaty obligations in re/descheduling proceedings.[18] We conclude that the statutory requirement likely does not prevent the President from rescheduling marijuana but that it leaves only a narrow, uncertain argument for complete descheduling. Lastly, we turn to the deferential standards for judicial review of agency action that should apply to the re/descheduling procedure. Courts in the past have deferred to the DEA's repeated decision to keep marijuana on Schedule I; that deference will (or, at least, should) now cut in the other direction.

Part IV explores some key consequences of our analysis and addresses potential counterarguments. We contend that contrary to Professor Mikos's

14. *See infra* Section III.A.
15. *See infra* Section III.C.
16. *See infra* Section III.B (analyzing the international drug treaty issue).
17. *See* Mikos, *POTUS and Pot*, *supra* note 5, at 674.
18. *See* 21 U.S.C. § 811(d).

concern that presidential re/descheduling efforts will halt congressional action, such efforts may well have the opposite effect and serve as a catalyst for Congress to act. We then address (and dismiss) several separation of powers arguments that could be raised against the appropriateness of presidential re/descheduling. Finally, we clarify common misunderstandings regarding how re/descheduling would impact the potential FDA regulation of marijuana and the resulting marketplace structure. Part V briefly concludes the Article.

II. Background: The CSA and the Federal Marijuana Policy Disaster

This Part lays out the background needed to frame our subsequent analysis of the CSA's re/descheduling procedure in Part III. Three points are most important to highlight. First, we explain that Congress created five schedules of drugs and embedded in the CSA a complex procedure to allow future presidential administrations to schedule, reschedule, or deschedule drugs. Second, we summarize the policy disaster that has resulted from Congress's decision to place marijuana on schedule I—the most serious of the CSA's five schedules. This decision has caused overincarceration, perpetuated racial disparities, and harmed individuals and businesses in several other ways. Third, we highlight how the CSA's administrative re/descheduling procedure—which has considerable appeal to reformers given the aforementioned policy disaster—has been overlooked and misunderstood in legal literature and beyond.

A. The CSA and the Administrative Re/Descheduling Procedure

Congress enacted the CSA in 1970 to create a comprehensive set of laws regulating controlled substances.[19] The CSA has twin aims: it is a public health measure and a criminal law.[20] To effectuate these two aims, the CSA

19. 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. §§ 801-904, 951-971); *see also* Gonzales v. Raich, 545 U.S. 1, 10 (2005); Nat'l Org. for the Reform of Marijuana L. (NORML) v. Drug Enf't Admin., 559 F.2d 735, 737 (D.C. Cir. 1977).

20. *Gonzales*, 545 U.S. at 12 ("The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances."); *see* JOANNA R. LAMPE, CONG. RSCH. SERV., R45948, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 116TH CONGRESS, at i (2019), https://crsreports.congress.gov/product/pdf/R/R45948/2 ("The CSA simultaneously aims to protect public health from the dangers of controlled substances diverted into the illicit market while also seeking to ensure that patients have access to pharmaceutical controlled substances for legitimate medical purposes.").

creates two overlapping legal schemes—registration provisions that require registration for entities working with controlled substances and trafficking provisions that establish penalties for producing, distributing, and possessing controlled substances outside the legitimate scope of the registration system.[21]

The term "controlled substances" refers to drugs or other substances that are included in one of five schedules listed in § 812 of the Act.[22] Congress arranged the schedules from most serious (schedule I) to least serious (schedule V) and specified the criteria for placing drugs on each schedule.[23] Schedule I controlled substances are supposed to have a high potential for abuse, have no currently accepted medical use in treatment in the United States, and lack accepted safety for use under medical supervision.[24] By contrast, substances on schedules II through V do have currently accepted medical uses in treatment in the United States or currently accepted medical uses with severe restrictions.[25] While schedule II drugs also have a high potential for abuse, the potential for abuse of drugs on schedules III, IV, and V is supposed to be comparatively lower than the drugs on the immediately preceding schedule.[26] Congress did not define the terms "potential for abuse" or "currently accepted medical use." The meaning of those terms has instead been supplied by the agencies tasked with administering the CSA.[27] Congress's omission has proven consequential, as we explain later.[28]

Congress classified marijuana as a schedule I drug when it originally enacted the CSA.[29] This was a "preliminary classification" based partly on the recommendation of the Assistant Secretary of the Department of Health, Education, and Welfare—the precursor to today's HHS—that marijuana be placed on schedule I until pending studies were completed.[30] The Assistant Secretary explained that since there was "still a considerable void in our knowledge" about marijuana, Congress should place the drug on schedule I

21. *See, e.g.*, LAMPE, *supra* note 20.
22. 21 U.S.C. § 802(6).
23. *Id.* § 812(b)(1)-(5).
24. *Id.* § 812(b)(1).
25. *Id.* § 812(b)(2)-(5).
26. *See id.*
27. *See infra* Section III.A.
28. *See infra* Section III.A.
29. *See* Gonzales v. Raich, 545 U.S. 1, 14 (2005); *see also* 21 U.S.C. § 812(c) (Schedule I (c)(10)).
30. *Gonzales*, 545 U.S. at 14.

until "certain studies now underway" were completed.[31] At that point, "the Attorney General [could] change the placement of marihuana to a different schedule" if appropriate.[32]

As the Assistant Secretary's testimony indicates, Congress did not intend for its initial scheduling decisions to be locked into place forever. It instead created a statutory procedure whereby the Attorney General—in consultation with the Secretary of HHS—could schedule, reschedule, or deschedule drugs as warranted by future developments.[33] The Attorney General has, in turn,

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31. INTERSTATE & FOREIGN COM. COMM., COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970, H.R. REP. NO. 91-1444, at 61 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4566, 4629 (Committee on Interstate and Foreign Commerce) (statement of Roger O. Egeberg, M.D., Assistant Secretary for Health and Scientific Affairs).

32. *Id.*; *see also* United States v. Amalfi, 47 F.4th 114, 120 (2d Cir. 2022); *Commission on Marihuana: Hearings Before Subcomm. No. 3 of the H. Comm. on the Judiciary on H.R. 10019, H.R. 11166, H.R. 11540, H.R. 13786, H.R. 14011, H.R. 14012, H.R. 14137, and H.R. 14354*, 91st Cong. 53 (1970) [hereinafter *Hearings Before Subcommittee No. 3*] (statement by John E. Ingersoll, Bureau of Narcotics and Dangerous Drugs, DOJ) ("In further response to your question, Mr. Chairman, a question was raised earlier whether we ought not to go into a vacuum or stop any action pending the outcome of the proposed commission study. I don't think we should. I think we should continue to make progress in the area, and once the commission's work is finished, evaluate for the possibility of further progress.").

33. 21 U.S.C. § 811(a); *Gonzales*, 545 U.S. at 13 ("The CSA provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between schedules."); Washington v. Barr, 925 F.3d 109, 117 (2d Cir. 2019) ("[T]he statute contemplated that these initial lists would be regularly revised and updated by the Attorney General, in consultation with the Secretary of Health and Human Services . . . ."); Nat'l Org. for the Reform of Marijuana L. (NORML) v. Bell, 488 F. Supp. 123, 127 (D.D.C. 1980) ("Recognizing that scientific information concerning controlled substances would change, Congress empowered the Attorney General to hear petitions for the reclassification or removal of drugs from the schedules."); Nat'l Org. for the Reform of Marijuana L. (NORML) v. Drug Enf't Admin., 559 F.2d 735, 737-38 (D.C. Cir. 1977) ("Recognizing that the results of continuing research might cast doubt on the wisdom of initial classification assignments, Congress created a procedure by which changes in scheduling could be effected." (footnote omitted)); Nat'l Org. for the Reform of Marijuana L. (NORML) v. Ingersoll, 497 F.2d 654, 656 (D.C. Cir. 1974) ("Congress contemplated that the classification set forth in the Act as originally passed would be subject to continuing review by the executive officials concerned, notably in the Department of Justice and the Department of Health, Education and Welfare. Provision was made for further consideration, one taking into account studies and data not available to Congress when the Act was passed in 1970.").

promulgated rules delegating this power to the Administrator of the DEA, and the Secretary of HHS has delegated its power to the FDA.[34]

Section 811 of the CSA details the re/descheduling process that Congress created. This process is incredibly complicated. It begins when the Attorney General decides to initiate the procedure "on his own motion" or when the Attorney General receives either a request from the Secretary of HHS or a petition from "any interested party" to do the same.[35] From there, the Attorney General must "request from the Secretary [of HHS] a scientific and medical evaluation" of the drug, along with the Secretary's recommendation for where the drug should ultimately be scheduled.[36] The Secretary's recommendation is binding on the Attorney General as to scientific and medical issues, and if the Secretary concludes that a substance "not be controlled," the Attorney General must follow that recommendation.[37] Historically, DEA has never attempted to place a substance on a schedule contrary to HHS's recommendation.[38]

Once the Secretary of HHS has issued their report, the ball returns to the Attorney General's court. The Attorney General must consider the Secretary's analysis (together with any other information the Attorney General deems relevant) and then determine whether there is "substantial evidence" to warrant scheduling, rescheduling, or descheduling the drug.[39] If there is, the Attorney General "shall initiate proceedings" to schedule, reschedule, or deschedule the drug in accordance with two sets of statutory factors identified by Congress.[40]

The first set of factors is the scheduling criteria associated with schedules I-V.[41] The Attorney General may add or transfer any drugs that have "a

34. 28 C.F.R. § 0.100 (2023); Food and Drug Administration; Delegation of Authority, 86 Fed. Reg. 49337 (Sept. 2, 2021). To avoid confusion, we continue to refer to the relevant actors using the terms in the statute (the "Attorney General" and the "Secretary") unless context calls for more specificity.

35. 21 U.S.C. § 811(a); *see also* 21 C.F.R. § 1308.43 (2023).

36. 21 U.S.C. § 811(b).

37. *Id.*

38. *See* PENNINGTON ET AL., *supra* note 7, at 12; *Cannabis Policies for the New Decade: Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Com.*, 116th Cong. 9, 61 (2020), https://www.congress.gov/116/meeting/house/110381/documents/HHRG-116-IF14-Transcript-20200115.pdf (testimony from senior DEA official) (confirming that the official was not aware that DEA had ever deviated from a scheduling recommendation it received from HHS).

39. PENNINGTON ET AL., *supra* note 7, at 12.

40. 21 U.S.C. § 811(b).

41. *See id.* § 811(a).

potential for abuse" and that meet the criteria for "the schedule in which such drug is to be placed."[42] And the Attorney General may remove drugs from the CSA's ambit entirely—that is, deschedule them—where they do not "meet the requirements for inclusion in any schedule."[43]

The second set of factors instructs the Attorney General to look beyond the bare scheduling criteria and make a more holistic evaluation of the drug. Toward that end, Congress included eight additional factors when it detailed the CSA's re/descheduling process in § 811:

> (1) [A drug's] actual or relative potential for abuse.
> (2) Scientific evidence of its pharmacological effect, if known.
> (3) The state of current scientific knowledge regarding the drug or other substance.
> (4) Its history and current pattern of abuse.
> (5) The scope, duration, and significance of abuse.
> (6) What, if any, risk there is to the public health.
> (7) Its psychic or physiological dependence liability.
> (8) Whether the substance is an immediate precursor of a substance already controlled under [the CSA].[44]

Confusingly, § 811 also instructs the Secretary of HHS to consider these factors when they conduct their medical and scientific evaluation toward the beginning of the re/descheduling process.[45] The CSA (perplexingly, again) also does not explain the relationship between the first and second sets of factors the Attorney General is supposed to consider.[46] It is not a model of statutory clarity.

In any event, if the Attorney General concludes that a drug should be re/descheduled, the decision must be "made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by [the

42. *Id.* § 811(a)(1).
43. *Id.* § 811(a)(2).
44. *Id.* § 811(c).
45. *Id.* § 811(b).
46. Kreit, *supra* note 8, at 345, 347 (describing the relationship between the first and second set of factors as "ambiguous" and "mysterious").

Administrative Procedure Act]."[47] That decision is then subject to judicial review.[48]

Lastly, Congress included an exception in the procedure for drugs that are subject to international drug treaties. We call this exception the "Treaty Carve-Out." Section 811(d) provides:

> If control is required by United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section.[49]

In other words, if a substance is controlled under a pre-1970 international treaty, the Attorney General must list the substance in the schedule that they deem "most appropriate to carry out such obligations," notwithstanding any contrary recommendation from the Secretary of HHS.[50] Notably, marijuana is controlled as a schedule I substance under the United Nations Single Convention on Narcotic Drugs—a pre-1970 international treaty to which the United States is a party.[51]

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47. 21 U.S.C. § 811(a)(2); *see also* Shane Pennington, *President Biden's Scheduling Directive Part 2*, ON DRUGS (Oct. 13, 2022), https://ondrugs.substack.com/p/president-bidens-scheduling-directive-19b (describing §§ 811 and 812) (explaining how the formal "on the record" process is a rare rulemaking procedure, unlike any familiar administrative process such as notice-and-comment).

48. 21 U.S.C. § 877.

49. 21 U.S.C. § 811(d)(1); *see also id.* § 812(b) ("Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance.").

50. *See id.* § 811(d)(1). The Treaty Carve-Out does not, however, allow the Attorney General to completely circumvent the Secretary of HHS. The Attorney General must still obtain the Secretary's scientific and medical evaluation and must consider the Secretary's recommendation to the extent the Attorney General deems it to be consistent with the relevant treaty obligations. *See* Nat. Org. for Reform of Marijuana Law (NORML) v. Drug Enf't Admin., 559 F.2d 735, 747 (D.C. Cir. 1977) (holding that the Treaty Carve-Out does not allow the Attorney General to avoid obtaining the Secretary's medical and scientific evaluation).

51. United Nations Single Convention on Narcotic Drugs, Mar. 30, 1961, 520 U.N.T.S. 151, *amended by* the 1972 Protocol Amending the Single Convention on Narcotic Drugs,

In sum, Congress listed marijuana as a schedule I drug as a temporary measure, pending further study. At the same time, Congress created a complex statutory mechanism for the Attorney General and Secretary of HHS to re/deschedule drugs. Today, marijuana nonetheless remains a schedule I drug.[52] And because schedule I is the most restrictive drug classification under the CSA, the production, sale, and use of marijuana are strictly regulated by federal law in the research context and criminally prohibited in all others.[53]

B. Marijuana's Schedule I Status: A Policy Disaster

Congress's initial placement of marijuana on schedule I has proven to be an unmitigated policy disaster. As a threshold matter, it is important to recognize that the decision to list marijuana in the most restrictive drug schedule was informed by a decades-long anti-marijuana campaign significantly rooted in misinformation, racism, and oppression. This history has been thoroughly canvassed elsewhere.[54] We recount it briefly to emphasize the unsoundness of Congress's initial scheduling decision.

