

5-2019

The Authorization Continuum: Investigating the Meaning of "Authorization" Through the Lens of the Controlled Substances Act

Breanna C. Philips

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Food and Drug Law Commons](#)

Recommended Citation

Breanna C. Philips, *The Authorization Continuum: Investigating the Meaning of "Authorization" Through the Lens of the Controlled Substances Act*, 72 *Vanderbilt Law Review* 1335 (2019)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol72/iss4/5>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

NOTES

The Authorization Continuum: Investigating the Meaning of “Authorization” Through the Lens of the Controlled Substances Act

Federal prohibitions are ubiquitous in society. These prohibitions may be absolute, providing no exceptions, or they may be qualified, providing exemptions that allow specified parties to avoid a law’s reach. The power to exempt parties from a prohibition is not limited to the federal government; it may be delegated to states or smaller polities as well. This is the structure that Congress employed when enacting the Mail Order Drug Paraphernalia Control Act: the Act bans, among other things, the sale and distribution of drug paraphernalia but provides an exemption for “any person authorized by local, State, or Federal law.”

While the Act’s exemption may appear unambiguous at first blush, interpretive difficulty ensues when one asks what is required of a state or locality to “authorize” federally prohibited conduct. This difficulty is troublesome given the significance that attaches to whether a party is considered “authorized.” In states that have legalized marijuana, paraphernalia businesses are engaging in federally unlawful conduct until deemed authorized by state law, and a lack of authorization can result in devastating consequences. The importance of whether a party meets the Act’s authorization exemption thus warrants a more nuanced understanding of what is required to “authorize” prohibited conduct.

But the law lacks such an understanding—not only in the context of the Paraphernalia Control Act but in other areas as well. This Note aims to provide a framework for discerning what actions are sufficient to authorize otherwise prohibited conduct. It submits that authorization exists along a continuum: it may be affirmative, more implicit, or inherent. By understanding the full range of meanings that authorization may take, the law will be better equipped to provide a more complete answer when determining whether a party is “authorized.”

INTRODUCTION.....	1336
I. WHY AUTHORIZATION MATTERS: THE FEDERAL MARIJUANA PARAPHERNALIA PROHIBITION	1340
A. <i>Paraphernalia Regulation: The Model Act</i>	1341
B. <i>Paraphernalia Prohibition: The Paraphernalia Control Act</i>	1344
1. The Authorization Exemption	1344
2. The Definition of “Paraphernalia”	1347
C. <i>Paraphernalia Penalties: The Consequences of Prohibition</i>	1350
1. Enumerated Penalties	1350
2. Unenumerated Consequences	1354
a. <i>Trademark Registration</i>	1354
b. <i>Banking</i>	1357
c. <i>Contract Enforcement</i>	1360
II. THE AUTHORIZATION CONTINUUM	1364
A. <i>Affirmative Authorization</i>	1366
1. Affirmative Authorization via Statute	1366
2. Affirmative Authorization via Licensure... ..	1368
B. <i>Authorization Through Inaction</i>	1370
C. <i>Implied Authorization</i>	1371
1. Authorization by Repeal.....	1371
2. Authorization by Delegation	1374
3. Authorization Through Context	1375
III. AUTHORIZING CONDUCT PROHIBITED BY THE PARAPHERNALIA CONTROL ACT	1380
A. <i>Affirmative Authorization</i>	1381
B. <i>Authorization Through Inaction</i>	1386
C. <i>Implied Authorization</i>	1387
CONCLUSION	1390

INTRODUCTION

Federal prohibitions are ubiquitous in society.¹ These prohibitions are often sweeping in nature, taking the form of absolute

1. Consider, for example, federal prohibitions related to workers' safety; prohibitions on specific trade-related activities under the Sherman Act, 15 U.S.C. §§ 1–38 (2012); and prohibitions on certain types of contract terms. See Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 230 (1998) (listing examples). Consumer protection law alone includes myriad prohibitions, including, for example, prohibitions related to advertising and labeling of tobacco products, see 15 U.S.C. §§ 4401–4408 (2012); debt collection practices, see Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p (2012); credit repair services, see Credit Repair Organizations Act,

bans that include no exemptions and frequently attach significant penalties to violations.² But Congress sometimes chooses to qualify these bans by “authorizing” certain parties to engage in otherwise prohibited activities or by delegating this power to states or localities.

While seemingly benign, the term “authorized” carries significant weight. Prohibitions often entail staggering penalties for violations, including not only monetary sanctions but imprisonment as well. As such, how a decisionmaker interprets the term may determine a person’s freedom or a business’s viability. Even if an individual is not charged with violating a federal prohibition, negative consequences may automatically attach as a result of the prohibited activity’s “unlawful” status.³ Accurately determining whether a party has been “authorized” to engage in otherwise unlawful conduct thus necessitates a comprehensive understanding of the term.

And yet the law lacks such an understanding. Decisionmakers disagree on whether authorization may be inferred from surrounding circumstances or whether more formal, affirmative permission is required. Some have even posited that conduct is authorized so long as it is not prohibited. This Note aims to elucidate the matter by providing a framework for understanding how the term “authorized” should be interpreted.

Authorization, this Note submits, exists along a continuum of possible meanings, with affirmative authorization at one end of the continuum and authorization through inaction at the other. Affirmative authorization, likely the most familiar form, involves a direct, positive empowerment to act. Statutory authorizations and licensing regimes frequently fall on this side of the continuum. Authorization through inaction, on the other hand, considers conduct inherently authorized unless it is expressly prohibited or regulated (or has been in the past). Between these two ends exists a range of implied forms of authorization that depend on the circumstances surrounding a particular prohibition.

15 U.S.C. §§ 1679–1679j (2012); lending services, *see* Truth in Lending Act, 15 U.S.C. §§ 1601–1667f (2012); telemarketing, *see* Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101–6108 (2012); protection of minors, *see, e.g.*, Sports Agent Responsibility and Trust Act, 15 U.S.C. §§ 7801–7807 (2012); and discrimination against customers in certain industries, *see, e.g.*, Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (2012).

2. *See, e.g.*, 18 U.S.C. § 115 (2012) (prohibiting actions that impede, intimidate, or interfere with any U.S. official, U.S. judge, or law enforcement officer engaged in official activities); 18 U.S.C. § 2339C (2012) (prohibiting the knowing finance of terrorist activities); 21 U.S.C. § 331 (2012) (prohibiting, among other things, “receipt in interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof”).

3. *See infra* Section I.C.2 (discussing consequences that automatically attach to violation of the Paraphernalia Control Act).

The breadth of forms that authorization may take remains largely unexplored in the literature and by the courts. This may be because scholars and courts have presumed that authorization must be affirmative, but this position was recently rejected by the Supreme Court in *Murphy v. National Collegiate Athletic Association*, which held that a state's repeal of a prohibition constitutes authorization by law.⁴ But the Court did not explicate the meaning of authorization further, thus leaving open the question of what other actions constitute authorization by law. This Note seeks to fill that gap by providing the authorization continuum as a comprehensive framework for understanding what authorization requires.

To illustrate the need for such a framework and how it might inform decisionmaking, this Note investigates the term “authorized” as used in the Mail Order Drug Paraphernalia Control Act (“Paraphernalia Control Act”).⁵ The Act prohibits certain paraphernalia-related activities,⁶ but this prohibition is not absolute; it includes an exemption that allows those “authorized by local, State, or Federal law” to engage in the otherwise prohibited conduct.⁷

States' ability to authorize federally prohibited paraphernalia-related activities is of special import given the surge of states that have legalized marijuana. While marijuana is federally prohibited, every state but one has legalized the drug in some form.⁸ Of those, ten states plus the District of Columbia have done so for recreational use.⁹ These states have largely failed, however, to legalize the sale, distribution, and manufacture of marijuana paraphernalia. But the broad, all-encompassing definition of “paraphernalia” used in the Paraphernalia Control Act necessitates doing so.

Paraphernalia, as statutorily defined, covers a wide assortment of items used to prepare, conceal, and ingest controlled substances.¹⁰ The term is not limited to conventional notions of paraphernalia—pipes, bongs, and other instrumentalities of use—but includes the proverbial “picks and shovels” of the drug industry as well. In the

4. 138 S. Ct. 1461, 1474 (2018); *see infra* Section II.C.1.

5. 21 U.S.C. § 863 (2012).

6. *Id.* § 863(a).

7. *Id.* § 863(f)(1).

8. *See* Robert A. Mikos, *Only One State Has Not Yet Legalized Marijuana in Some Form . . .*, VAND. U. (July 16, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/07/only-one-state-has-not-yet-legalized-marijuana-in-some-form> [<https://perma.cc/3HDD-6ALM>] (noting that only Iowa continues to prohibit all forms of marijuana).

9. *See* Robert A. Mikos, *Update: Voters in 3 of 4 States Approve Marijuana Legalization Measures*, VAND. U. (Nov. 7, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/11/update-voters-in-3-of-4-states-approve-marijuana-legalization-measures> [<https://perma.cc/7VCG-UFRR>].

10. 21 U.S.C. § 863(d); *see also infra* Section I.B.2.

context of the marijuana industry, this means that items such as fertilizers, irrigation systems, and lighting technology marketed to marijuana cultivators are prohibited by federal law. States' failure to take advantage of the authorization exemption forces industry participants to deal with the many enumerated and unenumerated consequences that stem from violation of the Paraphernalia Control Act. Even if these actors are not prosecuted or fined under the Act,¹¹ several negative consequences automatically attach to any business or person engaging in prohibited conduct. For instance, marijuana paraphernalia businesses may not register federal trademarks because paraphernalia is considered unlawful commerce.¹² Likewise, otherwise valid contracts may be found unenforceable when they relate to paraphernalia, since such items are unlawful and enforcement may therefore be against public policy.¹³ Most detrimentally, marijuana paraphernalia businesses are limited in their ability to secure banking due to federal anti-money laundering laws.¹⁴

But the Paraphernalia Control Act presents a mechanism for easily protecting paraphernalia-industry participants from these consequences. The Act's authorization exemption allows state and local governments to authorize conduct otherwise prohibited: "This section shall not apply to . . . any person *authorized by local, State, or Federal law* to manufacture, possess, or distribute [paraphernalia]."¹⁵ Constraining the provision's seemingly plain meaning, however, is the uncertainty presented by the term "authorized." Decisionmakers have thus far rejected arguments by paraphernalia-industry participants that they fall within the authorization exemption's scope.¹⁶ This context illustrates the need for a better understanding of what actions are sufficient to "authorize" conduct and offers a unique lens through which to view the term's meaning.