Between the early 1900s and 1937, every state and the federal government passed laws that effectively prohibited the non-medical use of marijuana.[55] Opponents of marijuana spread sensationalized accounts about the drug, asserting that it led to everything from uncontrollable sexual desires to

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1961, Aug. 8, 1975, 976 U.N.T.S. 105 [hereinafter 1961 Single Convention]; *see also infra* Sections II.C, III.B.

52. 21 U.S.C. § 812(c) (Schedule I (c)(10)).

53. Ams. for Safe Access v. Drug Enf't Admin., 706 F.3d 438, 439 (D.C. Cir. 2013).

54. The germinal work on this topic in legal academic literature is Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971 (1970). Bonnie and Whitebread's fascinating look into the history of marijuana prohibition concludes that early prohibition laws "were essentially kneejerk responses uninformed by scientific study or public debate and colored instead by racial bias and sensationalistic myths." *Id.* at 1010. For more recent accounts, see, for example, Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 388-93 (2020); Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789 (2019); Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689 (2016); *see also* George Fisher, *Racial Myths of the Cannabis War*, 101 B.U. L. REV. 933 (2021) (concluding that the original cannabis prohibition movement was catalyzed not by racism but by sensationalized fears of white children getting addicted to marijuana).

55. Fisher, *supra* note 54, at 945 (noting that every state had banned non-medical use of marijuana by 1937); Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551, *invalidated by* Leary v. United States, 395 U.S. 6 (1969).

murder and grouping it with narcotic drugs like opium and heroin.[56] Governments banned marijuana to protect children from the "killer weed."[57] Racial bias almost certainly compounded this misinformation campaign. Bonnie and Whitebread's research into the history of American marijuana prohibition argues that anti-Mexican bias fueled irrational fears about marijuana, particularly in the American West.[58] Later, as marijuana use spread to the cities, Henry Anslinger—the man often credited as the architect of marijuana prohibition and former Commissioner of the Federal Bureau of Narcotics—warned that marijuana use created an undesirable sense of empowerment among Black men and would lead to interracial relationships with white women.[59]

By the late 1960s, marijuana use had become associated with the counterculture and anti-war movements, and smoking was common on college campuses across America. President Nixon was not a fan.[60] He ran for office on a "law and order" platform and almost certainly viewed marijuana prohibition as a tool to oppress the hippie movement that opposed him.[61] Nixon saw drug policy through a racial lens as well. In one of his infamous Oval Office recordings, Nixon expressed alarm that marijuana use was "now becoming a white problem."[62] In another recording, he indignantly declared that "every one of the bastards that are out for legalizing marijuana is Jewish. What the Christ is the matter with the Jews?"[63]

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56. Bonnie & Whitebread, *supra* note 54, at 1022-26.

57. *See id.* at 974.

58. *Id.* at 1012-16.

59. *See* Vitiello, *supra* note 54, at 799 (listing racist quotes from Anslinger, who was head of the Federal Bureau of Narcotics).

60. *See id.* at 801-02.

61. *Id.* at 802; Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPERS MAG. (Apr. 2016), https://harpers.org/archive/2016/04/legalize-it-all/ (quoting Nixon's domestic policy adviser John Ehrlichman as confessing that marijuana prohibition was a tool to "arrest the[] [hippies'] leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news").

62. *White House Tapes: Conversation 568-004 [Sept. 9, 1971]*, RICHARD NIXON PRESIDENTIAL LIBR. & MUSEUM, at 3:14, https://www.nixonlibrary.gov/white-house-tapes/568/conversation-568-004 (last visited Dec. 17, 2023). A transcript of the remarks relating to marijuana is available at *[Untitled]*, COMMON SENSE FOR DRUG POL'Y, http://www.csdp.org/research/nixonpot.txt (last visited Dec. 17, 2023).

63. *White House Tapes: Conversation 505-004 [May 26, 1971]*, RICHARD NIXON PRESIDENTIAL LIBR. & MUSEUM, at 4:55, https://www.nixonlibrary.gov/white-house-tapes/505/conversation-505-004 (last visited Dec. 17, 2023). A transcript of the remarks related to marijuana is available at *[Untitled]*, *supra* note 62.

Given that oppression was a motivating factor behind marijuana prohibition, it is unsurprising that the policy has produced oppressive outcomes. The most direct consequence of criminalizing such a widely used and relatively harmless substance has been overincarceration and racial disparities in incarceration rates.[64] Beyond incarceration and the continued challenges that formerly incarcerated persons face, marijuana prohibition has also led to a range of collateral consequences: marijuana users may risk losing their housing if they participate in federally funded housing programs, face immigration consequences, lose their jobs, and more.[65] Further, people who could experience physical and emotional benefits from marijuana use have been denied those benefits. Indeed, research into the therapeutic benefits of marijuana has been stymied by its schedule I status.[66] The DEA and the National Institute on Drug Abuse ("NIDA") have restricted opportunities for researchers to study the drug's benefits and, until recently, have limited the crop of approved-for-research marijuana to a single facility at the University of Mississippi.[67]

Marijuana's status as a schedule I drug is about as unpopular as it is unjust. National opinion polls show widespread support for legalizing marijuana,[68]

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64. *See, e.g.*, EZEKIEL EDWARDS ET AL., ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM (2020), https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform; EZEKIEL EDWARDS ET AL., ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE (2013), https://www.aclu.org/report/report-war-marijuana-black-and-white.

65. *See, e.g.*, Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 97-100 (2015) (discussing employment, probation/parole, and family law consequences); Forest City Residential Mgmt., Inc. v. Beasley, 71 F. Supp. 3d 715 (E.D. Mich. 2014) (involving a disabled person who was evicted from public housing for using state-legal medical marijuana); Kathy Brady, *USCIS Policy Manual Penalizes Legalized Marijuana*, IMMIGRANT LEGAL RES. CTR. (Aug. 2019), https://www.ilrc.org/sites/default/files/resources/uscis_marijuana_final-0815.pdf (advising on a 2019 USCIS policy update that allowed state-legal marijuana use and employment in the marijuana industry to serve as a bar to establishing good moral character for immigration purposes).

66. *See, e.g.*, Sean M. O'Connor & Erika Lietzan, *The Surprising Reach of FDA Regulation of Cannabis, Even After Descheduling*, 68 AM. U. L. REV. 823, 849 (2019).

67. *Id.* After decades, the NIDA-imposed monopoly on growing marijuana for research purposes finally ended when the DEA approved eight new growers. *See Marihuana Growers Information*, DRUG ENF'T ADMIN. DIVERSION CONTROL DIV., https://www.deadiversion.usdoj.gov/drugreg/marihuana.htm (last visited Dec. 8, 2023).

68. *E.g.*, Ted Van Green, *Americans Overwhelmingly Say Marijuana Should Be Legal for Medical or Recreational Use*, PEW RSCH. CTR. (Nov. 22, 2022), https://www.pewresearch.org/short-reads/2022/11/22/americans-overwhelmingly-say-marijuana-should-be-legal-for-medical-or-recreational-use/; Kyle Jaeger, *Three in Four Americans Support*

and states of all political stripes have taken exactly that action, usually via ballot initiative.[69] As of this writing, forty states plus Washington D.C. and Puerto Rico have legalized marijuana for medical or recreational use, and more will surely follow.[70] In response to these state-level reforms, the Department of Justice ("DOJ") has opted to deprioritize federal marijuana enforcement,[71] and Congress has acted to restrict the DOJ's ability to prosecute medical marijuana users and businesses.[72]

But those measures do not prevent all of the problems caused by federal prohibition. Users continue to face some risk of criminal enforcement and the aforementioned collateral consequences. The marijuana-related businesses that states regulate also face a host of collateral consequences that stem from federal prohibition.[73] Most significantly, prohibition impairs these businesses' access to traditional financial services like lending and banking.[74] They are ineligible for federal funding programs, including the Small Business Administration loans that benefit small businesses in virtually every

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Marijuana Legalization, Expungements and Banking Reform, New Poll Finds, MARIJUANA MOMENT (Nov. 29, 2022), https://www.marijuanamoment.net/three-in-four-americans-support-marijuana-legalization-expungements-and-banking-reform-new-poll-finds/.

69. *See, e.g.*, *Where Marijuana Is Legal in the United States*, MJBIZDAILY, https://mjbizdaily.com/map-of-us-marijuana-legalization-by-state/ (last updated Nov. 13, 2023) (indicating that states as politically varied as Massachusetts and Mississippi have legalized marijuana for recreational and/or medical use).

70. *Id.*

71. *See* Memorandum from James M. Cole, Deputy Att'y Gen., Dep't of Just., to All U.S. Att'ys (Aug. 29, 2013) [hereinafter Cole Memo], https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf. Although former Attorney General Jeff Sessions rescinded the Cole Memo, the DOJ's deprioritization policy has continued in practice. Memorandum from Jefferson B. Sessions, Att'y Gen., to All U.S. Att'ys (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download; *see also* Scott Bloomberg, *Frenemy Federalism*, 56 U. RICH. L. REV. 367, 392-93 (2022) ("But even without the express dictates of the Cole Memo, the DOJ has tacitly continued its cooperative policy of nonenforcement. State marijuana marketplaces are still able to function without an imposing fear of federal interference, a state of play that will almost certainly continue under Merrick Garland's tenure as Attorney General.").

72. *See* Consolidated and Further Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014).

73. *See, e.g.*, Matthew A. Melone, *Federal Marijuana Policy: Homage to Federalism in Form; Potemkin Federalism in Substance*, 63 WAYNE L. REV. 215, 230-47 (2018) (detailing the various collateral consequences of federal marijuana prohibition for state-legal marijuana businesses).

74. *Id.*; *see also* Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RSRV. L. REV. 597 (2015); SAFE Banking Act of 2023, S. 1323, 118th Cong. (2023) (bill to provide marijuana businesses access to banking services).

other industry.[75] And, due to a provision in the tax code known as § 280E, they carry a higher effective tax rate than businesses in other industries.[76] Thus, even with the recent sea change in marijuana policy at the state level, federal prohibition continues to impart harm on people and businesses.

Despite all of this, Congress has failed to legalize marijuana. That may continue to be the case for some time. There is growing agreement in Congress that marijuana should be legalized, but lawmakers cannot seem to coalesce on *how* that reform should happen.[77] Some prefer to pass a clean bill that simply removes marijuana from the CSA's ambit.[78] Others favor a comprehensive bill that vests federal agencies with regulatory power over marijuana businesses.[79] Progressive Democrats have insisted that any legalization bill should contain a social equity component, while Conservative Republicans have opposed such measures.[80]

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75. This limitation was of particular consequence during the COVID-19 pandemic, where marijuana businesses and their service providers were ineligible for CARES Act funding disbursed through SBA loan programs. *See* OFF. OF FIN. ASSISTANCE, U.S. SMALL BUS. ADMIN., SOP 50 10 5(K): LENDER AND DEVELOPMENT COMPANY LOAN PROGRAMS 107-08 (2019), https://www.sba.gov/sites/sbagov/files/2019-02/SOP%2050%2010%205%28K%29%20FINAL%202.15.19%20SECURED%20copy%20paste.pdf (deeming "[d]irect marijuana business[es]" and "[i]ndirect marijuana business[es]" ineligible for SBA loan programs).

76. 26 U.S.C. § 280E; Melone, *supra* note 73, at 234-35 (explaining that under § 280E, "expenses, such as rent, payroll, utilities, and the like, are not deductible" for marijuana businesses).

77. A bill to legalize marijuana passed through a Democratic-controlled House for the first time in 2020 before dying in the Senate due to Republican opposition. *See* MORE Act of 2020, H.R. 3884, 116th Cong. (2020). However, a growing number of Republicans now support legalization as well. *See, e.g.*, States Reform Act, H.R. 5977, 117th Cong. (2021) (introduced by Republican Congresswoman Nancy Mace and co-sponsored by four other Republican congresspersons).

78. Thomas Massie (@RepThomasMassie), TWITTER (Dec. 2, 2020, 2:40 PM), https://twitter.com/RepThomasMassie/status/1334236034780057606?s=20 (expressing his preference for a "clean" legalization bill).

79. *E.g.*, Cannabis Administration and Opportunity Act, S. 4591, 117th Cong. (2022).

80. *See* Kyle Jaeger, *Congressional Democrats Elevate Marijuana Equity Issues at Retreat Panel Focused on Legalization*, MARIJUANA MOMENT (Mar. 11, 2022), https://www.marijuanamoment.net/congressional-democrats-elevate-marijuana-equity-issues-at-retreat-panel-focused-on-legalization/ (highlighting Democrats' focus on social equity); *see also* Don Murphy, *Democrats' Focus on Social Justice Marijuana Bills Has Blocked Achievable Progress on Reform (Op-Ed)*, MARIJUANA MOMENT (Dec. 2, 2022), https://www.marijuanamoment.net/democrats-focus-on-social-justice-marijuana-bills-has-blocked-achievable-progress-on-reform-op-ed/ (opining that "equity-based regulation will never get a vote in a GOP-controlled House").

State legalization may complicate the politics of federal legalization even further. As one of us explained in a 2022 article, federal legalization will abruptly displace the current marijuana-marketplace system, in which interstate trade is illegal, with an integrated national market.[81] Congress could, however, delay or prevent interstate trade in marijuana by including in a legalization bill a provision that suspends the Dormant Commerce Clause, thus expressly authorizing states to restrict interstate commerce post-legalization.[82] The decision of whether and how quickly to authorize interstate trade in marijuana will carry massive consequences for different businesses and states. Larger producers will seize the opportunity to consolidate their operations in states with environmental and regulatory climates that are friendly to marijuana (think: warm weather, lax health and safety rules, and cheap labor).[83] Other states will see their cultivation industries contract significantly.[84] Ironically, then, state legalization has birthed a host of stakeholders that may urge their representatives to oppose federal legalization unless it results in a marketplace structure that aligns with their business incentives.

C. Re/Descheduling Through Administrative Action: Underexplored and Misunderstood

Given Congress's continuing failure to reverse its disastrous and deeply unpopular marijuana policy, it should come as no surprise that presidential candidates have promised to legalize marijuana themselves. On the 2020 campaign trail, Senator Bernie Sanders pledged to legalize marijuana within his first 100 days in office, while Senator Warren similarly promised to begin the descheduling process within her first 100 days.[85] President Biden did not campaign on a promise to deschedule marijuana. However, since taking office, he has directed the Attorney General and the Secretary of HHS to

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81. Scott Bloomberg & Robert A. Mikos, *Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana*, 49 PEPP. L. REV. 839, 856 (2022).

82. *Id.* at 887.

83. *Id.* at 865-69.