This Note's objective is twofold: First, it seeks to ease the interpretive difficulty of the term "authorized" by presenting a framework of forms that authorization may take. Second, it aims to provide states with a better understanding of how the Paraphernalia Control Act's authorization exemption can be employed. This Note

11. For a discussion of the penalties expressly enumerated in the Paraphernalia Control Act, see *infra* Section I.C.1.

12. See *infra* Section I.C.2.a.

13. See *infra* Section I.C.2.c.

14. See *infra* Section I.C.2.b.

15. 21 U.S.C. § 863(f)(1) (emphasis added).

16. See, e.g., *Anderson v. United States*, Crim. No. L-00-033, 2009 U.S. Dist. LEXIS 107118 (D. Md. Nov. 16, 2009); *CannaKorp, Inc. v. United States*, 234 F. Supp. 3d 1345 (Ct. Int'l Trade 2017); *In re Ultra Trimmer, L.L.C.*, No. 86479070, 2016 TTAB LEXIS 563 (T.T.A.B. Nov. 29, 2016).

proceeds in three parts. Part I outlines the Act's legal framework and the consequences that attach to violations. Part II introduces the authorization continuum as a tool for understanding the meaning of authorization. It explains that rather than enjoying a single, inherent meaning, authorization may take many forms. Part III then applies the forms of authorization explored in Part II to the Paraphernalia Control Act's authorization exemption. This Part outlines how each form might be treated by legal decisionmakers and asks why the law might prefer some forms of authorization over others.

I. WHY AUTHORIZATION MATTERS: THE FEDERAL MARIJUANA PARAPHERNALIA PROHIBITION

The Controlled Substances Act ("CSA")¹⁷ was enacted in 1970 as a means of regulating the sale, manufacture, and use of certain substances deemed impermissible for the general population.¹⁸ The Act classifies substances into five schedules with varying levels of restriction based on the substance's potential for abuse, therapeutic value, and safety.¹⁹ Schedule I is the most restrictive category; substances in this category are prohibited by law and may not be prescribed by a physician.²⁰ Substances in Schedules II through V, on the other hand, are recognized as having at least some medical value and may be legally distributed.²¹

Marijuana is classified as a Schedule I substance, making it unlawful for any person to knowingly possess, dispense, distribute, or manufacture it.²² While prohibited by federal law, marijuana has been

17. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801–971).

18. See 21 U.S.C. § 801 (2012) (congressional findings); see also *Gonzales v. Raich*, 545 U.S. 1, 12–13 (2005) (explaining that the CSA was enacted with the express purpose of “conquer[ing] drug abuse” and “control[ing] the legitimate and illegitimate traffic in controlled substances”).

19. 21 U.S.C. § 812(b) (2012); see also Brian M. Blumenfeld, *State Legalization of Marijuana and Our American System of Federalism: A Historio-Constitutional Primer*, 24 VA. J. SOC. POL'Y & L. 77, 84–85 (2017) (explaining the CSA schedules). The CSA authorizes the Attorney General to classify and reschedule substances under the CSA, and the Attorney General has delegated that responsibility to the Drug Enforcement Administration (“DEA”). See 21 U.S.C. § 811(a) (2012) (delegation to Attorney General); 28 C.F.R. § 0.100 (2019) (delegation to DEA); see also *Ams. for Safe Access v. Drug Enf't Admin.*, 706 F.3d 438, 441 (D.C. Cir. 2013) (discussing this regulating structure).

20. 21 U.S.C. § 812. The ban on Schedule I substances includes a very narrow exception for investigative research, which must be approved by the Food and Drug Administration after submission of a research protocol. 21 C.F.R. § 1301.18 (2019). If approved, research is tightly controlled. *Id.* §§ 1301.33, 42.

21. 21 U.S.C. § 829(a)–(c) (2012); see also *Ams. for Safe Access*, 706 F.3d at 441 (noting that “[u]nlike Schedule I drugs, federal law permits individuals to obtain Schedule II, III, IV, or V drugs for personal medical use with a valid prescription”).

22. 21 U.S.C. § 841(a) (2012) (prohibited acts).

legalized in some form by nearly every state.²³ To date, ten states and the District of Columbia have legalized marijuana for recreational use,²⁴ and twenty-three states have legalized it for medical use.²⁵

While states have moved to legalize marijuana-related activities, many have failed to take the additional step of legalizing activities related to marijuana *paraphernalia*. While federal law prohibits the sale, distribution, and importation of such items,²⁶ this prohibition provides a work-around: it includes an exemption for “any person *authorized* by local, State, or Federal law.”²⁷ As this Part illustrates, the law attaches much significance to the term “authorized.” Whether a person is authorized to engage in paraphernalia-related conduct determines the lawfulness of that person’s actions and thus the consequences she faces. By authorizing conduct, states ensure that industry participants can avoid both enumerated penalties—imprisonment, forfeiture of property, and fines—and unenumerated consequences that attach as a result of paraphernalia’s status as “unlawful”—for example, the inability to receive federal trademark protection, barriers to banking, and difficulty enforcing contracts. Through authorization, states minimize the risk otherwise faced by marijuana paraphernalia businesses. The federal paraphernalia prohibition thus illustrates the importance of properly understanding the term “authorized.” This Part begins by outlining the federal paraphernalia prohibition, including the regulatory regime that preceded it, and then turns to the consequences that automatically attach to paraphernalia-related activities as a result of the prohibition.

A. Paraphernalia Regulation: The Model Act

When enacting the CSA, Congress chose to abstain from regulating drug paraphernalia, instead leaving the field to the states.²⁸ In response, many states criminalized the sale of drug paraphernalia via statute, but these statutes often crumbled under constitutional

23. See Mikos, *supra* note 8 (noting that forty-nine states and the District of Columbia have legalized either recreational marijuana, medical marijuana, or cannabidiol (“CBD”)).

24. See Mikos, *supra* note 9.

25. *State Medical Marijuana Laws*, NAT’L CONF. ST. LEGISLATURES (Mar. 5, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/ZD6T-NGFR>].

26. 21 U.S.C. § 863(a) (2012).

27. *Id.* § 863(f)(1).

28. See U.S. DEP’T OF JUSTICE, DRUG PARAPHERNALIA: FEDERAL PROSECUTION MANUAL 1 (1991), <https://www.ncjrs.gov/pdffiles1/Digitization/134764NCJRS.pdf> [<https://perma.cc/9BG3-P9U7>] [hereinafter DOJ MANUAL] (explaining that federal paraphernalia legislation was not urged “because it was not thought to represent the most efficient or sensible allocation of federal drug enforcement resources”).

challenges.²⁹ At the request of multiple states, the Drug Enforcement Administration (“DEA”) set out to create a regime that would withstand constitutional scrutiny. This effort resulted in the 1979 Model Drug Paraphernalia Act (“Model Act”), which was developed to serve as a guide for states in their efforts to control the drug paraphernalia trade.³⁰ The Model Act banned the possession, sale, manufacture, and advertisement of drug paraphernalia³¹ and was widely adopted.³² Despite the federal prohibition on controlled substances and states’ prohibition on drug paraphernalia, drug use persisted.³³ The lack of a federal paraphernalia prohibition was eventually blamed for the continued proliferation of drugs, and policymakers determined that closing the legislative gap on paraphernalia was necessary to address the nation’s ongoing drug crisis.³⁴

29. See *id.* (citing cases); MODEL DRUG PARAPHERNALIA ACT prefatory note (U.S. DRUG ENF’T ADMIN. 1979) (“[S]tate laws aimed at controlling Drug Paraphernalia are often too vaguely worded and too limited in coverage to withstand constitutional attack or to be very effective.”), reprinted in *Drug Paraphernalia: Hearing Before the H. Select Comm. on Narcotics Abuse and Control*, 96th Cong. 88 (1979).

30. See MODEL DRUG PARAPHERNALIA ACT prefatory note (“This Model Act was drafted, at the request of state authorities, to enable states and local jurisdictions to cope with the paraphernalia problem.”).

31. DOJ MANUAL, *supra* note 28, at 1.

32. The Model Act was “adopted in some form in thirty-eight states and the District of Columbia.” *United States v. Mishra*, 979 F.2d 301, 303 (3d Cir. 1992).

33. See, e.g., *Carmona v. Ward*, 576 F.2d 405, 412 (2d Cir. 1978) (“Drug abuse has become epidemic . . .”); *Slettvet v. State*, 280 N.E.2d 806, 809 (Ind. 1972) (“We take judicial notice of the frightening rise of illicit drug use occurring in this country which is rapidly approaching epidemic proportions.”).

34. See 132 CONG. REC. 26451 (1986) (statement of Sen. Pete Wilson) (calling the lack of a federal drug paraphernalia ban “one of the gaping holes in existing law”). Paraphernalia’s purported promotion and glamorization of drug use was considered a central reason for the drug epidemic. See *Mail Order Drug Paraphernalia Control Act: Hearing on H.R. 1625 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 51 (1986) [hereinafter *Paraphernalia Control Act Hearing*] (statement of Rep. Charles B. Rangel, Chairman, H. Select Comm. on Narcotics Abuse and Control) (claiming that the drug paraphernalia industry has “traditionally glamorized and promoted, [and] encouraged drug use”); 132 CONG. REC. 22921 (statement of Rep. Mel Levine) (contending that “[t]he drug paraphernalia industry both glamorizes the use of illegal drugs and contributes to the problem of drug abuse” and that reform efforts would “reemphasiz[e] that society is completely opposed to any glamorization or acceptance of dangerous drug use”).

Beyond concerns related to paraphernalia’s alleged promotion of drug use, Congress considered it morally condemnable that drug use had spurred a profitable industry—one large enough to generate industry publications and trade associations with lobbying power. See Steven E. Gersten, *Drug Paraphernalia: Illustrative of the Need for Federal-State Cooperation in Law Enforcement in an Era of New Federalism*, 26 SW. U. L. REV. 1067, 1074 (1997) (explaining that the industry’s trade associations “lobb[ie]d against proposed anti-paraphernalia legislation” and “challenge[d] the constitutionality of enacted statutes”). While no congressional member submitted evidence related to the paraphernalia industry’s profits, estimates for the years leading up to the Paraphernalia Control Act’s enactment ranged from \$3 to \$18 billion. See, e.g., *Drugs—The Effects on the Black Community: Hearing Before the H. Select Comm. on Narcotics Abuse and Control*, 98th Cong. 26 (1984) (statement of Ronald Dougherty, Executive Director, Benjamin Rush Center)

Two principal concerns animated efforts to enact a ban on drug paraphernalia. First, the paraphernalia industry was able to evade state regulation by using the interstate mail system to advertise, sell, and transport paraphernalia.³⁵ This “mail order” paraphernalia was considered “a deliberate attempt to circumvent State and local law enforcement efforts to control the sale of paraphernalia.”³⁶ Because state laws were only effective at targeting paraphernalia retailers operating within a state and were unable to reach nonresident manufacturers or distributors, states had difficulty regulating interstate paraphernalia.³⁷ Second, by placing a federal ban on drugs while not banning drug paraphernalia, Congress feared that it communicated to the public that using drugs was acceptable.³⁸ On this view, inconsistencies in federal drug laws evinced an “institutional hypocrisy” that indicated a relaxed approach to drug regulation.³⁹ Congress was also concerned that the continued legality of interstate channels for paraphernalia trafficking reinforced the notion that policymakers were apathetic toward drug use.⁴⁰ Thus, Congress determined that if drugs were to be eradicated, a federal solution to the prevalence of paraphernalia was required.

(estimating annual industry profits of \$18 billion); 132 CONG. REC. 22921 (statement of Rep. Mel Levine) (estimating annual industry profits of \$3 billion).

35. 131 CONG. REC. 5828 (1985); *see also* DOJ MANUAL, *supra* note 28, at 3 (describing the rising availability of drug paraphernalia due to the widespread use of mail and private package services).

36. *Paraphernalia Control Act Hearing*, *supra* note 34, at 16 (statement of Rep. Mel Levine, Member, H. Select Comm. on Narcotics Abuse and Control).

37. *See* Gersten, *supra* note 34, at 1084 (1997) (“State and local paraphernalia laws generally were used only against retailers, and were powerless to regulate out-of-state manufacturers and distributors.”); *id.* at 1084 n.109 (“[S]tates are powerless to prohibit interstate or mail order activity *per se* since only the United States Congress is empowered under the federal Constitution to regulate interstate commerce and to establish Post Offices.”).

38. *See, e.g.*, 132 CONG. REC. 22921 (statement of Rep. Mel Levine) (“The open sale of drug paraphernalia misleads many young Americans to believe that drugs are acceptable to use. Advertisements . . . sell the idea that drug use is a normal and acceptable activity.”); *see also* *Paraphernalia Control Act Hearing*, *supra* note 33, at 168 (statement of Irvin B. Nathan, Deputy Assistant Att’y Gen., Criminal Division, U.S. Department of Justice) (claiming that the existence of “head shops” and other “open advertisement[s]” for paraphernalia affected the public’s perception of whether drug use was acceptable).

39. 132 CONG. REC. 23096 (statement of Sen. William V. Roth, Jr.).

40. 132 CONG. REC. 22921 (statement of Rep. Mel Levine) (“A further danger . . . is the idea that if drug paraphernalia can be openly sold through the mails, then society is not serious about enforcing drug laws, that the health risks are not really so great, and that the legal consequences are not serious.”).

*B. Paraphernalia Prohibition:
The Paraphernalia Control Act*

To control the trafficking of paraphernalia, Congress enacted the Mail Order Drug Paraphernalia Control Act of 1986.⁴¹ The Act enumerates three prohibited paraphernalia-related activities: (1) the sale or offer for sale of paraphernalia, (2) the use of interstate commerce to transport paraphernalia, and (3) the import or export of paraphernalia.⁴² While manufacture of paraphernalia is not expressly prohibited by the Act, courts have allowed indictments based on manufacture alone.⁴³ Further, manufacturing paraphernalia for profit necessarily implicates the Act's express prohibition on sales and offers for sale. Possession of paraphernalia, however, is not federally prohibited.⁴⁴ This Section begins by detailing the Paraphernalia Control Act's authorization exemption and then explains the broad scope of what items are considered "paraphernalia" under the Act. Section I.C takes up the consequences of engaging in conduct prohibited by the Act.

1. The Authorization Exemption

The Paraphernalia Control Act's prohibition on paraphernalia is not absolute. The Act includes an exemption for "any person *authorized by local, State, or Federal law* to manufacture, possess, or distribute such items."⁴⁵ Because Congress enacted the Paraphernalia Control Act as part of an omnibus bill, there is scant legislative history regarding

41. 21 U.S.C. § 863 (2012); *see also Paraphernalia Control Act Hearing, supra* note 34, at 6 (statement of Rep. William J. Hughes, Chairman, Subcomm. on Crime of the H. Comm. on the Judiciary) (describing the Paraphernalia Control Act as "another chapter in our effort to try to provide whatever tools are reasonably needed to the law enforcement community in trying to deal with this national malaise").

42. 21 U.S.C. § 863(a).

43. *See, e.g., United States v. Dyer*, 750 F. Supp. 1278, 1298–99 (E.D. Va. 1990) (holding that a manufacturer may be charged under the Paraphernalia Control Act).

44. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1985 (2015) ("Federal law criminalizes the sale of or commerce in drug paraphernalia, but possession alone is not criminalized at all."). Some courts, however, have erroneously interpreted the Act to prohibit possession. *See, e.g., Jenkins v. Micks*, No. 1:14-CV-3522 (NJV), 2014 WL 6241217, at *5 n.6 (N.D. Cal. Nov. 14, 2014).

45. 21 U.S.C. § 863(f)(1) (emphasis added). The Act also includes an exemption for items "traditionally intended for use with tobacco products" from the Paraphernalia Control Act's reach. 21 U.S.C. § 863(f)(2). To determine whether an item is intended for tobacco use or for use with a controlled substance, courts look to objective factors rather than a defendant's subjective intent. *See Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 520–21 (1994) ("An item's 'traditional' use is not based on the subjective intent of a particular defendant."); *see also infra* Section I.B.2 (discussing factors used in determining whether an item is unlawful paraphernalia).

the authorization exemption. As a result, little is known about how Congress intended the provision to operate.⁴⁶

As originally introduced, the Act did not contain exemptions for use,⁴⁷ but both chambers of Congress later proposed early versions of the authorization exemption. Both versions delineated specific purposes for which prohibited conduct would be authorized: The House bill exempted from its scope paraphernalia “for medical or scientific needs”⁴⁸ and was likely intended to address a narrow exception in the CSA that allows for federally approved investigative research into the effects of controlled substances.⁴⁹ The Senate bill, meanwhile, was much more detailed; it listed professions that would be exempt from the Act’s prohibitions.⁵⁰ This version was likely in response to the myriad everyday objects that fall within paraphernalia’s definition and the perceived need for a safe harbor for industries dealing in objects that could potentially be covered by that definition.⁵¹ These proposed exemptions were eventually replaced with the current authorization exemption—although the legislative history is equally quiet as to why this version was preferred.

The more generalized exemption that was ultimately adopted may indicate that Congress envisaged a broader role for the states in regulating paraphernalia, as it had when drafting the Model Act.⁵² This possibility is buttressed by pronouncements made by executive branch officials that regulation was a matter best left to the states.⁵³ During a hearing on the appropriateness of federal regulation, a Department of Justice (“DOJ”) representative indicated that because a federal ban on drug paraphernalia would not represent an efficient allocation of available federal resources, paraphernalia was not a priority for the

46. See *United States v. 57,261 Items of Drug Paraphernalia*, 705 F. Supp. 1256, 1264–65 (M.D. Tenn. 1988) (explaining that because of the omnibus nature of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, there is little legislative history related to the Paraphernalia Control Act), *aff’d*, 869 F.2d 955 (6th Cir. 1989).

47. 131 CONG. REC. 5828–29 (1985) (as introduced in the Senate by Sen. Pete Wilson); see also *id.* at 5932 (as introduced in the House of Representatives by Rep. Mel Levine).

48. 132 CONG. REC. 22878 (1986).