84. *Id.* at 868; *see also* Robert A. Mikos, *Interstate Commerce in Cannabis*, 101 B.U. L. REV. 857, 889-94 (2021) (explaining how interstate commerce will lead to industry consolidation and a shift in the locus of production to more hospitable states).

85. Mikos, *POTUS and Pot*, *supra* note 5, at 672-73 (discussing Sanders' and Warren's campaign promises).

review how marijuana is scheduled under federal law.[86] Those efforts remain ongoing, and, as of this writing, it is not clear what the outcome of that review will be (nor is it clear when it will be completed).

The former presidential candidates' campaign promises and the actual President's action tee up the million-dollar question: can the President unilaterally reschedule or deschedule marijuana? The answer to this all-important question has not gotten adequate attention in legal academic literature. Our research revealed only a single law review article focused on the scope of the President's power to re/deschedule marijuana under the CSA.[87] That article was a brief (by law review standards) symposium piece designed mainly to push back on claims that the President can re/deschedule marijuana with the proverbial stroke of a pen.[88]

In *POTUS and Pot: Why the President Could Not Legalize Marijuana Through Executive Action*, Professor Mikos argues that the CSA prohibits the President from re/descheduling marijuana, with the possible exception of a move to schedule II.[89] Two arguments form the core of Mikos's position.

First, he argues that the President cannot deschedule marijuana because "the CSA equates recreational drug use with drug abuse," and the statute requires that all drugs with abuse potential be controlled.[90] Since marijuana is widely used for recreational purposes, it must remain on one of the CSA's schedules.[91]

Second, he points out that the United States' treaty obligations prevent the President from re/descheduling marijuana, except perhaps to schedule II.[92] The United States is party to the Single Convention on Narcotic Drugs (1961).[93] The Convention lists marijuana as a schedule I drug, a designation

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86. *Statement from President Biden on Marijuana Reform*, *supra* note 1 (directing the Secretary of HHS and the Attorney General to "initiate the administrative process to review expeditiously how marijuana is scheduled under federal law").

87. Mikos, *POTUS and Pot*, *supra* note 5; *see also supra* note 8 (listing tangentially relevant scholarship).

88. *See* Mikos, *POTUS and Pot*, *supra* note 5.

89. *Id.* at 678. As Mikos has pointed out elsewhere:

> [W]hile moving marijuana to Schedule II would legalize marijuana in a very limited way, that's not what most people have in mind when they think of "legalization." After all, cocaine is a Schedule II drug, but no one talks about cocaine being "legal" because Schedule II drugs are still very tightly controlled.

Mikos, *CRS Wrongly Suggests*, *supra* note 6.

90. Mikos, *POTUS and Pot*, *supra* note 5, at 675-76.

91. *Id.* at 676-77.

92. *See id.* at 677-78.

93. 1961 Single Convention, *supra* note 51.

that requires signees to restrict all non-medical, non-research uses of the drug.[94] Ordinarily, the United States could simply violate its treaty obligation without any real consequence.[95] But, as Mikos explains, the Single Convention on Narcotic Drugs is different because the CSA's Treaty Carve-Out incorporates our international obligations into domestic law.[96] Thus, the President cannot violate the Convention without also violating the CSA.[97]

We add a third problem that has proven to be a sticking point in previous re/descheduling efforts. Section 812's criteria for placing a drug below schedule I requires that the drug have medical utility.[98] And as Mikos pointed out in his critique of a Congressional Research Service report on re/descheduling marijuana, "to demonstrate medical utility requires conducting some large scale well-controlled clinical studies of the drug."[99] Since no such studies have been conducted that prove that marijuana is medically efficacious, marijuana is stuck on schedule I.[100]

For the reasons we explain below, we believe Professor Mikos's article overlooks key areas of nuance—understandably so given the article's length and purpose—that give the President more leeway to revise marijuana's scheduling than he concludes. Nonetheless, we agree that the pathway to re/descheduling marijuana without Congress is more arduous than other commentators (not to mention presidential candidates) have seemed to appreciate. In the following section, we unpack the re/descheduling procedure in detail, highlighting the maximum discretion a pro-marijuana administration would have to re/deschedule marijuana, and noting the hurdles a re/descheduling effort would nonetheless face.

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94. *Id.*

95. Indeed, other signees have legalized marijuana and have not faced any real repercussions. *See, e.g.*, Press Release, U.N. Info. Serv., Uruguay Is Breaking the International Conventions on Drug Control with the Cannabis Legislation Approved by Its Congress, U.N. Press Release UNIS/NAR/1190 (Dec. 11, 2013), https://incb.org/documents/Publications/PressRelease/PR2013/press_release_111213.pdf; Press Release, Int'l Narcotics Control Bd., International Narcotics Control Board Expresses Deep Concern About the Legalization of Cannabis for Non-Medical Use in Canada, U.N. Press Release UNIS/NAR/1353 (June 21, 2018), https://www.incb.org/incb/en/news/press-releases/2018/incb-expresses-deep-concern-about-the-legalization-of-cannabis-for-non-medical-use-in-canada.html. And, as we explain below, the United States itself has been out of compliance with the Convention for decades and has not faced repercussion. *See infra* Section III.B.

96. 21 U.S.C. § 811(d)(1); Mikos, *POTUS and Pot*, *supra* note 5, at 677.

97. Mikos, *POTUS and Pot*, *supra* note 5, at 677.

98. 21 U.S.C. § 812(b)(2)-(5).

99. Mikos, *CRS Wrongly Suggests*, *supra* note 6.

100. *Id.*

III. Re/Descheduling Marijuana Through Administrative Action

A. Applying the CSA's Re/Descheduling Factors to Marijuana

We focus in this section on identifying the various ways in which the CSA's re/descheduling procedure is flexible enough to allow a Presidential Administration to change marijuana's scheduling. The first part of the section describes the Attorney General's stated reasons for keeping marijuana on schedule I up to now. The ensuing parts of the section identify various pathways for the Attorney General to conclude that marijuana no longer belongs on schedule I. This analysis allows us to then turn, in Sections III.B and III.C, to the CSA's Treaty Carve-Out provision and to the deferential standards of review that would likely apply to a re/descheduling decision.

1. The Attorney General's Position and the Reasoned-Decision-Making Rule

When an administrative agency changes a settled policy, the shift in policy is subject to an APA rule known as the reasoned-decision-making rule.[101] Under that rule, "[a]gencies are free to change their existing policies," but they "must at least 'display awareness that [they are] changing position' and 'show that there are good reasons'" for the change.[102] In contrast, "an '[u]nexplained inconsistency' in agency policy is 'a reason for holding [that agency's] interpretation to be an arbitrary and capricious change from agency practice.'"[103] Given the Attorney General's longstanding insistence that marijuana must remain on schedule I, any decision re/descheduling marijuana would constitute a shift in settled agency policy. Accordingly, the Attorney General will need to acknowledge the current policy on marijuana and justify why they are departing from that policy. We thus start with the Attorney General's settled rationale for keeping marijuana on schedule I before proceeding to how they can depart from that rationale in a manner consistent with the APA and the CSA.

From its earliest days, the Attorney General has faced a near-constant stream of petitions under § 811(a) to remove marijuana from schedule I.[104]

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101. Allentown Mack Sales & Serv., Inc. v. Nat'l Lab. Rels. Bd., 522 U.S. 359, 374 (1998) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ass'n, 463 U.S. 29, 52 (1983)).

102. Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 212, 221 (2016) (quoting Fed. Commc'n Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)).

103. *Id.* at 212 (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)).

104. *See infra* note 240 and accompanying text.

Yet they have denied each and every one,[105] finding that marijuana has both a high potential for abuse and no currently accepted medical use in treatment in the United States.[106] Since the CSA does not define the "potential for abuse" criteria,[107] the Attorney General has relied on the statute's legislative history to give the term meaning. The CSA's House Report identified four factors that the Attorney General might consider when "determining whether a . . . substance has a potential for abuse."[108] These factors are summarized as follows:

> a. Individuals are taking the substance in amounts sufficient to create a hazard to their health or to the safety of other individuals or to the community.
>
> b. There is a significant diversion of the drug or substance from legitimate drug channels.
>
> c. Individuals are taking the substance on their own initiative rather than on the basis of medical advice from a practitioner licensed by law to administer such substances.
>
> d. The substance is so related in its action to a substance already listed as having a potential for abuse to make it likely that it will have the same potential for abuse as such substance, thus making it reasonable to assume that there may be significant diversions from legitimate channels, significant use contrary to or without medical advice, or that it has a substantial capability of creating hazards to the health of the user or to the safety of the community.[109]

105. *See infra* note 240 and accompanying text.

106. *See infra* note 240 and accompanying text; 21 U.S.C. § 812(b)(1).

107. *See supra* Section II.A.

108. Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40552, 40553 (July 8, 2011) (relying on the four factors outlined in the legislative history to determine abuse potential).

109. *Id.* This Federal Register language summarizes and approximates the same four-factor listing in the CSA's House Report. *See* INTERSTATE & FOREIGN COM. COMM., COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970, H.R. REP. NO. 91-1444, at 34 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4566, 4601.

Applying these factors to marijuana, the Attorney General has repeatedly concluded that it has a high potential for abuse.[110] Pared down to essentials, their key reasons are as follows:

- [Marijuana] is the most widely used illicit substance in the United States.
- Preclinical and clinical data show that [marijuana] has reinforcing effects characteristic of drugs of abuse.
- National databases on actual abuse show that cannabis is the most widely abused drug, including significant numbers of substance abuse treatment admissions.
- Data on cannabis seizures show widespread availability and trafficking.[111]

As noted before, the CSA also does not define the phrase "currently accepted medical use in treatment in the United States."[112] Very early in the CSA's history, the Attorney General interpreted the phrase to require a substance to have been approved by the FDA as safe and effective for marketing in interstate commerce under the Food, Drug, and Cosmetics Act ("FDCA").[113] While courts acknowledged that FDA approval was *sufficient* to demonstrate a currently accepted medical use, they rejected the Attorney General's view that it was *necessary* to make the required showing.[114]

In *Grinspoon v. DEA*, the First Circuit rejected the Attorney General's view that FDA approval is the only way to demonstrate that a substance has a currently accepted medical use.[115] On remand, the Attorney General fashioned an eight-factor standard for making the required showing.[116] Later, in *Alliance for Cannabis Therapeutics v. DEA*, the D.C. Circuit found the

110. *See, e.g.*, Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53688, 53688 (Aug. 12, 2016); Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40552, 40552 (July 8, 2011); Notice of Denial of Petition, 66 Fed. Reg. 20038, 20038 (Apr. 18, 2001).

111. Pennington, *supra* note 47.

112. *See supra* Section II.A.

113. *See, e.g.*, Nat'l Org. for the Reform of Marijuana L. (NORML) v. Drug Enf't Admin., 559 F.2d 735, 743 n.41 (D.C. Cir. 1977).

114. *See* Pennington, *supra* note 47 (providing a narrative description of federal case law regarding the accepted medical use standard).

115. 828 F.2d 881, 884, 891 (1st Cir. 1987).

116. Schedules of Controlled Substances; Scheduling of 3,4-Methylenedioxymethamphetamine (MDMA) Into Schedule I of the Controlled Substances Act; Remand, 53 Fed. Reg. 5156, 5157-58 (Feb. 22, 1988).

Attorney General's interpretation "in the main acceptable" but remanded anyway because three of the eight factors were "logically impossible to satisfy."[117] On remand, the Attorney General discarded the three impossible factors and applied a conjunctive five-factor test for "currently accepted medical use":

1) The drug's chemistry is known and reproducible;

2) There are adequate safety studies;

3) There are adequate and well-controlled studies showing efficacy;

4) The drug is accepted by qualified experts; and

5) The scientific evidence is widely available.[118]

Two of these factors proved to be particular sticking points in these proceedings. First, the DEA concluded that marijuana cannot satisfy the first factor because marijuana does not have a known and reproducible chemistry.[119] As a naturally occurring plant, its precise chemistry varies.[120] Second, the DEA pointed to a lack of adequate and well-controlled studies—by which it means controlled clinical trials—for marijuana.[121]

Since establishing this five-part test, the Attorney General has repeatedly relied on it to dismiss every petition seeking to transfer marijuana out of schedule I.[122] In the ensuing subsection, we unpack various ways that the Attorney General could depart from their current position on marijuana without running afoul of the CSA or the APA.

2. Modifying the "Medical Use" and "Abuse Potential" Criteria

The first option would be for the Attorney General to redefine § 812's "medical use" and "abuse potential" criteria. These terms are not statutorily defined, and as we explain in Section III.C, below, the Attorney General's interpretation of them would receive deference on judicial review.[123]

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117. 930 F.2d 936, 937 (D.C. Cir. 1991).

118. Marijuana Scheduling Petition; Denial of Petition; Remand, 57 Fed. Reg. 10499, 10504-07 (Mar. 26, 1992).

119. *Id.* at 10507.

120. *Id.*

121. *See id.*; *see also* Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53688, 53700-02 (Aug. 12, 2016) (describing how marijuana cannot meet the chemically reproducible standard and detailing why existing studies of marijuana's safety and efficacy are inadequate).

122. *See* Pennington, *supra* note 47.

123. *See infra* Section III.C.

Depending on how the Attorney General modifies the definitions, they could create the flexibility needed to reschedule marijuana below schedule II or—in a more uncertain scenario—to deschedule it entirely.

The Attorney General's challenge in modifying the definitions is that any modification would apply to all controlled substances, not just to marijuana. The Attorney General would thus want to wield a scalpel, not a hatchet, lest marijuana's re/descheduling result in unintended consequences for the panoply of other drugs. We identify two modifications that would significantly expand the Attorney General's flexibility to change marijuana's scheduling without, we believe, resulting in undesirable tradeoffs.