49. See *supra* note 20.

50. 132 CONG. REC. 25666–67. These exempted classes included “manufacturers, wholesalers, jobbers, licensed medical technicians, technologists, nurses, hospitals, research teaching institutions, clinical laboratories, medical doctors, osteopathic physicians, dentists, chiropractors, veterinarians, pharmacists, or embalmers in the normal lawful course of their respective businesses” and “common carriers or warehousemen or their employees engaged in the lawful transportation of such items.” *Id.*

51. See *infra* Section I.B.2 (discussing the Paraphernalia Control Act’s broad definition of “paraphernalia”).

52. See *supra* Section I.A.

53. See Gersten, *supra* note 34, at 1081–82 (discussing the executive branch’s view that states should be the primary actors in regulating paraphernalia).

federal government.⁵⁴ Instead, the DOJ encouraged states to “weigh all the circumstances and decide whether it is in their best interests to enact [legislation].”⁵⁵ Representatives from the DEA likewise indicated that regulation could “be done best at the State and local level” and that states and local municipalities should be provided autonomy to determine for themselves “what kind of environment, what kind of streets, [and] what kind of neighborhoods, they want to have.”⁵⁶

Importantly, Congress appeared to share this view for a time.⁵⁷ In 1980, the House Select Committee on Narcotics issued a “find[ing] that regulation of the paraphernalia industry can best be accomplished at the State and local government levels.”⁵⁸ When legislation mirroring the Model Act was introduced into the Senate in 1981, it garnered little support and ultimately died in committee.⁵⁹ While it is unclear why the legislation failed to gain traction, efforts by states to decriminalize marijuana may have played a role.⁶⁰

While the legislative history of the Paraphernalia Control Act is sparse, the foregoing discussion suggests that Congress likely intended

54. See *Drug Paraphernalia: Hearing Before the H. Select Comm. on Narcotics Abuse and Control*, 96th Cong. 33 (1979) (statement of Irvin B. Nathan, Deputy Assistant Att’y Gen., Criminal Division, Department of Justice) (explaining that the DOJ preferred not to involve itself in regulating drug paraphernalia because “[t]he Federal Government has limited resources” and must “allocate those resources in the way [it] think[s] is best to attack the overall drug problem”); see also *id.* at 35 (“The Department of Justice . . . does not view its responsibilities as making specific recommendations to the State and local governments as to what is in their best interest.”).

55. *Id.* at 35.

56. *Id.* at 31 (statement of Peter B. Bensinger, Administrator, Drug Enforcement Administration); see also *id.* (arguing that it was up to “communities . . . to develop and determine how they are going to control their environment”); *id.* (“We believe the Model Act should be discussed and reviewed by the individual jurisdictions, whether villages, cities, county governments, or State governments.”).

57. See KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 105 (2013) (“Executive expressions that precede legislative history, as normally understood, are part of a statute’s context.”).

58. STAFF OF H. SELECT COMM. ON NARCOTICS ABUSE & CONTROL, 96TH CONG., REP. ON DRUG PARAPHERNALIA 17 (Comm. Print 1980).

59. See Gersten, *supra* note 34, at 1082 (“A bill virtually identical to the Model Act was introduced in 1981 by Senator John Tower, but the proposal generated little interest and died in committee.”).

60. See *Drug Paraphernalia: Hearing Before the H. Select Comm. on Narcotics Abuse and Control*, 96th Cong. 78–84 (1979) (statement of Sue Rusche, President, DeKalb Families in Action) (discussing state efforts to decriminalize marijuana). State-level marijuana prohibition eroded between President Nixon’s “War on Drugs” pronouncement and President Reagan’s anti-drug “crusade,” in part due to a 1972 report released by the National Commission on Marihuana and Drug Abuse declaring that use of marijuana was “not such a grave problem that individuals who smoke marihuana, and possess it for that purpose, should be subject to criminal procedures.” JOHN HUDAK, MARIJUANA: A SHORT HISTORY 59–61 (2016) (internal quotation marks omitted). The report prompted eleven states to liberalize their marijuana laws. See Richard J. Bonnie, *The Surprising Collapse of Marijuana Prohibition: What Now?*, 50 U.C. DAVIS L. REV. 573, 576–86 (2016).

the authorization exemption to permit states broad discretion to authorize paraphernalia-related activities as they saw fit. This reading comports with the general language used in the exemption.⁶¹ Even if one accepts that Congress intended to allow states to authorize the federally prohibited conduct at their discretion, it is still unclear what actions are sufficient to constitute authorization for purposes of the Act. This inquiry is taken up in Part II. But before discussing the meaning of authorization, it is necessary to understand the significance of such a determination. As the remainder of this Part demonstrates, the prohibition on paraphernalia is far-reaching and imposes substantial penalties—some enumerated and others attaching automatically to paraphernalia’s unlawful status.

2. The Definition of “Paraphernalia”

The term “drug paraphernalia” is typically associated with the traditional instrumentalities of drug use—bongs, pipes, needles, and so forth. But the definition used in the Paraphernalia Control Act is far more encompassing and brings a wider array of items into the statute’s purview.⁶² This broad scope follows directly from the Model Act, which purposefully included a broad definition of paraphernalia and served as a guide for drafters of the Paraphernalia Control Act.⁶³ Congress was aware of the definition’s breadth; it was acknowledged during legislative hearings that the definition would include “items other than those used for drug connected purposes.”⁶⁴

61. 21 U.S.C. § 863(f)(1) (2012) (“This section shall not apply to . . . any person authorized by local, State, or Federal law to manufacture, possess, or distribute such [paraphernalia] items.”).

62. See *Paraphernalia Control Act Hearing*, *supra* note 34, at 61 (statement of Jack E. Swagerty, Assistant Chief Postal Inspector for Criminal Investigations, U.S. Postal Inspection Service) (noting that, as drafted, the Paraphernalia Control Act “may include items other than those used for drug connected purposes”).

63. See MODEL DRUG PARAPHERNALIA ACT art. I cmt. (U.S. DRUG ENF’T ADMIN. 1979) (“Although this definition may appear too general in its wording, or too broad in its scope, there are so many forms of drug paraphernalia that any attempt to define the term in more specific language would guarantee major loopholes in the Act’s coverage.”), *reprinted in Drug Paraphernalia: Hearing Before the H. Select Comm. on Narcotics Abuse and Control*, 96th Cong. 88 (1979); see also *Paraphernalia Control Act Hearing*, *supra* note 34, at 15 (statement of Rep. Mel Levine, Member, H. Select Comm. on Narcotics Abuse and Control) (explaining the Paraphernalia Control Act was “drafted closely after” the Model Act); *id.* at 146 (statement of Lee Huddleston, Att’y, Huddleston Brothers) (noting that the Model Act and Paraphernalia Control Act share the same definition).

64. *Paraphernalia Control Act Hearing*, *supra* note 34, at 61 (statement of Jack E. Swagerty, Assistant Chief Postal Inspector for Criminal Investigations, U.S. Postal Inspection Service). While some have argued that the statute is unconstitutionally vague because of its scope, courts have disagreed, holding that the broad character of the definition is not vulnerable to constitutional challenges. See, e.g., *United States v. Mishra*, 979 F.2d 301, 308–09 (3d Cir. 1992); *United States v. Murphy*, 977 F.2d 503, 506 (10th Cir. 1992).

As defined by the Act, “drug paraphernalia” refers to any item “primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.”⁶⁵ The statute recites a brief list of items that fall under this definition.⁶⁶ If not squarely within the enumerated list, an item may still be considered paraphernalia when “designed” or “primarily intended” for use with a controlled substance.⁶⁷

An item is “designed” for use if its objective features establish that it is “principally” used for making or consuming a controlled substance.⁶⁸ The Supreme Court has clarified that this determination depends on the item’s true purpose as represented by the manufacturer’s design intent rather than the retailer’s intent in selling the item or the buyer’s intent in using it.⁶⁹ In other words, no scienter requirement exists for parties other than manufacturers.⁷⁰ A focus on the manufacturer’s design precludes consideration of any “contrived” uses that litigants may propose in an attempt to circumvent the object’s true purpose.⁷¹

Whether an item is “primarily intended” for use with controlled substances likewise rests on objective considerations and does not involve questions of the violator’s subjective intent. Despite indication in the Act’s legislative history that Congress presumed the phrase “primarily intended” would rest on subjective intent,⁷² the Supreme Court has rejected this reading.⁷³ Instead, the Court has determined that whether an item is “primarily intended” for drug use depends on whether the item is “likely” to be used with illicit drugs.⁷⁴ This reading was adopted based on the overall construction of the Paraphernalia

65. 21 U.S.C. § 863(d).

66. *See id.* (listing fifteen examples of drug paraphernalia); *see also* United States v. Search of Music City Mktg., Inc., 212 F.3d 920, 924 (6th Cir. 2000) (explaining that the list of items included in the definition of paraphernalia is not exhaustive).

67. Specifically, the Paraphernalia Control Act prohibits items designed or primarily intended for use “in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.” 21 U.S.C. § 863(d).

68. *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 518 (1994).

69. *See id.* (establishing that the “‘designed . . . for use’ standard refer[s] to ‘the design of the manufacturer, not the intent of the retailer or customer’” (alteration in original) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 501 (1982))).

70. *See id.*

71. *Id.* Examples of “contrived” uses include using a bong as a flower vase, a smoking pipe to burn incense, or a roach clip as a barrette. *See id.* (providing examples).

72. *See Paraphernalia Control Act Hearing, supra* note 34, at 47–48 (statement of Rep. Mel Levine, Member, H. Select Comm. on Narcotics Abuse and Control).

73. *Posters ‘N’ Things*, 511 U.S. at 522 n.12.

74. *See id.* at 518–21.

Control Act, including the possibility that Congress envisioned the “primarily intended” wording as referring to the intentions of parties other than the party violating the Act—for example, the intentions of the item’s manufacturer, distributor, retailer, buyer, or end user.⁷⁵

The definition of paraphernalia is further broadened by the Act’s directive to consider “all . . . logically relevant factors” when classifying an item.⁷⁶ Relevant factors include, for example, instructions, descriptive materials, or advertisements accompanying or related to the item in question; the manner in which the item is displayed; whether the party in control of the item “is a legitimate supplier of like or related items to the community,” such as items for use with tobacco; and expert testimony on the item’s intended use.⁷⁷ The breadth of factors that may be considered enables prosecutors to rely entirely on circumstantial evidence to prove a violation under the Paraphernalia Control Act.⁷⁸

The expansive definition of paraphernalia may result in the prohibition of otherwise lawful and commonplace objects. An airtight container, for instance, is prohibited paraphernalia if the circumstances surrounding its sale indicate that it was marketed for concealing a controlled substance, regardless of whether the defendant intended to use the item in that manner or sell it for that purpose.⁷⁹ Crucially, the picks and shovels of the marijuana industry fall within the definitional scope as well. Because “paraphernalia” includes items used for “manufacturing” marijuana, any item used to plant, cultivate, or harvest marijuana is covered by the Act.⁸⁰ The result is that the

75. *Id.*

76. 21 U.S.C. § 863(e) (2012); *see, e.g.*, *United States v. Ways*, 832 F.3d 887, 894–95 (8th Cir. 2016) (holding that it was reasonable for a jury to conclude that items at issue constituted drug paraphernalia after consideration of logically relevant factors); *United States v. Search of Music City Mktg., Inc.*, 212 F.3d 920, 927–28 (6th Cir. 2000) (relying on factors included in the Paraphernalia Control Act in determining whether seized items constituted “drug paraphernalia”).

77. 21 U.S.C. § 863(e). Online materials are frequently referenced in determining whether an item should be considered unlawful paraphernalia. *See e.g.*, *In re Ultra Trimmer, L.L.C.*, No. 86479070, 2016 TTAB LEXIS 563, at *5–9 (T.T.A.B. Nov. 29, 2016) (relying on a product’s website description to find that it met the definition of paraphernalia); *In re Brown*, 119 U.S.P.Q.2d (BNA) 1350, 1350–51, 1353 (T.T.A.B. 2016) (relying on the applicant’s website and photos of potential retail storefronts).

78. *See, e.g.*, *United States v. Dyer*, 750 F. Supp. 1278, 1281–82 (E.D. Va. 1990) (relying on invoices to substantiate charges alleging a violation of the Paraphernalia Control Act); *see also* DOJ MANUAL, *supra* note 28, at 28 (instructing prosecutors on how to bring charges against a defendant using advertisements).

79. *See Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 521 n.11 (1994) (explaining this concept). This is true even if the defendant does not intend to use the purchased container for use with a controlled substance. *See id.*

80. 21 U.S.C. § 863(d) (“The term ‘drug paraphernalia’ means any equipment, product, or material of any kind which is primarily intended or designed for use in *manufacturing* . . . a

products necessary for the proper functioning of the marijuana industry—for instance, climate control and ventilation systems, irrigation systems, lighting equipment, and fertilizers—are unlawful items subject to the Paraphernalia Control Act's enumerated penalties and unenumerated consequences. Thus, the penalties that attach to manufacturers and suppliers of pipes and bongs equally attach to manufacturers and suppliers of marijuana Miracle-Gro and other hydroponic products.⁸¹ For these businesses, being authorized by state law to engage in prohibited activities can mean the difference between a viable business venture and failure.

C. Paraphernalia Penalties: The Consequences of Prohibition

The Paraphernalia Control Act, like most criminal drug statutes, raises a host of unenumerated consequences in addition to the Act's specifically enumerated penalties. These unenumerated consequences are not fixed upon a decisionmaker's determination that a party is guilty of violating the Act but instead attach automatically to a party's status as a manufacture, supplier, or distributor of paraphernalia. This Section begins by exploring the Act's enumerated penalties and then proceeds to highlight three detrimental consequences that accompany parties dealing in paraphernalia. While this Note examines three consequences, this list is not exhaustive but instead merely serves as an illustration of the adverse effects that may result from marijuana paraphernalia's unlawful status.

1. Enumerated Penalties

The Paraphernalia Control Act explicitly provides that violation may result in imprisonment of up to three years, monetary fines, or both.⁸² Because each individual transaction involving paraphernalia is

controlled substance" (emphasis added). "Manufacturing" includes planting, cultivating, harvesting, and preparing controlled substances. *See id.* § 802(15), (22).

81. *See* Kristine Ogram, *Scotts Miracle-Gro Tests Whether It Can Make Pot Grow Too*, BLOOMBERG (Aug. 23, 2018), <https://www.bloomberg.com/news/articles/2018-08-23/scotts-miracle-gro-is-testing-whether-it-can-make-pot-grow-too> [<https://perma.cc/X8PF-JRUS>] (discussing Scotts Miracle-Gro's entry into the hydroponic industry).

82. 21 U.S.C. § 863(b) ("Anyone convicted of an offense [in] this section shall be imprisoned for not more than three years and fined under Title 18."); *see also* BRIAN T. YEH, CONG. RESEARCH SERV., RL30722, DRUG OFFENSES: MAXIMUM FINES AND TERMS OF IMPRISONMENT FOR VIOLATION OF THE FEDERAL CONTROLLED SUBSTANCES ACT AND RELATED LAWS 8 (2015) (placing the maximum possible fine for violation of the Paraphernalia Control Act at \$250,000). Additionally, in lieu of the traditional fine, "a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds." 21 U.S.C. § 855 (2012).

a single violation of the Act, fines may be assessed for each piece of paraphernalia sold or distributed.⁸³ Marijuana paraphernalia businesses are also subject to the provisions of the Money Laundering Control Act, which prohibits certain financial transactions involving “the proceeds of specified unlawful activity,” including activities prohibited by the Paraphernalia Control Act.⁸⁴ The penalties for money laundering are even more substantial than penalties for violations of the Paraphernalia Control Act—monetary fines are twice as large and persons may be imprisoned for up to twenty years.⁸⁵

Paraphernalia is also subject to seizure and forfeiture.⁸⁶ Seizure and forfeiture is not limited to paraphernalia itself; real property used in conjunction with a Paraphernalia Control Act violation may also be seized.⁸⁷ Seizures and forfeitures occur even when a business plans to sell or use its products only in a state with legalized marijuana, which is of particular consequence for businesses seeking to import paraphernalia.⁸⁸ The inability to import products has serious implications for competition among industry participants; for some businesses seizure may cause irreparable harm and threaten dissolution.⁸⁹

83. *See, e.g., Dyer*, 750 F. Supp. at 1298–99 (holding that a retailer or manufacturer may be charged for each individual transaction involving paraphernalia).

84. 18 U.S.C. § 1956(a), (c)(7)(D) (2012). Those violating the Paraphernalia Control Act have indeed been charged and convicted under the anti-money laundering laws. *See, e.g., Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513 (1994); *United States v. Ways*, 832 F.3d 887 (11th Cir. 2016).

85. 18 U.S.C. § 1956(a).

86. 21 U.S.C. §§ 863(c), 881(a)(7), 881(a)(10).

87. *Id.* § 881(a)(7) (allowing forfeiture of “[a]ll real property, including any right, title, and interest (including any leasehold interest) . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of” the CSA). What constitutes “commission” is broad. For instance, storage of paraphernalia on real property is sufficient to establish that the property was used in the commission of a crime. *See United States v. Real Property Located at 25445 Via Dona Christa*, 138 F.3d 403, 407–08 (9th Cir. 1998). Forfeiture may also be utilized to satisfy fines imposed on businesses for Paraphernalia Control Act violations. *See, e.g., United States v. Carmichael*, 436 F. Supp. 2d 1244, 1245–46 (M.D. Ala. 2006) (forfeiture of property worth \$2.5 million to satisfy fines).

88. *See, e.g., CannaCloud Vaporizer*, CBP Ruling Letter, HQ H275206 (Mar. 24, 2017), <https://rulings.cbp.gov/ruling/H275206> [<https://perma.cc/YL9D-EJF6>] (ruling letter rejecting the importation of a single-use, pod-based cannabis vaporizing system to be sold in Colorado because the product constituted “drug paraphernalia” under the Paraphernalia Control Act). Businesses attempting to import paraphernalia will either receive an advance ruling letter from U.S. Customs and Border Protection that denies importation or have their goods seized by the agency upon importation. *See, e.g., Stashlogix Storage Case*, CBP Ruling Letter, HQ H282163 (Apr. 13, 2017), <https://rulings.cbp.gov/ruling/H282163> [<https://perma.cc/PM85-B58R>] (ruling letter rejecting the importation of childproof lock boxes for storing marijuana because the product was “drug paraphernalia” as defined by the Paraphernalia Control Act).

89. *See, e.g., CannaKorp, Inc. v. United States*, 234 F. Supp. 3d 1345, 1348 (Ct. Int’l Trade 2017) (rejecting the argument that seizure would inflict irreparable harm “through disruption of

Enforcement of these penalties is not uncommon. The federal government has targeted the paraphernalia industry on multiple occasions. Two nationwide investigations that took place in the early 2000s—code-named “Operation Pipe Dreams” and “Operation Headhunter”—were joint enforcement efforts by the DOJ and DEA aimed at “eliminat[ing] the demand for illegal substances by eliminating those products that are used to ingest and inhale illegal substances.”⁹⁰ Enforcement of the Paraphernalia Control Act was considered a necessary step to targeting the drug trade. As then-Acting DEA Administrator John B. Brown explained, “People selling drug paraphernalia are in essence no different than drug dealers They are as much a part of drug trafficking as silencers are a part of criminal homicide.”⁹¹ The two operations ultimately resulted in the arrest of fifty individuals, including the widely publicized arrest of actor Tommy Chong, of Cheech and Chong fame.⁹² Chong was ultimately sentenced to nine months in prison, fined, and forced to forfeit \$120,000 in assets.⁹³

Federal enforcement has been pursued even in instances where local enforcement agencies have permitted the prohibited conduct. For example, following a 2005 operation by the DEA that targeted paraphernalia retailers in Montana, a Missoula retailer who had operated a paraphernalia shop without opposition from local or state government officials for eight years was indicted and found guilty under the Paraphernalia Control Act.⁹⁴ Prior to opening his paraphernalia

supplier relationships, lost business opportunities, and reputational harm . . . threaten[ing] the complete failure of CannaKorp’s business”).