One option is to modify the accepted medical use criteria when applied to botanical substances like marijuana. The FDA has done something similar for New Drug Applications ("NDAs") under the FDCA.[124] In that context, the FDA has taken a "more flexible" approach, in part to account for the fact that botanical substances cannot ordinarily meet the FDA's rigorous NDA standards regarding chemical reproducibility.[125] Thus, to establish the "therapeutic consistency" needed for approval, a botanical NDA can take a "totality of the evidence approach" that includes "a thorough review of past human experience with the raw materials and known constituents," among other factors.[126]

In 2012, this flexibility allowed a botanical drug called Mytesi to gain FDA approval.[127] A member of the agency's botanical review team (and their supervisor) overrode a chemistry reviewer's conclusion that "issues relating to the identity, strength, purity, and quality of the drug substance and drug product precluded approval."[128] The botanical reviewer found that the proposed rejection "stemmed from a 'strict reading' of the regulations and definitions of 'identity,' 'active ingredient,' and 'purity' from a 'pure small molecule drug perspective.' He argued that the regulations should be interpreted in a way that would 'accommodate the complex nature of botanical drug substance.'"[129]

The Attorney General could similarly modify the medical use standard for botanicals under the CSA. Indeed, doing so would be particularly appropriate since the Attorney General's extant definition of "accepted medical use" comes from the FDA's definition. Providing a measure of flexibility for

124. *See* O'Connor & Lietzan, *supra* note 66, at 869.
125. *See id.* at 871.
126. *Id.* at 872.
127. *Id.* at 869 n.290.
128. *Id.* at 872-73.
129. *Id.*

botanicals under the Attorney General's five-prong standard for establishing accepted medical use would keep those definitions roughly consistent.[130]

A modified standard for botanicals could help overcome the most significant hurdles for marijuana to satisfy the DEA's five-part test for finding accepted medical use. First, a modified standard would relieve marijuana from having to satisfy the chemical-reproducibility prong. Second, in recognizing that botanical substances include several varying chemical compounds, the DEA could interpret the other prongs of its test—including the "well controlled studies" prong—to apply to a botanical substance's active components. In the case of marijuana, THC and CBD indisputably have accepted medical uses for treatment in the United States as both are active ingredients in FDA-approved drugs.[131]

Importantly, the treatment of botanical substances under the CSA would not need to perfectly mirror the FDA's standards for approving new botanical drugs. As we note above, federal courts have already rejected the premise that FDA's approval standards are the only way to establish accepted medical use.

Finally, it is worth a reminder that the CSA's text does not command the Attorney General to employ this five-prong test for assessing medical use—in fact, far from it. In a case one of us recently litigated,[132] a concurring judge on the Ninth Circuit opined that in a future case "the [DEA] may well be obliged to initiate a reclassification proceeding for marijuana, given the strength of petitioners' arguments that the agency has misinterpreted the controlling statute by concluding that marijuana 'has no currently accepted medical use in treatment in the United States.'"[133] Indeed, had the D.C. Circuit not originally reviewed the five-part test "during an era of reflexive *Chevron* deference" it may well not have survived judicial review in the first place.[134] Nor is it manifest that marijuana can never be deemed to have an accepted medical use under the CSA. After reviewing all the evidence, an administrative law judge concluded that marijuana had an accepted medical

130. *See supra* note 118 and accompanying text.

131. *See, e.g.*, *FDA and Cannabis: Research and Drug Approval Process*, FDA, https://www.fda.gov/news-events/public-health-focus/fda-and-cannabis-research-and-drug-approval-process (last updated Feb. 24, 2023) (identifying Epidiolex as an FDA-approved drug with CBD as its active ingredient and both Marinol and Syndros as FDA-approved drugs with THC as their active ingredient).

132. Litigated as co-counsel with Matthew C. Zorn.

133. Sisley v. U.S. Drug Enf't Admin., 11 F.4th 1029, 1036 (9th Cir. 2021) (Watford, J., concurring) (quoting 21 U.S.C. § 812(b)(1)(B)).

134. Pennington, *supra* note 47.

use thirty-five years ago, only to be overturned by an anti-marijuana DEA Administrator.[135]

Another option is for the Attorney General to reinterpret "potential for abuse" to recognize that use does not always equal abuse. The current stance equates any recreational marijuana use with abuse, but the "potential for abuse" inquiry could focus instead on harm. A harm-centric analysis could reasonably result in marijuana having a comparatively much lower potential for abuse than schedule I and II drugs. For example, marijuana use may occur more frequently than use of, say, PCP (a schedule II substance), but the harm associated with PCP use vastly outweighs the harm associated with marijuana use.

Indeed, according to the Centers for Disease Control and Prevention ("CDC"), "[r]ecent research estimated that approximately 3 in 10 people who use marijuana have marijuana use disorder."[136] But, as one of us pointed out in a recent article,[137] research also shows that three in ten coffee drinkers are addicted to caffeine.[138] Professor Jay Wexler makes a similar point in his insightful book, *Weed Rules*.[139] There, Wexler recounts the DSM criteria that would cause him to be diagnosed with marijuana use disorder and concludes that the same factors would lead to his diagnosis of "cheese use disorder," if applied to that delectable substance.[140]

The obvious reason that there haven't been efforts to criminalize caffeine use (or, heaven forbid, cheese use) is that it is not as dangerous as other addictive substances. The FDA has cited 400 milligrams a day—about four

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135. *See* Marijuana Scheduling Petition; Denial of Petition, 54 Fed. Reg. 53767 (Dec. 29, 1989) (rejecting an ALJ's conclusion that "marijuana has an accepted medical use in treatment of some medical conditions . . . and that marijuana should be rescheduled into Schedule II").

136. *Marijuana and Public Health: Data and Statistics*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/marijuana/data-statistics.htm (last updated June 8, 2021) (citing Deborah S. Hasin et al., *Prevalence of Marijuana Use Disorders in the United States Between 2001–2002 and 2012–2013*, 72 JAMA PSYCHIATRY 1235 (2015)).

137. Andrew Kline & Shane Pennington, *Moving Marijuana to Schedule III Would Aid Access to Legal Care*, BLOOMBERG L. (Oct. 25, 2023, 3:00 AM), https://news.bloomberglaw.com/us-law-week/moving-marijuana-to-schedule-iii-would-aid-access-to-legal-care.

138. Mary M. Sweeney et al., *Prevalence and Correlates of Caffeine Use Disorder Symptoms Among a United States Sample*, 10 J. CAFFEINE & ADENOSINE RES. 4, 5 (2020) ("The only general population examination of *DSM*-defined caffeine use disorder in the United States surveyed 162 current caffeine consumers in Vermont and found that 30% of caffeine consumers met generic *DSM-IV* criteria for substance dependence as applied to caffeine.").

139. JAY WEXLER, WEED RULES: BLAZING THE WAY TO A JUST AND JOYFUL MARIJUANA POLICY (2023).

140. *Id.* at 57.

or five cups of coffee—as an amount not generally associated with any dangerous, negative effects,[141] and death from caffeine ingestion is rare.[142]

Compare that to the opioid epidemic. The CDC reports that "[f]rom 1999 to 2020, more than 263,000 people died in the United States from overdoses involving prescription opioids,"[143] and that number is on the rise—with more than 68,000 drug overdose deaths involving synthetic opioids in the year 2021 alone.[144] Like caffeine, marijuana is not responsible for any reported overdose deaths.[145] (Nor is cheese, we think.)

A shift to a harm-centric assessment of abuse, under which marijuana can be distinguished from more dangerous drugs, may well be coming in the Biden Administration's current rescheduling proceeding. President Biden's October 6, 2022, scheduling proclamation signaled his Administration's position that it makes little sense to schedule marijuana alongside more harmful substances: "Federal law currently classifies marijuana on Schedule I of the Controlled Substances Act, the classification meant for the most dangerous substances. This is the same schedule as for heroin and LSD, and even higher than the classification of fentanyl and methamphetamine – the drugs that are driving our overdose epidemic."[146]

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The Attorney General might worry that applying changes like those suggested here to other substances already scheduled and to substances they might consider scheduling would cause too much disruption to drug scheduling generally. We do not deny that possibility. Our point is simply that the Attorney General has ample authority to reconsider the meaning of the CSA's key scheduling criteria. In doing so, the Attorney General can weigh the tradeoffs associated with such modifications and can reasonably

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141. *Spilling the Beans: How Much Caffeine is Too Much?*, U.S. FOOD & DRUG ADMIN. (Sept. 7, 2023), https://www.fda.gov/consumers/consumer-updates/spilling-beans-how-much-caffeine-too-much.

142. Jennifer L. Temple et al., *The Safety of Ingested Caffeine: A Comprehensive Review*, 8 FRONTIERS IN PSYCHIATRY, article no. 80, at 1, 4 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5445139/.

143. *Drug Overdose Deaths: Overview*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/deaths/prescription/overview.html (last updated May 18, 2022).

144. U.S. DEP'T. OF JUSTICE, DRUGS OF ABUSE: A DEA RESOURCE GUIDE 52 (2022), https://www.dea.gov/sites/default/files/2022-12/2022_DOA_eBook_File_Final.pdf (citing the CDC).

145. *Id.* at 92 ("No deaths from overdose of marijuana have been reported.").

146. *Statement from President Biden on Marijuana Reform*, *supra* note 1.

conclude that transferring marijuana out of schedule I is nevertheless appropriate.

3. Rescheduling Marijuana Using Existing Standards for Medical Use and Abuse Potential

We have already established that the § 812 criteria are not statutorily defined, and thus the Attorney General can reinterpret them to change marijuana's scheduling status. But what if the Attorney General, for whatever reason, does not want to modify the five-part accepted medical use test or its current understanding of potential for abuse? Even in that situation, we believe the Attorney General can move marijuana to a lower schedule.

Let us start with the accepted medical use criteria. In 1982—ten years before the DEA established its five-part test—the FDA acknowledged in a marijuana rescheduling proceeding that new drug approval under the FDCA (as was later embodied by the five-part test) was not the only way to establish accepted medical use for purposes of the CSA.[147] There were two other routes. The first is that a drug could have "currently accepted medical use in the United States" by virtue of a narrow grandfathering provision in the FDCA.[148] This route is inapplicable to marijuana.[149] The second is that drugs can obtain "accepted medical use[s]" for purposes of § 812(b)(1)(B) "by virtue of totally intrastate production and use."[150] This second route acknowledges a limit on the FDA's jurisdiction contained in the FDCA.[151] Its authority over new drugs is limited to those "introduce[d] or deliver[ed] . . . into interstate commerce."[152] If a drug is "manufactured, processed, and used entirely within a single State without any connection at all with interstate commerce," it may gain accepted medical use for treatment

147. *See* Proposed Recommendations to the Drug Enforcement Administration Regarding the Scheduling Status of Marihuana and Its Components and Notice of a Public Hearing, 47 Fed. Reg. 28141, 28150-51 (June 29, 1982).

148. *Id.*

149. *Id.*

150. *Id.*; PENNINGTON ET AL., *supra* note 7, at 13 (describing the FDA's position on intrastate use and production); Petitioners' Opening Brief at 47, Aggarwal v. U.S. Drug Enf't Admin., 2023 WL 7101927 (9th Cir. 2023) (No. 22-1718) (referencing the FDA's intrastate use and production position in litigation).

151. 21 U.S.C. § 355.

152. *Id.*

in the United States without satisfying the FDA's new drug approval standards.[153]

The DEA's current five-part test is the primary way to show accepted medical use; it closely tracks the FDA's new drug approval standard. But it does not foreclose the two other routes the FDA previously recognized for establishing currently accepted medical use. In 1982, of course, no state had legalized marijuana for medical use.[154] Today, however, more than three-fourths of the states have now established state-regulated medical marijuana programs.[155] Newly legal medical marijuana markets are increasingly recognizing diverse lists of qualifying medical conditions, from human immunodeficiency virus to glaucoma to opioid-use mitigation.[156] Congress has even recognized the value of this medicine by protecting these programs from federal interference.[157]

Because marijuana is the only substance in the CSA's history to have achieved this unique status, the Attorney General could recognize marijuana's accepted medical use in this way without otherwise altering their approach to scheduling and without drawing the scheduling status of any other substance into question. Moreover, the likelihood of setting aside such a conclusion on judicial review seems unlikely. The statute makes HHS's

153. Proposed Recommendations to the Drug Enforcement Administration Regarding the Scheduling Status of Marihuana and Its Components and Notice of a Public Hearing, 47 Fed. Reg. at 28150–51. To be clear, we are not claiming that the FDA lacks authority to regulate the intrastate marketing of medical marijuana; the agency can almost certainly find a jurisdictional hook to interstate commerce for commercial-scale medical marijuana operations. That is not the point. The point is instead the FDA acknowledgment that accepted medical use can be established by intrastate production and use.

154. Interestingly, however, the FDA did look to the laws and practices within the states in assessing whether marijuana had an accepted medical use at the time. By 1982, "more than 20 states authorize[d] the use of marihuana and/or THC for medical research." *Id.* at 28151. The FDA rejected this state-level development as evidence of accepted medical use not because state laws and practices were irrelevant to the inquiry, but instead because the state laws at the time permitted only research use, *and not medical use*. *Id.* Today's state laws, of course, do permit medical use. *See* KACEY MORRISSEY, NEW FRONTIER DATA, 2023 U.S. CANNABIS REPORT: MARKET UPDATES AND PROJECTIONS 3 (Amanda Reiman ed., 2023).

155. MORRISSEY, *supra* note 154, at 3 (finding thirty-nine state markets for medical marijuana, with 4.5 million medical marijuana registered patients in 2022, which is estimated to grow to 5.2 million patients by 2030).

156. *Id.* at 16.

157. *See* Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, § 531, 136 Stat. 49, 150-51 ("None of the funds made available under this Act to the Department of Justice may be used, with respect to [medical marijuana states], to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.").

findings with respect to scientific and medical issues binding on the Attorney General.[158] And since Congress charged HHS—an agency with significant expertise on medical and scientific matters—with conducting the relevant analysis, a court is particularly likely to defer to the agency's expert conclusion on marijuana's accepted medical use.[159] Indeed, some scholars have used the term "super deference" to describe courts' review of expert agencies' scientific determinations.[160]

Next, the Attorney General could conclude that the evidence no longer supports a finding that marijuana has a high abuse potential. Looking to the factors the Attorney General established for interpreting the CSA's potential for abuse standard, the proliferation of state marijuana markets arguably moves the needle on (at least) two of the three relevant factors.[161] One factor is whether "[t]here is a significant diversion of the drug or substance from legitimate drug channels."[162] The Attorney General could conclude that marijuana's intrastate use as medicine in treatment, as recommended by licensed physicians and consistent with state medical marijuana laws, constitutes a "legitimate drug channel" even if such use violates federal law by dint of marijuana's schedule I status under the CSA. The same could be said of marijuana purchased through state adult-use programs, nearly all of which have a complex web of regulations designed specifically to prevent "diversion . . . from legitimate drug channels."

Another factor is the extent to which "[i]ndividuals are taking the substance on their own initiative rather than on the basis of medical advice from a practitioner licensed by law to administer such substances."[163] Considering this factor, the Attorney General could again point to changes in the state markets as a reason to revisit marijuana's abuse potential. They could argue that because use of medical marijuana in treatment continues to increase year after year, the proportion of marijuana use that occurs based on medical advice has increased significantly over time. Furthermore, it is

158. *See* 21 U.S.C. § 811(b).

159. *See, e.g.*, Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.").

160. Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 734 (2011); *see also* Jonathan H. Adler, *Super Deference and Heightened Scrutiny*, 74 FLA. L. REV. 267, 269 (2022).

161. The fourth factor, regarding similarity to other drugs found to have an abuse potential, is not germane to marijuana.

162. *See supra* note 109 and accompanying text.

163. *See supra* note 109 and accompanying text.

reasonable to expect that more physicians would be willing to recommend marijuana to patients in treatment but for marijuana's schedule I status under federal law. Taking this tack would, at the very least, permit the Attorney General to conclude that marijuana "has a potential for abuse less than the drugs or other substances on schedules I and II."[164] And, really, any other view of marijuana's abuse potential—under any reasonable definition of that term—borders on the absurd. Marijuana has a lower potential for abuse than schedule I and II drugs like cocaine and fentanyl. Acknowledging that reality is not arbitrary and capricious; it is interpreting the CSA with a healthy dose of common sense.

4. The Section 812 Criteria as Non-Dispositive Factors

For the reasons discussed in the preceding subsections, the CSA gives the Attorney General flexibility to find that marijuana has an accepted medical use and a low potential for abuse. But assume that a problem remains. Say the Attorney General does not want to redefine those terms or does not believe they can make the requisite findings regarding the § 812 criteria. The Attorney General could *still* reschedule marijuana because reviewing courts have interpreted the § 812 criteria as being non-dispositive. Instead, courts have described the criteria as factors in a more holistic analysis that includes the eight scheduling criteria listed in § 811.

In *NORML v. DEA*, the D.C. Circuit rejected the DEA's argument that a substance belonged on schedule II only if it satisfied all three criteria listed in § 812(b)(2).[165] The court held that § 812(b)(2) calls for a balancing of the three factors it identifies.[166] In the court's view, the DEA's approach threatened to render much of the eight-factor analysis required by § 811(b)-(c) a meaningless exercise. If a substance's lack of a currently accepted medical use (or failure to satisfy one of the other two schedule II criteria) were dispositive, for example, it would make little sense to require the Attorney General and HHS to undertake an exhaustive analysis of eight factors, many of which have no bearing on currently accepted medical use, before saying so.[167]

The Attorney General's approach to scheduling actions before and after *NORML* support the D.C. Circuit's analysis. As the court emphasized in *NORML*, "several substances listed in CSA Schedule II, including poppy

164. 21 U.S.C. § 812(b)(3)(A).

165. *See* Nat'l Org. for the Reform of Marijuana L. (NORML) v. Drug Enf't Admin., 559 F.2d 735, 747-50 (D.C. Cir. 1977).

166. *See id.*

167. *See id.* at 748; *see also* 21 U.S.C. § 811(b)-(c).

straw, have no currently accepted medical use."[168] Likewise, following remand from the D.C. Circuit's *NORML* opinion, the Attorney General referred the rescheduling petitions at issue to HHS for a scientific and medical evaluation and recommendation.[169] HHS "weighted the three criteria for each Schedule" before concluding that cannabis and synthetic THC "could be placed in either Schedule I or Schedule II," even though it lacked a currently accepted medical use.[170] Similarly, in 2000, the Attorney General accepted HHS's recommendation to transfer particular formulations of gamma-hydroxybutyric acid (GHB) from schedule I to schedule III based on a holistic approach to § 812 that balanced the various scheduling criteria against each other.[171] They did so despite expressly acknowledging that "GHB has no accepted medical use."[172]

Were the Attorney General to adopt this approach, they could conclude that although marijuana technically lacks a currently accepted medical use, it is nevertheless appropriate to transfer it out of schedule I. For example, the Attorney General could conclude that marijuana's abuse potential is like a schedule IV drug and that its lack of accepted medical use is like a schedule I drug. Balancing those factors, the Attorney General could conclude that the drug belongs on schedule III. Or, if the Attorney General (and HHS) revisits their position on marijuana's accepted medical use, they could perhaps use the balancing approach to move marijuana further down the scheduling ladder.

In *NORML v. Bell* (another case in the *NORML* litigation saga), a three-judge district court panel rejected various constitutional challenges to marijuana's schedule I status.[173] One of the plaintiff's equal protection claims involved an argument that marijuana did not fit the § 812 statutory criteria for inclusion on schedule I.[174] The court assumed *arguendo* that marijuana

168. 559 F.2d at 748.

169. *See* Marihuana and Synthetic THC; Scheduling of Controlled Substances, 44 Fed. Reg. 36123, 36123 (June 20, 1979); 21 U.S.C. § 811(b).

170. Marihuana and Synthetic THC; Scheduling of Controlled Substances, 44 Fed. Reg. at 36123.

171. *See* Schedules of Controlled Substances: Addition of Gamma-Hydroxybutyric Acid to Schedule I, 65 Fed. Reg. 13235, 13236-37 (Mar. 13, 2000) (to be codified at 21 C.F.R. pts. 1301, 1308).

172. *Id.* at 13236; *see also* Petitioners' Opening Brief at 41, Aggarwal v. U.S. Drug Enf't Admin., 2023 WL 7101927 (9th Cir. 2023) (No. 22-1718) (using the GHB example to show that the § 812 criteria are factors to be balanced).

173. Nat'l Org. for the Reform of Marijuana L. (NORML) v. Bell, 488 F. Supp. 123, 125 (D.C. Cir. 1980).

174. *Id.* at 139-40.

did not, in fact, fit the criteria but rejected the plaintiff's claim nonetheless. It explained:

> The statutory criteria of *section 812(b)(1)* are guides in determining the schedule to which a drug belongs, but they are not dispositive. Indeed, the classifications at times cannot be followed consistently, and some conflict exists as to the main factor in classifying a drug—potential for abuse or possible medical use.[175]

If the § 812 criteria were dispositive, the court continued, there would be no place to put a drug that had no accepted medical use and a relatively low potential for abuse.[176] The same is true for drugs that lack accepted medical use and have a moderate potential for abuse. Both categories of drugs would not fit the § 812 criteria for any schedule.[177]

The consequence of a literal interpretation goes beyond just a logical gap in the CSA's scheduling scheme. It would allow the Attorney General to entirely deschedule any drug they find to have no accepted medical use and a low or moderate potential for abuse. Section 811(a)(2) of the CSA provides that "the Attorney General may by rule . . . remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule."[178] If the § 812 criteria are dispositive, the Attorney General could simply find that marijuana has no accepted medical use and a low or moderate potential for abuse: this finding would allow them to deschedule marijuana. The same would be true for any other drug. To be clear, we do not favor this approach to descheduling because it rests on a technical loophole and because we believe marijuana has a currently accepted medical use in the United States. But the loophole does reinforce the view that the § 812 criteria cannot be interpreted as dispositive factors in a scheduling decision.

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175. *Id.* at 140.

176. *Id.*

177. Kreit, *supra* note 8, at 339 (explaining that a hypothetical substance that "has 'a low potential for abuse relative to the drugs or other substances in schedule IV' and its abuse might 'lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV'" should be in schedule V, but if it also has no currently accepted medical use in the United States, the substance does not meet the scheduling requirements for any one category (quoting 21 U.S.C. § 812(b)(5))).

178. 21 U.S.C. § 811(a)(2).

In addition to case law and the statute's structure, the CSA's legislative history further supports an inference that the § 812 criteria "are not intended to be exclusive."[179] As the *NORML v. Bell* Court explained:

> The House report states that "[a]side from the criterion of actual or relative potential for abuse, [21 U.S.C. § 811(c)] lists seven other criteria . . . which must be considered in determining whether a substance meets the specific requirements specified in [21 U.S.C. § 812(b)] for inclusion in particular schedules . . . ."[180]

If the *sine qua non* of the CSA's scheduling criteria are really eight factors that need to be balanced instead of three factors (or, for schedule I, effectively two factors) that must be independently satisfied, then the Attorney General has far more flexibility in re/descheduling marijuana than they would otherwise enjoy.

5. Marijuana's Unique Legislative History Lends Support

Finally, whichever lever the Attorney General pulls for re/descheduling marijuana, they can rely on the CSA's unique legislative history regarding marijuana as support for their authority to make the policy change. When Congress enacted the CSA in 1970, it did so amid tremendous uncertainty about how dangerous marijuana was, about what medical uses it had, and thus about where it should be scheduled. The same could be said of other drugs, too—after all, Congress included a precise catalog of dozens of substances into different schedules despite not being a body of medical and public health experts. But uncertainty over marijuana's scheduling stands out. During a pertinent House subcommittee hearing on marijuana, one influential legislator declared that "no facet of the drug problem is subject to more controversy, debate and misinformation than the use of marihuana and its effects on the user."[181] Another noted the "great confusion in the public's mind over what [marijuana is] all about."[182] Another highlighted Congress's need for "more information" and its duty to "take marihuana out of the realm of rumor and place it into the realm of fact."[183] Another bemoaned the "many

179. 488 F. Supp. at 140 (citing INTERSTATE AND FOREIGN COM. COMM., COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970, H.R. REP. NO. 91-1444, at 35 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4566, 4602).

180. *Id.*

181. *Hearings Before Subcommittee No. 3*, *supra* note 32, at 44 (statement of Rep. Gilbert Gude).

182. *Id.* at 12 (statement of Rep. Edward I. Koch).

183. *Id.* at 108 (statement of Rep. Glenn M. Anderson).

questions about marihuana usage that are presently unanswered."[184] The list could go on.[185]

All this uncertainty convinced Congress to include a section in the CSA that created a commission to study marijuana. Section 601 of the Act established the "Commission on Marihuana and Drug Abuse" and charged the Commission with drafting a comprehensive report on marijuana.[186] The report was to include recommendations for how to regulate the drug and "proposals for legislation and *administrative* action as may be necessary to carry out its recommendations."[187] Two years later the report would call for decriminalizing the possession of marijuana.[188] Likewise, as we mentioned in Section II.A, the Assistant Secretary of HEW's recommendation that marijuana be placed on schedule I was premised on the understanding that "*the Attorney General* [could] change the placement of marihuana to a different schedule" once the substance was further studied.[189]

Congress was uncertain in the moment and aware that the wisdom of time might prove it wrong—on marijuana and on other drugs. Consistent with that healthy level of uncertainty about the enduring wisdom of its specific scheduling decisions, Congress embedded into the CSA a process for the Executive Branch to re/deschedule drugs.[190] Congress deliberately crafted a detailed procedure so that, when the body of knowledge around controlled substances advanced, the federal government had an option *other than passing a new law* for moving drugs to a more appropriate schedule (or for removing them entirely from the CSA's ambit).

It would be strange for a reviewing court to now interpret this procedure as so constraining that the drug about which Congress was most uncertain cannot be removed from Schedule I. Instead, the more natural conclusion is that Congress anticipated that its statutory scheme could be used someday to re/deschedule marijuana. Both Congress's reference to "administrative

184. *Id.* at 113 (statement of Rep. Joseph G. Minish).

185. Indeed, the *Hearings Before Subcommittee No. 3* transcript is chock-full of similar comments.

186. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 601, 84 Stat. 1236, 1280-81.

187. *Id.* § 601(d)(2), 84 Stat. at 1281 (emphasis added).

188. NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 151 (1972).

189. INTERSTATE & FOREIGN COM. COMM., COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970, H.R. REP. NO. 91-1444, at 61 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4566, 4629 (Committee on Interstate and Foreign Commerce) (statement of Roger O. Egeberg, M.D., Assistant Secretary for Health and Scientific Affairs).

190. 21 U.S.C. § 811.

action" in section 601 of the CSA and the Assistant Secretary's understanding that the Attorney General would have power to reschedule marijuana buttress this conclusion.

B. A Potential Roadblock: The Treaty Carve-Out

Beyond the CSA's scheduling factors, the statute contains a potential roadblock to re/descheduling marijuana: the Treaty Carve-Out. To recount, that clause of the CSA provides:

> If control is required by United States obligations under international treaties . . . in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section.[191]

In effect, the Treaty Carve-Out allows the Attorney General to avoid the ordinary re/descheduling procedure when: (1) a drug is subject to an international treaty and (2) the Attorney General believes that, considering the treaty, the drug should be included on a different schedule than the statutory criteria would ordinarily dictate.

Marijuana is subject to the Single Convention on Narcotic Drugs and is indeed listed as a schedule I substance under the Convention.[192] Signees are required to limit such drugs to medical and scientific uses.[193] Toward that end, drugs listed on schedule I of the Convention must be dispensed only via prescription.[194] Moreover, governments must license any participant in the drug's supply chain (or own the supply chain directly), authorize each specific international transaction, impose record-keeping requirements on

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191. 21 U.S.C. § 811(d)(1). The cross-references to sub-sections (a) and (b) pertain to the determinations that the Attorney General and Secretary of HHS ordinarily have to make in the rescheduling process.

192. 1961 Single Convention, *supra* note 51. Marijuana is also subject to the United Nations Convention on Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 175, and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95. We focus on the 1961 Single Convention because the CSA's Treaty Carve-Out only applies to "international treaties, conventions, or protocols in effect on October 27, 1970." 21 U.S.C. § 811(d)(1).

193. 1961 Single Convention, *supra* note 51, art. 4.

194. *Id.* art. 30, ¶ 2(b)(ii).

supply-chain participants, and cap the quantity of drugs available to what is needed for medical and scientific uses.[195]

As the D.C. Circuit Court of Appeals in the *NORML v. DEA* litigation found nearly fifty years ago, in the absence of further rulemaking to impose additional restrictions as necessary to ensure treaty compliance,[196] rescheduling marijuana below schedule II of the CSA—moving it to schedule III, IV, or V—would violate the Convention for several reasons.[197] Drugs on those schedules do not require import and export permits for individual transactions, there are no manufacturing quotas for such drugs, and the recordkeeping requirements are laxer than the Convention permits.[198] Descheduling marijuana entirely would quite obviously violate the Convention as well by authorizing non-medical, non-research use of the drug.[199]

For Professor Mikos (and other commentators[200]), that is the end of the story. The CSA's Treaty Carve-Out incorporates the Convention into

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195. *Id.* art. 30 (supply chain requirements); *id.* art. 31 (import/export requirements); *id.* art. 34 (recordkeeping requirements); *id.* art. 19 (quantity limitation); *id.* art. 21 (quantity limitation).

196. In the years since, DEA has moved substances subject to control under the Single Convention to less-restrictive schedules. *See, e.g.*, Schedules of Controlled Substances: Placement in Schedule V of Certain FDA-Approved Drugs Containing Cannabidiol; Corresponding Change to Permit Requirements, 83 Fed. Reg. 48950 (Sept. 28, 2018) (moving the FDA-approved, cannabis-derived drug, Epidiolex, from schedule I to schedule V). In doing so, DEA has imposed additional regulations to those substances in particular to ensure treaty compliance. *Id.* at 48952 ("To ensure this requirement remains in place (and thus to prevent any lapse in compliance with the requirements of the Single Convention), this order will amend the DEA regulations (21 CFR 1312.30) to add the Epidiolex formulation to the list of nonnarcotic schedule III through V controlled substances that are subject to the import and export permit requirement.").