90. Jacob Sullum, *Bongs Away!*, REASON (Feb. 2009), <https://reason.com/archives/2009/01/16/bongs-away> [<https://perma.cc/LU9X-C98E>] (quoting U.S. Attorney Mary Beth Buchanan of the Western District of Pennsylvania, who spearheaded the investigation).

91. Press Release, Drug Enf’t Admin., Operations Pipe Dreams and Headhunter Put Illegal Drug Paraphernalia Sellers Out of Business (Feb. 24, 2003), <https://www.dea.gov/pubs/pressrel/pr022403.html> [<https://perma.cc/86DC-8Z42>].

92. *Id.* (detailing enforcement efforts); see also Thomas Regnier, “Civilizing” Drug Paraphernalia Policy: Preserving Our Free Speech and Due Process Rights While Protecting Children, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 115, 149–50 (2011) (detailing Tommy Chong’s arrest and imprisonment).

93. Sullum, *supra* note 90. Chong pled guilty to the Paraphernalia Control Act charges after prosecutors threatened to charge his wife and son as well, because they had cosigned a loan for Chong’s business. *Id.* The severity of the sentence may have been due to Assistant U.S. Attorney Mary Houghton’s request that the judge impose a harsh term: “[T]he defendant has become wealthy throughout his entertainment career through glamorizing the illegal distribution and use of marijuana. Feature films that he made with his longtime partner Cheech Marin, such as ‘Up in Smoke,’ trivialize law enforcement efforts to combat drug trafficking and use.” *Id.*

94. See Tristan Scott, *Pipe Shop Owner Given Probation*, MISSOULIAN (June 3, 2006), https://www.missoulian.com/news/local/pipe-shop-owner-given-probation/article_10664266-fa41-5257-95a0-bc5b982f49e6.html [<https://perma.cc/QBH3-8BT7>] (explaining that the retailer

shop, the retailer sought clarification from his local prosecutor's office that the venture was legal, and the office explicitly affirmed that it was.⁹⁵ The prosecutor to whom the retailer spoke even served as a defense witness at his trial.⁹⁶ Despite receiving permission from local authorities, the retailer's conduct was not considered "authorized." The U.S. district attorney trying the case successfully argued that permission from a local prosecutor was inadequate to authorize the retailer's conduct under federal law, and the retailer was ultimately convicted of violating the Paraphernalia Control Act and sentenced to house arrest.⁹⁷

These operations illustrate the need for a better understanding of how to interpret the term "authorized." The Missoula retailer discussed above had sought and received explicit, verbal permission from local government officials to engage in otherwise prohibited conduct, but was found guilty of violating the Paraphernalia Control Act nonetheless. While the retailer received house arrest, Tommy Chong's case illustrates that those violating the Act are not spared from the significant penalties that can attach. Federal efforts targeting paraphernalia have not disappeared since the large-scale operations of the early 2000s. In 2016, for example, the DEA raided and seized paraphernalia from a business operating in New Mexico, where medical marijuana is legal.⁹⁸ Even if the federal government chooses to forego enforcement of the Paraphernalia Control Act, other consequences attach by virtue of paraphernalia's federally unlawful status, as explored in the next Section.

"operated [his paraphernalia shop] in Missoula for eight years, without subterfuge and without legal consequences").

95. See Sullum, *supra* note 90 ("[E]ven though [the paraphernalia shop] sold unconventional pipes of the sort commonly used to smoke marijuana, the local prosecutor's office had told [the retailer] his business was legal.").

96. See Scott, *supra* note 94 ("Deputy County Attorney Mike Sehestedt even testified that before [the retailer] opened his shop, [he] made a point to visit the county attorney's office and make certain his business was within legal boundaries. And the law gave [him] a green light."); Sullum, *supra* note 90 ("At his trial in February 2006, [the retailer] was able to bring as a witness for the defense Missoula County Chief Deputy County Attorney Mike Sehestedt, who said he did not consider [the paraphernalia shop's] merchandise to be drug paraphernalia . . .").

97. Sullum, *supra* note 90.

98. *United States v. Assorted Drug Paraphernalia*, No. CIV 16-1310 KBM/CG, 2018 U.S. Dist. LEXIS 171032, at *1-2 (D.N.M. Oct. 2, 2018) (describing a 2016 raid by the DEA on a paraphernalia shop in New Mexico); see Lynn and Erin Compassionate Use Act, ch. 210, 2007 N.M. Laws 2833 (codified as amended at N.M. STAT. ANN. §§ 26-2B-1 to -7 (2018)) (legalizing medical marijuana in New Mexico). The 2016 raid was not an isolated occurrence. See, e.g., *United States v. Assorted Drug Paraphernalia*, 90 F. Supp. 3d 1222, 1224 (D.N.M. 2015) (describing the DEA's seizure of marijuana paraphernalia from an inventory storage unit in New Mexico in 2012).

2. Unenumerated Consequences

Marijuana paraphernalia businesses, even those operating only in states with legal marijuana, face serious hurdles and are denied many federal privileges by virtue of the goods they deal. In addition to the penalties plainly enumerated in the Paraphernalia Control Act, a number of adverse consequences attach as a result of marijuana paraphernalia's federally unlawful status. This Section explores three chief consequences: the inability to register trademarks for use on paraphernalia or depicting paraphernalia, the barriers faced by industry participants in securing banking services, and the difficulty of enforcing otherwise valid contracts in federal court.

The adverse consequences highlighted in this Section are not the only consequences that arise from paraphernalia's unlawful status. For example, industry participants face onerous tax burdens, including the inability to deduct business expenses—rent, insurance, salaries, etc.—from their taxes, which greatly impacts a business's profits and overall sustainability.⁹⁹ Industry participants are also unable to benefit from bankruptcy protection since they are not entitled to equitable relief under the doctrine of unclean hands.¹⁰⁰ And significantly, many paraphernalia businesses find it difficult to obtain legal representation.¹⁰¹ These and many other consequences that attach to paraphernalia's unlawful status detrimentally impact marijuana paraphernalia businesses in ways not reflected in the text of the Paraphernalia Control Act.

a. Trademark Registration

While registration of trademarks relating to or for use on drug paraphernalia is not plainly prohibited by federal trademark laws, such a prohibition has been read into the law's text. The Lanham Act, which governs trademarks, permits registration of “trademark[s] used in commerce.”¹⁰² The U.S. Patent and Trademark Office (“USPTO”) has

99. 26 U.S.C. § 280E (2012) (“No deduction or credit shall be allowed for any amount paid or incurred . . . in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances . . . which is prohibited by Federal [or State] law . . .”); see Sam Kamin & Viva R. Moffat, *Trademark Laundering, Useless Patents, and Other IP Challenges for the Marijuana Industry*, 73 WASH. & LEE L. REV. 217, 235–36 (2016) (explaining that marijuana businesses must pay taxes on “ill-gotten income” and discussing the “devastating effect” this requirement has on businesses).

100. See Kamin & Moffat, *supra* note 99, at 234–35 (discussing marijuana businesses' inability to obtain bankruptcy protections).

101. See *id.* at 236–40 (highlighting various reasons that lawyers are deterred from representing marijuana and marijuana paraphernalia businesses).

102. 15 U.S.C. § 1051 (2012).

interpreted this general wording to require *lawful* use in commerce. The USPTO's Trademark Manual of Examining Procedures provides that "[u]se of a mark in commerce must be lawful use to be the basis for federal registration of the mark."¹⁰³

While lawful use in commerce is generally presumed, the manual explicitly contemplates paraphernalia-related activity as a basis for refusing registration.¹⁰⁴ This is true regardless of whether a paraphernalia business operates in a state with legalized marijuana.¹⁰⁵ And because the Paraphernalia Control Act broadly defines "paraphernalia," the picks and shovels of the industry, although not inherently unlawful, are unregistrable.¹⁰⁶ Under the trademark manual's guidance, examiners have relied on the Paraphernalia Control Act to reject numerous trademarks for use on marijuana

103. U.S. PATENT AND TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 907 (Oct. 2018); *see also, e.g., In re Stellar Int'l, Inc.*, 159 U.S.P.Q. (BNA) 48, 51 (T.T.A.B. 1968):

It is true, as applicant urges, that there is no reference to "lawful commerce" in Section 1 of the trademark statute It seems evident that the term "commerce" whenever and wherever used in the trademark statute must necessarily refer to "lawful commerce"; and that the statute was not intended to recognize under its registration provisions shipments in commerce in contravention of other regulatory acts promulgated under the "commerce clause" of the Constitution.

104. TRADEMARK MANUAL OF EXAMINING PROCEDURE, *supra* note 103, § 907 ("Generally, the USPTO presumes that an applicant's use of the mark in commerce is lawful . . . unless the record or other evidence shows a clear violation of law, such as the sale or transportation of a controlled substance."); *see id.* (noting that it is unlawful under the CSA to "sell, offer for sale, or use any facility of interstate commerce to transport drug paraphernalia").

This has not always been the case. In 2010, the USPTO permitted registration of marijuana-related marks, but it reversed course shortly thereafter and declared that registration of such marks was "highly unlikely" in the future. Rebecca Gan, *Intellectual Property Law: Protection for Marijuana Trademarks*, AM. BAR ASS'N (June 29, 2017), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2015/november-december/intellectual_property_law_protection_marijuana_trademarks [<https://perma.cc/A3U6-GJNW>]. After reversing course, the USPTO adopted guidelines for paraphernalia-related marks that are stricter than those for marks related to the substance itself. *See* U.S. PATENT & TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 907 (Jan. 2017).

105. TRADEMARK MANUAL OF EXAMINING PROCEDURE, *supra* note 103, § 907 ("Regardless of state law, the federal law provides no exception to the above-referenced provisions for marijuana for 'medical use.'").

106. *See, e.g., In re Ultra Trimmer, L.L.C.*, No. 86479070, 2016 TTAB LEXIS 563, at *5–6 (T.T.A.B. Nov. 29, 2016) (noting that the applicant's marijuana trimming machine "is a product that is not unlawful as it is described in the identification of goods in the application" but instead only becomes unlawful once it is determined that the item is intended for use with a controlled substance). For an explanation of how trademark examiners determine whether an item is unlawful paraphernalia, *see supra* Section I.B.2. Notably, this determination is not limited to an applicant's submitted materials; trademark examiners also use external evidence, such as the applicant's website or advertising materials, to decide a product's legality. *See e.g., In re Ultra Trimmer*, 2016 TTAB LEXIS 563, at *5–9 (relying on the applicant's website to determine that the product to which a mark would be affixed met the definition of paraphernalia); *In re Brown*, 119 U.S.P.Q.2d (BNA) 1350, 1350–51, 1353 (T.T.A.B. 2016) (relying on the applicant's website and photos of potential retail storefronts to determine that a mark was intended for use on unlawful paraphernalia and thus unregistrable).

paraphernalia, and the Trademark Trial and Appeal Board has affirmed these rejections.¹⁰⁷

The inability to register federal trademarks puts marijuana paraphernalia businesses at a disadvantage and harms consumers as well.¹⁰⁸ Trademarks serve an important “source identification” function in that they enable consumers to distinguish between producers of competing products.¹⁰⁹ A product’s source signals to the consumer information related to a product’s “attributes and quality.”¹¹⁰ By identifying the product’s source, a trademark reduces consumer search costs and ensures that consumers receive products of consistent quality.¹¹¹ Trademark registration also avoids deception in the market by ensuring that products are not speciously similar, which further lowers consumer search costs.¹¹² The signaling effect of a product’s source and quality, in turn, “secur[es] to the producer the benefits of good reputation.”¹¹³ A trademark gains its value from the reputation and goodwill that the product itself creates.¹¹⁴ Without proper source attribution, reputation cannot be generated,¹¹⁵ and without reputation,

107. See, e.g., *In re Ultra Trimmer*, 2016 TTAB LEXIS 563, at *1, *5 (affirming refusal to register the mark “Ultra Trimmer” for “agricultural machines” intended for trimming “leaves, plants, flowers and buds”); *In re JJ206, LLC*, 120 U.S.P.Q.2d (BNA) 1568, 1568–70 (T.T.A.B. 2016) (affirming refusal to register “Juju Joints” and “Powered by Juju” for use on a “smokeless cannabis vaporizing apparatus”); *In re Brown*, 119 U.S.P.Q.2d (BNA) at 1350–51, 1353 (affirming refusal to register “Herbal Access” for “retail store services featuring herbs”); see also *In re Ultra Trimmer*, 2016 TTAB LEXIS 563, at *5–7 (“[T]here is no doubt that [the Paraphernalia Control Act] is the statutory basis for the Examining Attorney’s conclusion that Applicant’s goods are unlawful under federal law.”).

108. See Kamin & Moffat, *supra* note 99, at 241–59 (discussing disadvantages).

109. See *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985) (“The Lanham Act provides national protection of trademarks in order to . . . protect the ability of consumers to distinguish among competing producers.”); *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 509 F.3d 380, 381 (7th Cir. 2007) (“Trademarks are designed to inform potential buyers who makes the goods on sale.”).

110. *Top Tobacco*, 509 F.3d at 381.

111. *Mana Prods., Inc. v. Columbia Cosmetics Mfg., Inc.*, 65 F.3d 1063, 1068 (2d Cir. 1995).

112. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003) (explaining that by “preventing competitors from copying ‘a source-identifying mark,’” a trademark “reduces the customer’s costs of shopping and making purchasing decisions” (quoting *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995))).

113. *Park ‘N Fly*, 469 U.S. at 198; see also *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 194–95 (1936) (explaining that “[g]ood will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities”).

114. See *Dastar*, 539 U.S. at 34 (explaining that trademark registration “helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product” (quoting *Qualitex*, 514 U.S. at 163–64)); *Mana Prods.*, 65 F.3d at 1068 (“Congress believed that protecting trademarks . . . secures to trademark owners their reputation and goodwill.”).

115. *Top Tobacco*, 509 F.3d at 381.

competition suffers.¹¹⁶ Reputational gains incentivize producers to invest in product quality to distinguish themselves from competitors in the market, which benefits society as a whole by increasing the quality of available products and forcing low-quality producers out of the market. Trademarks, then, benefit producers by providing goodwill gained from their products' quality and in turn foster competition.¹¹⁷

While state trademark protection may be available for marks related to marijuana paraphernalia, this protection provides only a partial remedy to the inability to obtain federal registration. The most obvious shortcoming is that state trademark protection is geographically limited.¹¹⁸ Full trademark protection for marijuana paraphernalia businesses requires registration in each state in which the business operates. Navigating the laws of multiple states is not only administratively difficult but financially burdensome as well.¹¹⁹ Further, should a business find that its mark is being used in a state in which the business is not registered, the business has no redress under federal law.¹²⁰

A solution to the consumer and producer harms that result from the inability to register federal trademarks is to authorize otherwise prohibited conduct using the Paraphernalia Control Act's authorization exemption. Stripping paraphernalia of its federally unlawful status offers procompetitive effects for the marijuana paraphernalia market: it reduces consumer search costs, promotes competition through increased reputational gains, and increases the overall quality of products on the market as a result of increased competition. By authorizing conduct under the Paraphernalia Control Act, a state can avoid the federal law's negative impact on businesses, consumers, and competition.

b. Banking

Because banks are subject to federal laws, these institutions largely refuse banking services to marijuana and marijuana paraphernalia businesses.¹²¹ Federal law places stringent requirements

116. *Id.* (citing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 166–209 (2003)).

117. *Mana Prods.*, 65 F.3d at 1068.

118. See Kamin & Moffat, *supra* note 99, at 257 (“State trademark rights protect businesses only within that state and for marijuana businesses in particular, other states’ courts may not be friendly fora.”).

119. See Kamin & Moffat, *supra* note 99, at 258–59.

120. See *id.* at 259.

121. This is true regardless of whether a financial institution is incorporated under state or federal charter or as a credit union. See Julie Andersen Hill, *Banks, Marijuana, and Federalism*,

on financial institutions that make banking with marijuana-industry participants unappealing. First, these institutions may be prosecuted for aiding and abetting prohibited conduct, which can occur by, for example, knowingly providing a loan to a marijuana paraphernalia business.¹²² Further, federal anti-money laundering laws require financial institutions to implement systems for preventing enterprises engaged in federally unlawful activities from entering the banking system.¹²³ These institutions are also required to discover illegal activities conducted by existing customers and to report any suspicious activity that may be discovered.¹²⁴ Should financial institutions discover a marijuana paraphernalia enterprise's unlawful activity and not respond appropriately, the financial institution will be subject to criminal liability or monetary sanctions under the Money Laundering Control Act.¹²⁵ These requirements and potential liabilities give the banking industry good reason to avoid any interactions with marijuana and marijuana paraphernalia businesses.¹²⁶

These burdensome requirements prevent industry participants from receiving loans from financial institutions, instead forcing them to rely on short-term loans from individuals, and necessitate using only

65 CASE W. RES. L. REV. 598, 604–06, 617–18 (2015) (explaining that federally backed insurance is largely responsible for federal control over state-chartered financial institutions and credit unions).

122. *Id.* at 607–10.

123. Federal law requires all banks, credit unions, and various other entities to maintain anti-money laundering programs that consist of internal controls and corresponding procedures, a specified compliance officer, ongoing employee training, and independent audits intended to test these programs. *See* 31 U.S.C. § 5318(h)(1) (2012) (mandating minimum standards for anti-money laundering programs); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended throughout the U.S. Code) (requiring detailed recordkeeping and reporting procedures); Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1118 (1970) (same); *see also* 31 U.S.C. § 5312 (2012) (broadly defining a “financial institution” subject to federal anti-money laundering requirements).

124. *See* Hill, *supra* note 121, at 612–15 & nn.73–76 (discussing the due diligence requirements that federal law imposes on financial institutions and the reports that must be filed should an institution identify suspicious activity).

125. 18 U.S.C. § 1956 (2012); *see* Hill, *supra* note 121, at 610–11 (detailing the ways in which financial institutions can be found liable for money laundering when interacting with marijuana-related businesses); *id.* at 618–20 (highlighting impediments to serving the marijuana industry faced by federally backed financial institutions). Serving the marijuana industry entails significant risk. For instance, financial institutions that violate anti-money laundering laws can have their charters revoked. *See* Ernest L. Simons IV, Note, *Anti-Money Laundering Compliance: Only Mega Banks Need Apply*, 17 N.C. BANKING INST. 249, 259–60 (2013) (providing specific examples of banks that have “run afoul of [anti-money laundering] laws, sometimes leading to lost charters or their exit from the correspondent banking market”).

126. 18 U.S.C. § 1956(c)(7)(D) (2012) (listing activities prohibited by the Paraphernalia Control Act as unlawful activities).

cash in the ordinary course of business.¹²⁷ These all-cash transactions present an additional burden on marijuana paraphernalia businesses: cash management. To ensure the security of their profits, businesses must make strategic decisions on how and where to guard their cash,¹²⁸ which drains valuable resources.¹²⁹ While some might assume banks are friendlier to paraphernalia businesses than they are to marijuana cultivators and distributors, this is not the case.¹³⁰ Even when the federal government issued guidance that urged prosecutors not to enforce the federal marijuana ban against actors in states with legalized marijuana,¹³¹ financial institutions remained reluctant to deal with those businesses.¹³² The recent rescission of that guidance¹³³ may

127. See Hill, *supra* note 121, at 600–01 (“Without access to banking services, marijuana businesses must conduct transactions in cash and spend an inordinate amount of time and resources on cash management.”).