197. Nat'l Org. for the Reform of Marijuana L. (NORML) v. Drug Enf't Admin, 559 F.2d 735, 751 n.71 (D.C. Cir. 1977) (declaring that "several requirements imposed by the Single Convention would not be met if cannabis and cannabis resin were placed in CSA Schedule III, IV or V" and providing examples).

198. *Id.* at 751 n.71 (referencing the CSA's import-export rules, 21 U.S.C. § 951 *et seq.*, and certain quota and recordkeeping rules, 21 U.S.C. § 826).

199. *See* Schedules of Controlled Substances: Placement in Schedule V of Certain FDA-Approved Drugs Containing Cannabidiol; Corresponding Change to Permit Requirements, 83 Fed. Reg at 48951 ("None of the foregoing obligations of the United States could be satisfied for a given drug if that drug were removed entirely from the CSA schedules.").

200. *See* John Hudak & Grace Wallack, *How to Reschedule Marijuana, and Why It's Unlikely Anytime Soon*, BROOKINGS INST. (Feb. 13, 2015), https://www.brookings.edu/blog/fixgov/2015/02/13/how-to-reschedule-marijuana-and-why-its-unlikely-anytime-soon/

domestic law and thus limits the President's discretion to re/deschedule marijuana below schedule II.[201] We believe there is more to it. A closer review of the Treaty Carve-Out and the Attorney General's implementation of it over the years demonstrates that it should not be interpreted to bar rescheduling marijuana to schedule III, IV, or V. And while it would admittedly be much more difficult to justify than rescheduling, there are colorable arguments that the Treaty Carve-Out does not absolutely bar descheduling either.

Below, we begin by unpacking the rescheduling issue and then offer what we believe is the strongest argument a Presidential Administration could make in favor of descheduling.

1. Rescheduling and the Treaty Carve-Out

As a threshold matter, we call attention to the grant of discretion conferred to the Attorney General by the text of the CSA's Treaty Carve-Out. That language does *not* constrict the Attorney General to keeping drugs on the precise CSA schedule that corresponds to the drug's Convention schedule. In other words, the Treaty Carve-Out does not mandate that marijuana stay on schedule I just because it is also on schedule I of the Convention. Rather, it requires the Attorney General to place drugs "under the schedule *he deems most appropriate* to carry out [the United States' treaty] obligations."[202] That language vests the Attorney General with discretion to (a) interpret the Convention and (b) make a judgment about where a drug ought to be scheduled considering that interpretation.[203] Professor Mikos and the *NORML* Court both recognize that the Treaty Carve-Out is not so constraining. After all, they agree that the President may be able to move

(interpreting the CSA to require the United States to maintain federal criminal penalties for recreational marijuana use).

201. Mikos, *POTUS & Pot*, *supra* note 5, at 677-78; Mikos, *CRS Wrongly Suggests*, *supra* note 6.

202. 21 U.S.C. § 811(d) (emphasis added). Regarding the Convention's incorporation into domestic law, one of us recently co-authored an article questioning whether the Treaty Carve-Out would survive constitutional scrutiny, particularly in light of conservative and libertarian judges' recent attempts at reviving the non-delegation doctrine. Shane Pennington & Matthew C. Zorn, *The Controlled Substances Act: An International Private Delegation That Goes Too Far*, 100 WASH. U. L. REV. ONLINE 29 (2023), https://wustllawreview.org/wp-content/uploads/2023/05/Pennington-Zorn-The-Controlled-Substances-Act-An-International-Private-Delegation-That-Goes-Too-Far.pdf.

203. As we explain below, the Attorney General's discretion—while not unbridled—would be accorded deference on judicial review. *See infra* notes 245-47 and accompanying text.

marijuana to schedule II of the CSA, even though it would remain on schedule I of the Convention.[204]

But the Attorney General's discretion goes further than that. Indeed, the Attorney General has already transferred two cannabis-derived substances below schedule II without violating the Treaty Carve-Out. Both times, the Attorney General has taken the additional regulatory step of restricting the substances' importation and exportation.

First, when the Clinton Administration dropped certain forms of the synthetic THC dronabinol from schedule II to schedule III, the DEA correspondingly enacted a rule requiring permits for dronabinol imports and exports.[205] The agency reasoned that adding an import-export restriction for dronabinol—despite not ordinarily applying to schedule III drugs—was necessary to comply with international drug treaties.[206]

The DEA then treated the cannabis-derived drug, Epidiolex, similarly. When the FDA approved Epidiolex for interstate marketing under the FDCA, the DEA recognized that it was no longer appropriate to keep the drug on schedule I.[207] Yet, because Epidiolex was still subject to control under the Single Convention, the DEA was obligated under the Treaty Carve-Out to schedule it in a way it deemed appropriate to meet the nation's treaty obligations.[208] To do so, the DEA did not place Epidiolex on schedule II. Instead, it moved the drug to schedule V and then added it to a list of controlled substances that require a permit to import or export.[209]

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204. *See supra* note 92 and accompanying text.

205. *See* Schedules of Controlled Substances: Rescheduling of the Food and Drug Administration Approved Product Containing Synthetic Dronabinol [(-)-Δ9-(trans)-Tetrahydrocannabinol] in Sesame Oil and Encapsulated in Soft Gelatin Capsules from Schedule II to Schedule III, 64 Fed. Reg. 35928, 35929 (July 2, 1999) (creating a regulation to continue restricting imports and exports of Marinol as if it were a schedule II drug even though its active ingredient was moved to schedule III).

206. *Id.*

207. Schedules of Controlled Substances: Placement in Schedule V of Certain FDA-Approved Drugs Containing Cannabidiol; Corresponding Change to Permit Requirements, 83 Fed. Reg. 48950, 48951 (Sept. 28, 2018) ("Now that Epiodiolex has been approved by the FDA, it has a currently accepted medical use in treatment in the United States for purposes of the CSA. Accordingly, Epidiolex no longer meets the criteria for placement in schedule I of the CSA.").

208. *Id.*

209. *See id.* at 48952 ("To ensure this requirement remains in place (and thus to prevent any lapse in compliance with the requirements of the Single Convention), this order will amend the DEA regulations (21 CFR 1312.30) to add the Epidiolex formulation to the list of nonnarcotic schedule III through V controlled substances that are subject to the import and export permit requirement.").

The DEA's focus in those rescheduling proceedings on complying with the Convention's import-export provisions appears to be consistent with the Biden Administration State Department's current view of the obligations that the treaty imposes. That view emphasizes the international trade aspects of the Convention while de-emphasizing the Convention's purely domestic requirements. Speaking before the United Nations Commission on Narcotic Drugs in Vienna, a senior Legal Advisor for the U.S. Department of State argued that the Single Convention should be interpreted "in good faith" to accomplish its purpose, which is focused on drug trafficking that has "an international dimension."[210] The State Department Official further emphasized the flexibility of international drug treaties, and their "highly respectful" disposition toward "the legal frameworks of state parties, in particular their constitutional limitations."[211] These comments are particularly notable given that—despite remaining a federally controlled substance—rescheduling below schedule II would make the federal government's regulation of marijuana inconsistent with the nation's domestic obligations under the Convention.

The precedent set by the DEA's dronabinol and Epidiolex reschedulings points to the Attorney General having authority to "deem[]" it "most appropriate" for marijuana to be placed on schedule III-V, with the added import-export restriction.[212] The State Department's position emphasizing the Convention's international dimension while downplaying its domestic restrictions lends further support to that determination. Thus, we conclude that the Attorney General may transfer marijuana to schedule III, IV, or V without running afoul of the Treaty Carve-Out.[213]

2. Descheduling and the Treaty Carve-Out

At the outset, we acknowledge that the case for permitting descheduling under the Treaty Carve-Out is much harder to sustain. If marijuana is

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210. *See* Shane Pennington, *A Good Sign for Schedule III*, ON DRUGS (Nov. 2, 2023), https://ondrugs.substack.com/p/a-good-sign-for-schedule-iii (describing §§ 811 and 812) (reporting on the comments of Virginia Patt Prugh before the United Nations Commission on Narcotic Drugs in Vienna a week earlier) (quoting Prugh's comments as recorded and available at https://webtv.un.org/en/asset/k18/k183ng5zxr).

211. *Id.* Prugh also insisted that contrary to its own self-descriptions, the International Narcotics Control Board's proper role under the Single Convention is to "assist" member states, not to "monitor" their compliance. *Id.*

212. 21 U.S.C. § 811(d).

213. The below arguments, in the descheduling section, regarding the constitutional limitations on federal marijuana policy further bolster our conclusion regarding the permissibility of rescheduling under the Treaty Carve-Out.

completely descheduled, it seems unlikely that the Attorney General would have authority to impose import-export restrictions on the substance.[214] And, as we have explained, those restrictions have proven to be an important component of the DEA's efforts to transfer cannabis-derived substances in prior scheduling proceedings. Nonetheless, we believe there is a *colorable*—albeit less likely than not to succeed—argument in support of permitting descheduling.

The strongest argument for permitting descheduling under the Treaty Carve-Out begins with the fact that *we are already in flagrant violation of the Convention*.[215] A whopping forty states (plus some territories), covering the vast majority of the United States population, have legalized marijuana for medical or recreational use.[216] The laws in states with recreational marijuana obviously do not accord with the Convention.[217] And the laws in each state with a medical-marijuana program almost certainly violate the Convention, too—their production and use requirements are not as stringent as the Convention requires.[218]

The International Narcotics Control Board ("INCB") has already warned the United States that its state-level marijuana reforms make it incompliant with the Convention. The INCB's 2018 annual report declares that "[u]niversal and full implementation of [drug control] treaties is put at serious risk because States parties, such as Canada and Uruguay (as well as states in

214. This observation leads to a few questions that warrant further research in the future. First, whether the President, Attorney General, their delegates, or any other federal agency would have statutory authority to impose import-export restrictions on marijuana if it is descheduled. Second, whether the President has inherent executive authority to prohibit importing and exporting a class of goods if doing so is necessary to uphold a treaty requirement. And third, whether—short of leaving the Single Convention altogether—parties to the Convention can rely on principles of international law to set aside or otherwise disregard its restrictions on the marijuana trade. *See* Tom Blickman et al., *Willful Blindness: INCB Can Find Nothing Good to Say on Cannabis Legalisation*, TNI (Mar. 14, 2023), https://www.tni.org/en/article/willful-blindness-incb-can-find-nothing-good-to-say-on-cannabis-legalisation (summarizing three potential options: denouncing and re-acceding to the Convention with a reservation regarding cannabis; using *inter se* modification to modify the terms of the Convention regarding cannabis as between like-minded signees; and, as a complement to the first two options, arguing that legalization allows the nation to better pursue its human rights obligations).

215. *See* PENNINGTON ET AL., *supra* note 7, at 25 (making the same point about the United States' current non-compliance with the Convention).

216. *See supra* note 69 and accompanying text.

217. 1961 Single Convention, *supra* note 51, art. 4 (requiring that signees limit drug use to medical and scientific purposes).

218. *See infra* notes 219-20.

the United States), have legalized cannabis for non-medical use."[219] As to medical marijuana in the United States, the 2018 annual report concluded that states' programs are "inconsistent with the international drug control treaties in failing to control cannabis production and supply," in failing "to ensure that good-quality medicines are provided under medical supervision," and in enabling "cannabis and its derivatives to be diverted to non-medical use."[220] This was not the state of play when the *NORML* court was interpreting the Convention nearly a half century ago.

Not only is the United States in flagrant violation of the Convention, but it would also be virtually impossible for the United States to become compliant—or even anything resembling compliant. As several marijuana-law scholars have explained, our federalist system severely constrains the federal government's ability to enforce marijuana prohibition.[221] The federal government cannot prevent the states from legalizing marijuana, nor can it require a state to regulate marijuana once the state chooses to legalize the drug.[222] Likewise, the federal government cannot require the states to assist it in enforcing federal marijuana laws.[223] All those policy options would violate a constitutional principle known as the anti-commandeering doctrine.[224] As a result, if the federal government wanted to limit marijuana to comply with its treaty obligations, it would need to marshal enough resources to shut down the country's massive marijuana industry, not to mention the national campaign that would be required to stymie individual

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219. Int'l Narcotics Control Bd., Rep. of the Int'l Narcotics Control Bd. for 2018, U.N. Doc. E/INCB/2018/1, at 11 (2019) [hereinafter Int'l Narcotics Control Bd., 2018 Report], https://www.incb.org/documents/Publications/AnnualReports/AR2018/Annual_Report/Annual_Report_2018_E_.pdf.

220. *Id.* at 12. In the same report, the INCB also warned that permitting home cultivation for medical purposes violates the Convention, as does approval of any medical use that has not been established via controlled studies. *Id.* at 3.

221. *See generally, e.g.*, Bloomberg, *supra* note 71; David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567 (2013); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009).

222. *E.g.*, Bloomberg, *supra* note 71, at 387, 399.

223. *Id.* at 387.

224. *See* New York v. United States, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel the States to enact or administer a federal regulatory program."); Printz v. United States, 521 U.S. 898, 933 (1997) (concluding that a federal law requiring local officials to perform handgun background checks "plainly runs afoul of" the anti-commandeering doctrine).

use (though the Convention does not require criminal penalties for individual users[225]). That is not going to happen.

Furthermore, the Convention expressly makes a party's obligation to penalize drug trafficking "subject to its constitutional limitations."[226] While this exception would not wholly relieve the United States of all its Convention obligations,[227] it gives the Attorney General another reason to conclude that they can deschedule marijuana. Given the constitutional constraints on the federal government's ability to enforce its criminal marijuana penalties in the wake of state legalization, the Attorney General could interpret the Convention to exempt the United States from having to criminalize marijuana trafficking. The loss of federal criminal penalties that would result from descheduling would, per this view, not pose a barrier under the Treaty Carve-Out.

Finally, the Attorney General might conclude that descheduling may help the United States further some of the Convention's objectives. They could conclude, for example, that descheduling would reduce the risk of violent crime stemming from the marijuana industry's reliance on cash, reduce or eliminate marijuana trafficking as a source of funds for international criminal organizations, and help prevent abuse of other drugs, such as opioids.[228]

There is certainly a different view of how descheduling marijuana could affect our treaty obligations. The INCB, for example, has declared that nation-states' federalist systems are no excuse for failing to comply with the treaty and that legalization is dangerous because it reduces stigma, leading to more drug use and more drug legalization.[229] That may well be a reasonable view, but it does not cabin the Attorney General's discretion under the Treaty Carve-Out. As we explain below, the standard of review in court would be deferential. The Attorney General would only need to establish that their interpretation of the Convention was reasonable, that their decision was not

225. 1961 Single Convention, *supra* note 51, art. 36.

226. *Id.* art. 36, ¶ 1.

227. *See* Int'l Narcotics Control Bd., Rep. of the Int'l Narcotics Control Bd. for 2022, U.N. Doc. E/INCB/2022/1, at 9-10 (2023) [hereinafter Int'l Narcotics Control Bd., 2022 Report], https://unis.unvienna.org/unis/uploads/documents/2023-INCB/INCB_annual_report-English.pdf (arguing that the exception does not permit parties to ignore their obligation to limit drug use to medical and scientific purposes).

228. *Cf.* Blickman et al., *supra* note 214 (arguing that signatories to the UN drug control conventions may be able to "justify cannabis regulation based on positive human rights obligations, as regulated cannabis cultivation and trade may offer a better opportunity for states to comply with their positive human rights obligations").

229. *See* Int'l Narcotics Control Bd., 2022 Report, *supra* note 227, at 10; Int'l Narcotics Control Bd., 2018 Report, *supra* note 219, at 10.

arbitrary and capricious, and that the decision was based on substantial evidence.[230] They do not need to establish that their scheduling decision is the indisputably best way to carry out the United States' treaty obligations or that it is consistent with the INCB's own views.[231]

To be sure, these standards of review do not license the Attorney General to do whatever they want. A reviewing court may well find that descheduling is a step too far for the Treaty Carve-Out, particularly in the absence of any import-export controls on marijuana. We think that outcome is more likely than not. But given the deferential standards of review at play, we believe the argument regarding federalism and the country's constitutionally entrenched non-compliance with the Convention are at least colorable, and thus worth presenting here.

In sum, we conclude that the Treaty Carve-Out permits transferring marijuana to schedules III, IV, or V. There is a colorable argument for permitting descheduling, though that argument hinges on a great deal of judicial deference and we believe it is less likely than not to succeed.

C. Judicial Review and Deference to the Agencies

The final step in determining the scope of the President's power to re/deschedule marijuana is to appreciate the standards a court would apply in assessing the Attorney General's scheduling decision on judicial review. These standards often require courts to defer to agency action, resulting in more latitude to re/deschedule marijuana than prior analysis of the issue has let on.

A reviewing court would not set aside a re/descheduling decision merely because it disagrees with the Attorney General's factual analysis or legal

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230. *See* 21 U.S.C. § 877 (establishing the substantial evidence standard); 5 U.S.C. § 706(2)(A) (establishing the arbitrary and capricious standard).

231. *See, e.g.*, Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 522 (1981) (defining the "substantial evidence" standard of review as being "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (quoting Universal Camera Corp. v. Nat'l Lab. Rels. Bd., 340 U.S. 474, 477 (1951))); *id.* at 523 ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (quoting Consolo v. FMC, 383 U.S. 607, 620 (1966))); Grinspoon v. Drug Enf't Admin., 828 F.2d 881, 894-96 (1st Cir. 1987) (applying the substantial evidence standard in a CSA rescheduling case); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."); Ams. for Safe Access v. Drug Enf't Admin., 706 F.3d 438, 440-41 (D.C. Cir. 2013) (applying the arbitrary and capricious standard in a CSA rescheduling case in which the DEA opposed rescheduling).

conclusions. As to factual determinations about marijuana, the provision of the CSA authorizing judicial review of the re/descheduling process treats the Attorney General's findings of fact as "conclusive" so long as they are "supported by substantial evidence."[232] The Administrative Procedure Act ("APA"), which also authorizes judicial review of agency action, adopts the same deferential standard for agencies' findings of facts, empowering courts to overrule agencies' factual determinations only if they are "unsupported by substantial evidence."[233]

The agencies' interpretations of the re/descheduling factors and their application of the factors to marijuana would similarly be subject to a deferential standard of review. As an initial matter, under the APA, courts will only set aside the agency's conclusions if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"—a standard of review that courts consider to be deferential.[234] Further, Congress did not define the terms "potential for abuse" and "currently accepted medical use" in the CSA.[235] Rather, it left the precise meaning of these terms open to agency interpretation, allowing the DEA to supply definitions through the administrative re/descheduling proceedings.[236] A reviewing court will accordingly exercise *Chevron* deference to uphold the agency's interpretations provided that those interpretations are reasonable.[237] Said differently, so long as the agency advances a "permissible construction of the statute"—even if it is not the best possible construction—a reviewing court will refuse to set aside the agency's action as being "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law" under the

232. 21 U.S.C. § 877.

233. 5 U.S.C. § 706(2)(E).

234. Ams. for Safe Access v. Drug Enf't Admin., 706 F.3d 438, 440 (D.C. Cir. 2013) (quoting 5 U.S.C. § 706(2)(A)).

235. *See* 21 U.S.C. § 802 (CSA's definition section); *see also* Kreit, *supra* note 8, at 350 ("Without a definition from Congress, the DEA has been free to come to its own conclusion, with very little to constrain its discretion.").

236. *See supra* Section III.A (discussing the DEA's definitions); *see Grinspoon*, 828 F.2d at 893; *see also* Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40552 (July 8, 2011). As explained in Section III.A, the agencies have effectively folded the third statutory criteria—lack of accepted safety for use—into the "accepted medical use" standard. *Id.* at 40552, 40563, 40585.

237. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); *see also* Craker v. Drug Enf't Admin., 714 F.3d 17, 26 (1st Cir. 2013) ("If it turns out that the statute is ambiguous, then *Chevron* deference must be afforded; the agency's interpretation of the statute will be upheld as long as it is 'based on a permissible construction of the statute.'").

APA.[238] Furthermore, once an agency establishes a rule or regulation based upon interpretation of a statute, reviewing courts will defer to the agency's interpretation of its own rule or regulation, at least where the language at issue is "genuinely ambiguous."[239]

Collectively, these deferential standards of review have permeated the body of case law surrounding the CSA's re/descheduling procedure. Over the past five decades, reformers have filed several petitions asking the Attorney General to move marijuana off schedule I, only to be rebuffed by the Attorney General each time.[240] And, each time, the reviewing court has upheld the Attorney General's ultimate decision to keep marijuana on schedule I.[241] These courts' decisions acknowledge the considerable deference owed to the Attorney General. As the *Americans for Safe Access* court explained: "On the merits, the question before the court is not whether marijuana could have some medical benefits. Rather, the limited question that we address is whether the DEA's decision declining to initiate proceedings to reschedule marijuana under the CSA was arbitrary and capricious."[242] The court then deferred to "the agency's interpretation of [its own] regulations" and held "that the DEA's denial of the rescheduling petition survives review under the *deferential* arbitrary and capricious standard."[243] Likewise, in *Alliance for Cannabis Therapeutics*, the court

238. *Craker*, 714 F.3d at 26; *see also* Kreit, *supra* note 8, at 342 (highlighting the "overly broad discretion the CSA gives a highly political law enforcement agency—the DEA—to define and apply its scheduling criteria").

239. *See Ams. for Safe Access*, 706 F.3d at 441; Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019) ("[T]he possibility of deference can arise only if a regulation is genuinely ambiguous.").

240. *See* United States v. Amalfi, 47 F.4th 114, 121 (2d Cir. 2022) ("There have been several attempts to reclassify marijuana through the CSA's administrative process . . . [b]ut '[d]espite considerable efforts . . . it remains a Schedule I drug.'" (quoting Gonzales v. Raich, 545 U.S. 1, 15 (2005)); Pearson v. McCaffrey, 139 F. Supp. 2d 113, 119 n.3 (D.D.C. 2001) (citing Nat'l Org. for the Reform of Marijuana L. (NORML) v. Ingersoll, 497 F.2d 654 (D.C. Cir. 1974); Nat'l Org. for the Reform of Marijuana L. (NORML) v. Drug Enf't Admin., 559 F.2d 735 (D.C. Cir. 1977); Alliance for Cannabis Therapeutics v. Drug Enf't Admin., 930 F.2d 936 (D.C. Cir. 1991); Alliance for Cannabis Therapeutics v. Drug Enf't Admin., 15 F.3d 1131 (D.C. Cir. 1994)) ("This Circuit has handled extensive litigation regarding the rescheduling of marijuana.").

241. *See* cases cited *supra* note 240.

242. *Ams. for Safe Access*, 706 F.3d at 440.

243. *Id.* at 440-41 (emphasis added); *see also id.* at 449 ("Because the agency's factual findings in this case are supported by substantial evidence and because those factual findings reasonably support the agency's final decision not to reschedule marijuana, we must uphold

rejected the petitioners' argument that marijuana had a "currently accepted medical use," explaining that because "neither the statute nor its legislative history precisely defines the term," the court was "obliged to defer to the [DEA] Administrator's interpretation of that phrase if reasonable."[244]

This characteristic deference to agency action is even more pronounced when courts review the Executive Branch's interpretation of a treaty, as a court would need to do to assess the Treaty Carve-Out's impact on re/descheduling marijuana. Indeed, there are few areas of law in which the Judicial Branch is more deferential to its co-equal branch of government than in treaty-interpretation cases. In a line of cases dating back over 100 years, the Supreme Court has declared, "It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'"[245] It noted that "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty"[246] and that "in resolving doubts the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight."[247]

Any analysis of the President's power to re/deschedule marijuana that fails to account for these deferential standards of review inherently underrepresents the extent of that power. This is true in three respects. First, if an analysis refers to the re/descheduling criteria as if they were defined by statute rather than agency action, it glosses over the deference owed to the agencies on review. Thus, when Professor Mikos declares that "the *CSA* equates recreational drug use with drug abuse" and "*[t]he statute*, in fact, considers *all* recreational use to be a harm," his description meaningfully changes the agencies' authority to interpret and apply the statute.[248] Second, prior case law rejecting petitioners' attempts to re/deschedule marijuana should not be uncritically relied upon as support for the proposition that

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the agency action."); *id.* at 449-50 ("Furthermore, the agency's interpretation of its own regulations 'must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994))).

244. *Alliance for Cannabis Therapeutics*, 930 F.2d at 939 (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

245. Abbott v. Abbott, 560 U.S. 1, 15 (2010) (quoting Sumitoma Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982)).

246. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999).

247. Factor v. Laubenheimer, 290 U.S. 276, 295 (1933) (citing Nielsen v. Johnson, 279 U.S. 47, 52 (1929); Charlton v. Kelly, 229 U.S. 447, 468 (1913)).

248. Mikos, *POTUS and Pot*, *supra* note 5, at 675, 685 (emphasis added); U.S. FOOD & DRUG ADMIN., ASSESSMENT OF ABUSE POTENTIAL OF DRUGS: GUIDANCE FOR INDUSTRY (2017), https://www.fda.gov/media/116739/download.

marijuana *must* remain on schedule I. Instead, those cases stand only for the proposition that marijuana *can* remain on schedule I if the agencies so decide.[249] That is all the reviewing courts were deciding when they upheld the DEA's interpretation of the CSA and the statute's application to marijuana. Indeed, we question whether the DEA's failure to remove marijuana from schedule I would have survived this prior litigation had the agency not benefitted from deference on judicial review.[250] Third, and perhaps most significantly, any analysis of the issue must consider the fact that an administration motivated to re/deschedule marijuana will benefit from the same (or similar) deferential standards of judicial review that allowed prior anti-marijuana DEA Administrators to keep marijuana on schedule I. The pendulum will swing in the opposite direction of past re/descheduling proceedings. Discounting or disparaging the significance of that deference would lead to a catch-22: the DEA's decision to keep marijuana on schedule I would have benefitted from such deference, but a decision to remove it from schedule I would not have.

Appreciating the existence and impact of these standards of judicial review is essential to understanding our analysis. If a Presidential Administration wanting to re/deschedule marijuana employed the statutory and treaty interpretations we advance above, the Administration would very likely benefit from deferential standards of review. This is not to say that the Administration could do whatever-it-wants-statute-be-damned. It is simply to recognize that Congress left key elements of the CSA undefined (and unclear) and that, where that is the case, our system of law ordinarily accords deference to the agencies charged with interpreting the statute.

IV. Consequences and Pushback

Having highlighted several ways in which the Attorney General has flexibility to change marijuana's scheduling, we turn now to addressing some consequences of and counterarguments to our analysis. First, we address the claim that administrative re/descheduling efforts will stymie congressional action on marijuana reform. Second, we dismiss several potential separation of powers concerns. Third, we dispel some misunderstandings about how

249. *See supra* note 240 and accompanying text.

250. *See* Pennington, *supra* note 47 ("Without this sort of deference, DEA likely wouldn't be able to maintain the fantasy that cannabis . . . has the same abuse potential as a substance like, say, heroin. Nor could it pretend that Marinol, a synthetic drug containing THC, belongs in Schedule III while cannabis languishes in schedule I.").

rescheduling would impact FDA regulation and interstate commerce in marijuana.

A. Congressional Inertia

The first concern is that administrative action on marijuana reform will halt congressional action. This concern was front-of-mind for Professor Mikos in *POTUS and Pot*. He warned that "[e]ntertaining proposals to legalize marijuana through executive action ultimately draws attention away from what is needed to reform federal marijuana policy: the adoption of new congressional legislation."[251] Professor Mikos's concern stemmed from his conclusion that the President cannot move marijuana below schedule II, thus making administrative reform efforts a fruitless distraction that "reduces the urgency for Congress to act."[252]

Addressing this concern, we see little reason to conclude that attempting to re/deschedule marijuana through administrative action will impede legislation and instead believe it may well have the opposite impact. Then-Professor Kagan's work on presidential leadership of administrative agencies is instructive on this point. In *Presidential Administration*, she explains how executive action may potentially "spur legislative action by calling public attention to Congress's failure to act" on the issue at hand.[253] She quotes President Clinton's Chief Domestic Policy Advisor, who opined that "[i]n our experience, when the [President] takes executive action, it not only leads to results while the political process is stuck in neutral, but it often spurs Congress to follow suit."[254] This hydraulic effect of executive action may be particularly important in an era of divided government and political polarization, like the current one.[255]

Indeed, the "political process" is undoubtedly "stuck in neutral" when it comes to federal marijuana legislation. Ending federal marijuana prohibition is extremely popular, with about three out of four American voters—including sixty-five percent of Republicans, seventy-six percent of Independents, and eighty-one percent of Democrats—supporting it.[256] Yet the light at the end of the tunnel for federal marijuana legislation does not appear to be getting brighter. If the President takes steps to re/deschedule

251. Mikos, *POTUS and Pot*, *supra* note 5, at 686.

252. *Id.*

253. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2312 (2001).

254. *Id.* at 2313 (quoting Marc Lacey, *Blocked by Congress, Clinton Wields a Pen*, N.Y. TIMES, July 5, 2000, at A13 (second alteration in original) (quoting in turn Bruce Reed)).

255. *Id.* at 2312.

256. Jaeger, *supra* note 68.

marijuana now, Congress may be inclined to swoop in and steal the win from the President, claiming credit for a popular reform before President Biden (or a subsequent President) can score his political points. That could happen during the administrative re/descheduling process or when that process (inevitably) goes under judicial review. Moreover, if the administrative re/descheduling process is successful, it could create a renewed sense of urgency for Congress to respond to the changed marketplace conditions. And, if the process ultimately fails, it could breed enough frustration with the CSA to break the current stalemate in Congress. Either way, an attempted re/descheduling proceeding could put some wind in political sails that—it is worth remembering—have laid dormant for decades despite consistent signals from past presidential administrations that marijuana reform was a problem for Congress. For these reasons, presidential re/descheduling efforts may serve as the catalyst that finally gets Congress to act on federal marijuana reform.

B. Separation of Powers Concerns

A second set of objections to the President unilaterally re/descheduling marijuana falls into the bucket of separation of powers concerns. Those objections sound in (small *c* and big *C*) constitutional arguments that it should be Congress and not the President who re/deschedules marijuana. We address three such arguments below.

The first argument is that even if the CSA is flexible enough to authorize the President to re/deschedule marijuana, a reviewing court should invalidate a re/descheduling decision under the Supreme Court's major questions doctrine. In a nutshell, the major questions doctrine instructs courts to be skeptical of agencies' claims of power to make decisions of "vast 'economic and political significance.'"[257] The doctrine has been described as having roots both in the canons of statutory construction and in the (long dormant) separation of powers nondelegation principle.[258] Whatever its source, the Court has applied it with increasing frequency, striking agency actions regarding fossil-fuel emissions,[259] student loan forgiveness,[260] evictions

257. West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring) (quoting the majority opinion).

258. *Id.* at 2609; Biden v. Nebraska, 143 S. Ct. 2355, 2376-84 (2023) (Barrett, J., concurring) (discussing whether the major questions doctrine should be viewed as a tool of statutory interpretation or as a substantive, constitutional doctrine).

259. *West Virginia*, 142 S. Ct. at 2587.

260. *Nebraska*, 143 S. Ct. at 2355.

during the COVID-19 pandemic,[261] and pandemic workplace vaccination and testing rules.[262]

We need not wade into the debate around the source or soundness[263] of the major questions doctrine to safely conclude that it does not apply here. To be sure, re/descheduling marijuana may well have "vast economic and political significance"; it may arguably be a *major* action for the President to take. But re/descheduling marijuana would not bear any of the other hallmarks that the Court has identified for invoking the doctrine. Here, the delegation of authority to re/deschedule drugs is not "vague" or "cryptic."[264] Congress laid out that authority in painstaking detail throughout an entire section of the CSA.[265] Nor is there a "mismatch" between the scope of the President's claimed authority and the scope of the provision purportedly granting that authority. Section 811 creates a procedure for the Executive Branch to re/deschedule drugs, and that is the exact authority the President would be exercising. Finally, this would not be a case where the relevant agencies are regulating outside of their areas of expertise.[266] Drugs are in the Attorney General's, Secretary of HHS's, and their delegates' wheelhouses. That is precisely why Congress conferred the re/descheduling power upon them. The major questions doctrine is inapposite here.

Second, one might argue that re/descheduling through administrative action would carry a democratic deficit. In other words, because the decision to re/deschedule marijuana is so significant, the decision should be made by Congress, as the branch of government that is supposed to be the most democratically responsive, rather than unelected agency heads (the Attorney General, the Secretary of HHS, and their respective delegates). From a normative policy standpoint, we prefer that federal marijuana reform come from Congress. But we do not believe the democratic deficit argument is a valid concern from a constitutional standpoint. Initially, we note that the aforementioned Executive Branch officials would be acting pursuant to a statutory scheme created *by Congress*—the democratically elected

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261. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam).

262. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (per curiam).

263. *See, e.g.*, Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022) (critiquing the doctrine and questioning its merits).

264. *West Virginia*, 142 S. Ct. at 2609; *Nebraska*, 143 S. Ct. at 2382 (Barrett, J., concurring).

265. 21 U.S.C. § 811.

266. *See West Virginia*, 142 S. Ct. at 2612-13.

legislative branch.[267] Further, the high-level Executive Branch officials who would drive the re/descheduling process are accountable to the President, who is of course an elected official reflective of a national electorate.[268] Indeed, some scholars have even argued that agencies carry a *stronger* democratic pedigree than Congress—though we need not agree with that argument to make our point.[269]

A final separation of powers concern stems from a distinction between the President directing Executive Branch officers to re/deschedule marijuana and those officers doing so on their own initiative. It could be problematic for the President to initiate the rescheduling process and/or to dictate a preferred outcome of that process because Congress vested the re/descheduling power in specific Executive Branch officials and not in the President.[270] Thus, on this view, the President is usurping Congress's power by claiming authority that the legislative branch gave to someone else (the Attorney General and the Secretary of HHS).

This view does not carry weight given the modern realities of the administrative state. As then-Professor Kagan detailed at length in *Presidential Administration*, Presidents have used the administrative state for decades to achieve signature policy outcomes.[271] The President has, broadly speaking, become the agenda setter. This is a good thing. Presidential control gives administrative agencies democratic bona fides that they would otherwise lack.[272] For unitary executive theorists, that democratic link is essential to the administrative state's constitutionality.[273] Moreover, as Kagan notes, it is reasonable to believe that when Congress vests power in

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267. *See, e.g.*, Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 377 (2019) (arguing that "[l]egitimacy arguments that turn on agencies' perceived democratic deficits are similarly misplaced" because "[a]gencies are themselves the products of a democratic process," and that agencies are publicly accountable because "what Congress can make, Congress can unmake").

268. *See, e.g.*, *id.* ("Agency bureaucrats . . . are subject to supervision by a president accountable to a national constituency . . . ."); Kagan, *supra* note 253, at 2331-32 ("[P]residential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former.").

269. *See, e.g.*, Norton E. Long, *Bureaucracy and Constitutionalism*, 46 AM. POL. SCI. REV. 808, 811-14 (1952); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81, 95 (1985).

270. 21 U.S.C. § 811 (vesting power in the Attorney General and the Secretary of HHS).

271. *See generally* Kagan, *supra* note 253.

272. *Id.* at 2331-32.

273. *E.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 1 (1994) (arguing that a unitary executive promotes the constitutional value of accountability).

an executive agency, it is impliedly giving that power to the President as well.[274] Congress knows that the President's removal power allows him or her to remove the heads of such agencies at will, giving the President constructive control of each agency.[275] Kagan thus convincingly argues that courts should presume that when Congress vests power in an executive agency it is implicitly authorizing the President to direct the exercise of that power.[276]

While it would exceed the scope of this Article to enter into the scholarly debate regarding Kagan's position, it is safe to conclude that her argument regarding presidential control of executive agencies is largely correct as a descriptive matter, if not a normative one. Thus, unless the nation wishes to fundamentally restructure the President's relationship with such agencies, the fact that the CSA vests power in the Attorney General and Secretary of HHS rather than the President is not constitutionally significant.

C. Resulting Marketplace and the Threat of FDA Regulation

Another set of objections raises concerns specifically about rescheduling.[277] According to these critics, rescheduling marijuana to schedules II-V could backfire dramatically on those seeking sensible marijuana policy. They raise two specific arguments:

1. Rescheduling would subject marijuana to onerous FDA regulations designed for the pharmaceutical industry.
2. In the wake of rescheduling, courts would declare the various state laws governing the marijuana industry preempted or unconstitutional under the Dormant Commerce Clause, leading to chaos and upheaval in the marijuana industry.[278]

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274. Kagan, *supra* note 253, at 2327.

275. *Id.*

276. *Id.* at 2328.

277. *See, e.g.*, KHURSHID KOJA, CANNABIS CANNIBALISM: HOW FEDERAL RESCHEDULING COULD CONSUME THE STATE-LICENSED INDUSTRY WITHOUT SAFE HARBORS UNDER THE FEDERAL FOOD, DRUG AND COSMETIC ACT (2d ed. 2023), https://www.parabolacenter.com/img/cannabis-cannibalism-second-edition.pdf; Paul F. Josephson, *Biden Statement on Cannabis Scheduling: Be Careful What You Wish For*, DUANE MORRIS LLP (Oct. 17, 2022), https://www.lexology.com/library/detail.aspx?g=9dd2eca2-a15f-4fa7-a85d-f68250c10463; Raza Lawrence, *President Biden's Cannabis Announcements Bring Hope, and Questions*, ZUBER LAWLER (Oct. 11, 2022), https://zuberlawler.com/president-bidens-cannabis-announcements-bring-hope-and-questions/.

278. *See* Pennington, *supra* note 47 (summarizing and countering these critical views of rescheduling).

These critics assume that the problems they identify will not materialize if marijuana remains on schedule I but would if marijuana were transferred to schedule II-V.[279] As we explain next, however, these assumptions are mistaken.

First, marijuana's schedule I status is not shielding marijuana companies or consumers from the problems these commentators identify. The FDA already has jurisdiction over marijuana while it is on schedule I.[280] It simply is not enforcing the FDCA against marijuana companies rigorously. Moving marijuana off schedule I would not increase the FDA's authority over marijuana in any way. That is because FDA jurisdiction over a substance hinges not on the substance's status as a controlled substance under the CSA but instead on whether the substance qualifies as a "drug," "medical device," "food," "dietary supplement," "cosmetic," or "tobacco product," as the FDCA and FDA regulations define those terms.[281]

The same is true for the preemption and Dormant Commerce Clause concerns.[282] Those constitutional doctrines apply to marijuana businesses today just as surely as they would apply to those same businesses regardless of marijuana's scheduling status under the CSA.[283]

In short, these commentators are mistaken in assuming that marijuana's schedule I status is somehow preventing their fears from materializing. Their reasoning exemplifies the classic correlation-causation fallacy. They have noticed a correlation—that marijuana is on schedule I and their fears have not yet materialized—and have mistakenly inferred a causal relationship—that marijuana's schedule I status is preventing their fears from materializing.

In fact, however, there are many reasons why their fears have not come to pass, and none are tied in any concrete way to marijuana's schedule I status. First, both Congress and the Executive Branch appear to be pushing for *less,* not more, marijuana enforcement at the federal level over time. Examples of that phenomena include:

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279. *Id.*

280. O'Connor & Lietzan, *supra* note 66, at 858 nn.230-31.

281. *Id.*

282. U.S. CONST. art. VI, cl. 2; *id.* art. I, § 8, cl. 3.

283. Though, the manner in which the DCC applies to restrictions on interstate commerce in marijuana is a matter of some debate. *Compare* Mikos, *supra* note 84, *with* Bloomberg, *supra* note 71.

- The President's October 6th announcement;[284]
- FDA's passivity toward CBD even after Congress descheduled CBD (and all other forms of hemp) in the 2018 Farm Bill;[285]
- Congress's passage of appropriations riders forbidding DOJ from using funds to interfere with the operation of state medical marijuana laws;[286] and
- Congress's perennial focus on marijuana legalization and reform proposals.[287]

Second, federal enforcement consumes a *lot* of agency time and money. For example, the funds FDA uses to enforce the FDCA come in roughly equal proportion from appropriations and user fees paid by the pharmaceutical companies that develop and market pharmaceutical drugs in interstate commerce.[288] DEA's budget for enforcing the CSA comes almost entirely from appropriations, but that budget is not nearly sufficient to fund nationwide enforcement of the CSA.[289] To make up for the shortfall, Congress offers the states access to federal funds conditioned on their cooperation in federal programs, including assistance with enforcing the CSA.

Importantly, however, rescheduling marijuana through the administrative process would increase neither agency's funding. Unlike Congress, which has the power of the purse over reform programs it creates, administrative agencies have no analogous spending power. Administrative agencies also lack authority to establish or modify the conditional spending arrangements

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284. *See supra* note 1.

285. *See* Press Release, Janet Woodcock, FDA, FDA Concludes That Existing Regulatory Frameworks for Foods and Supplements Are Not Appropriate for Cannabidiol, Will Work with Congress on a New Way Forward (Jan. 26, 2023), https://www.fda.gov/news-events/press-announcements/fda-concludes-existing-regulatory-frameworks-foods-and-supplements-are-not-appropriate-cannabidiol.

286. *See* Consolidated and Further Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014).

287. JOANNA R. LAMPE, CONG. RSCH. SERV.: LEGAL SIDEBAR, LSB10859, RECENT DEVELOPMENTS IN MARIJUANA LAW (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10859.

288. AMANDA K. SARATA, CONG. RSCH. SERV., R44576, THE FOOD AND DRUG ADMINISTRATION (FDA) BUDGET: FACT SHEET (2022), https://crsreports.congress.gov/product/pdf/R/R44576.

289. *See Drug Enforcement Administration (DEA): FY 2022 Budget Request at a Glance*, U.S. DEP'T OF JUST., https://www.justice.gov/d9/pages/attachments/2021/05/27/dea.pdf (last visited Dec. 10, 2023).

Congress also relies on to fund administrative enforcement. Thus, even if FDA had the inclination to ramp up enforcement in the marijuana space, it could do so only by re-allocating its already limited resources away from its current priorities.[290] And as we mentioned earlier in Section III.B, the cost associated with shouldering the new and nebulous responsibility of aggressive enforcement against a nationwide multi-billion-dollar industry that FDA has largely ignored for decades would be staggering.

V. Conclusion

Can the President reschedule marijuana? Our answer is yes. Congress had the foresight to know that future developments may prove its initial scheduling decisions wrong. Accordingly, it embedded into the CSA an administrative procedure for transferring drugs between schedules. In doing so, it left interpretation and application of the statute's key scheduling provisions in the Executive Branch's hands. That delegation of power gives the Attorney General and the Secretary of HHS ample discretion to conclude that marijuana fits best on a less restrictive CSA schedule, including schedule III. Indeed, it would be strange to interpret the procedure that Congress created for transferring drugs between schedules to foreclose transfer of the drug about which Congress was most uncertain at the time of the CSA's enactment.

Can the President deschedule marijuana? The pathway to descheduling is far narrower and more uncertain. The Attorney General could redefine the CSA's statutory criteria in a manner that allows for finding that marijuana has an accepted medical use and *de minimis* potential for abuse, perhaps justifying a descheduling decision as part of a holistic assessment of the scheduling factors. But such a radical change may be vulnerable to attack on judicial review, and even then, the Treaty Carve-Out would place another roadblock in front of descheduling. When combined, the CSA's flexibility and the deference accorded to agency action *may* allow a descheduling effort to survive judicial review, but we think it would be more likely than not to fail.

290. *See* Pennington, *supra* note 47 (discussing the funding and enforcement issue).