128. See Kristina Davis, *Licensed Marijuana Businesses Operate in the Shadows Without Access to Banks*, SAN DIEGO UNION-TRIB. (Feb. 18, 2017), <http://www.sandiegouniontribune.com/business/sd-me-pot-banking-20170210-story.html> [<https://perma.cc/2SDS-7TVG>] (quoting one business owner as explaining, “I buried everything. I had three different safes buried on a 200-acre parcel . . . Fifteen steps from the oak tree, a lot like a pirate. I had a little map. Pretty inconvenient and not the best cash management system.”).

129. See Hill, *supra* note 121, at 601 (“From vaults, to cameras, to security personnel, to finding suppliers that accept cash payment, managing cash can quickly become a logistical and security nightmare.”); James Rufus Koren, *Why Some Pot Businesses Hide Their Cash—And Others Truck It Straight to a Federal Vault*, L.A. TIMES (July 7, 2017), <http://www.latimes.com/business/la-fi-cannabis-banking-20170707-story.html> [<https://perma.cc/F22W-6PCL>] (detailing a CEO’s account that of his fifty-employee business, two employees are fully devoted to cash management).

130. See Davis, *supra* note 128 (highlighting findings from a 2015 survey that forty-nine percent of marijuana-industry enterprises not directly dealing with the substance do not have bank accounts).

131. In 2013, the federal government issued guidance on enforcement of marijuana-related conduct that evinced a strong deference to state law. See Memorandum from James M. Cole, Deputy Att’y Gen., to U.S. Att’ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/QZ2B-6R63>]. The guidance explained that “[i]n jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems . . . conduct in compliance with those laws and regulations is less likely to threaten . . . federal priorities.” *Id.* at 3. When states have implemented enforcement systems, “consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.” *Id.*

132. See Alicia Wallace, *What Now? Experts and Politicians Weigh In on Potential Impact of Sessions’ Rollback of Marijuana Policy*, CANNABIST (Jan. 4, 2018), <https://www.thecannabist.co/2018/01/04/sessions-cole-memo-marijuana-legal-impact/95903> [<https://perma.cc/9VXK-LJ45>].

133. In early 2018, the Trump administration rescinded the nonenforcement guidance and clarified its view that federal marijuana laws should take precedence over state marijuana laws. Press Release, Dep’t of Justice, Justice Department Issues Memo on Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement> [<https://perma.cc/843V-RN5G>] (“It is the mission of the Department of Justice to enforce the laws of the United States, and the previous issuance of guidance undermines the rule of law and the ability of our local, state, tribal, and federal law enforcement partners to carry out this mission.”).

intensify banks' reluctance to transact with marijuana and marijuana paraphernalia businesses.¹³⁴

Marijuana and marijuana paraphernalia businesses are not the only parties affected by their inability to bank; states are harmed as well. Under the current federal anti-money laundering laws, cash-only businesses have both an incentive and an opportunity to evade taxes. States' inability to collect taxes from marijuana and marijuana paraphernalia businesses makes it more difficult to fund regulatory structures for the marijuana industry.¹³⁵ Thus, in addition to protecting in-state marijuana paraphernalia businesses from the inability to safely manage their assets, states themselves would benefit from authorizing activities otherwise prohibited by the Paraphernalia Control Act.

c. Contract Enforcement

The federal marijuana prohibition hinders the ability of marijuana and marijuana paraphernalia businesses to engage in a routine and necessary feature of all industries: contract enforcement. The certainty provided by judicial enforcement of contracts is essential to any industry and of particular importance for the marijuana industry.¹³⁶ Without contractual protections, industry participants may be forced into a "world of illegal businesses" despite operating in a state where their business is legal.¹³⁷ The unlawful federal status of marijuana and marijuana paraphernalia, however, has prompted many courts to hold marijuana-related contracts unenforceable.¹³⁸

134. See Robert A. Mikos, *Jeff Sessions Rescinds Obama-Era Enforcement Guidance: Five Observations*, VAND. U. (Jan. 5, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/01/jeff-sessions-rescinds-obama-era-enforcement-guidance-six-observations> [<https://perma.cc/LFE3-DS6W>] (explaining that rescission of the nonenforcement guidance "will likely make it even more difficult for the industry to obtain banking services"); Wallace, *supra* note 132 (taking account of Professor Robert Mikos's view that without the assurances previously provided by the Cole Memorandum, "banks are going to become even more reluctant to deal with marijuana suppliers").

135. Hill, *supra* note 121, at 602–03; see Susan Cleary Morse et al., *Cash Businesses and Tax Evasion*, 20 STAN. L. & POL'Y REV. 37 (2009) (discussing incentives of cash-only businesses to underreport their taxes).

136. See Luke Scheuer, *Are "Legal" Marijuana Contracts "Illegal"?*, 16 U.C. DAVIS BUS. L.J. 31, 44–45 (2015) (highlighting the importance of contracts for the marijuana industry).

137. *Id.* at 53 (explaining that where courts cannot create a remedy for industry participants, violence and threats may serve as the primary enforcement mechanism).

138. See Sam Kamin, *The Limits of Marijuana Legalization in the States*, 99 IOWA L. REV. BULL. 39, 46 (2014) ("When a business's every transaction violates federal law, however, the certainty that contract law is supposed to provide is necessarily called into question."). For the marijuana paraphernalia industry, these contracts include, for instance, contracts for the sale of marijuana paraphernalia, contracts for funding marijuana paraphernalia enterprises, contracts for services rendered in relation to marijuana paraphernalia activities, lease agreements, and insurance claims.

Courts invalidate marijuana-related contracts under the doctrine of unclean hands,¹³⁹ whereby contracts are deemed invalid and unenforceable for violating public policy.¹⁴⁰ The doctrine is grounded in the requirement that plaintiffs must “have acted fairly and without fraud or deceit as to the controversy in issue.”¹⁴¹ When a contract is determined to be unenforceable under the doctrine of unclean hands, no legal remedy is available to the parties for an alleged contractual breach.¹⁴²

While contracts related to the marijuana industry are frequently deemed unenforceable because they relate to “unlawful” products, decisionmakers possess discretion in making this determination after balancing the relevant interests at stake.¹⁴³ Specifically, the Restatement (Second) of Contracts directs judges to balance the public policy interests in favor of contract enforcement with the policy interests against it.¹⁴⁴ Many courts, however, fail to balance the relevant interests and instead simply conclude that marijuana-related contracts are unenforceable because they are “illegal” under the CSA.¹⁴⁵

139. See generally Steven Mare, Note, *He Who Comes into Court Must Not Come with Green Hands: The Marijuana Industry’s Ongoing Struggle with the Illegality and Unclean Hands Doctrines*, 44 HOFSTRA L. REV. 1351, 1359–62 (2016) (reviewing history and application of the unclean hands doctrine).

140. See RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (AM. LAW INST. 1981) (“A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”). Put simply, this doctrine is based on the idea that “[a] plaintiff asking a court for equitable relief ‘must come with clean hands.’” *Northbay Wellness Grp., Inc. v. Beyries*, 789 F.3d 956, 959 (9th Cir. 2015) (quoting *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944)).

141. *Northbay Wellness Grp.*, 789 F.3d at 959 (quoting *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1097 (9th Cir. 1985)).

142. See Scheuer, *supra* note 136, at 45 (“Both the U.C.C. and the common law offer remedies that will not be available if a court refuses to enforce contracts . . .”).

143. See RESTATEMENT (SECOND) OF CONTRACTS § 178; see Kamin, *supra* note 138, at 46 (discussing prevalence of such decisions); Scheuer, *supra* note 136, at 46, 49–51 (detailing the balancing test for finding a contract unenforceable under the unclean hands doctrine).

144. See RESTATEMENT (SECOND) OF CONTRACTS § 178. The Restatement provides factors to weigh in conducting the balancing test. In evaluating the interests in favor of enforcement, courts are instructed to consider “(a) the parties’ justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term.” *Id.* § 178(2). The interests to consider in weighing the public policy against enforcement include “(a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.” *Id.* § 178(3).

145. See Scheuer, *supra* note 136, at 46 (criticizing courts for “void[ing] ‘illegal’ agreements without weighing any competing public policies”); see also, e.g., *Barrios v. County of Tulare*, No. 1:13-CV-1665 AWI GSA, 2014 WL 2174746, at *5 (E.D. Cal. May 23, 2014) (“Although California may provide Barrios with the right to possess medical marijuana, federal law does not.”); *Tracy v. USAA Cas. Ins. Co.*, No. 11-00487 LEK-KSC, 2012 WL 928186, at *13 (D. Haw. Mar. 16, 2012) (“[T]his Court cannot enforce the [contractual] provision because Plaintiff’s possession and

This failure to engage in a full balancing test may be a result of the Restatement's inclusion of relevant legislation as an explicit basis for finding an interest against enforcement.¹⁴⁶ But while legislation is a factor to consider, the Restatement clarifies that "it is not necessarily conclusive."¹⁴⁷ Instead, decisionmakers should "examine the particular statute in the light of the whole legislative scheme."¹⁴⁸ Examining the Paraphernalia Control Act in light of the entire CSA indicates a choice by Congress not to occupy the entire field,¹⁴⁹ which should lessen any potential policy interests against enforcement.¹⁵⁰

Some courts have adhered to the Restatement's balancing test and found marijuana-related contracts enforceable despite the substance's illegality. In *Northbay Wellness Group, Inc. v. Beyries*, for instance, the U.S. Court of Appeals for the Ninth Circuit reversed a lower court decision that prohibited a marijuana business from recovering funds embezzled by the business's attorney.¹⁵¹ In examining the lower court's decision, the Ninth Circuit noted that it had "failed to conduct the required balancing, instead concluding solely from the fact that Northbay had engaged in wrongful activity that the doctrine of

cultivation of marijuana, even for State-authorized medical use, clearly violates federal law," and enforcing the contract "would be contrary to federal law and public policy, as reflected in the CSA, *Gonzales*, and its progeny."); *Hammer v. Today's Health Care II*, Nos. CV2011-051310, CV2011-051311, 2012 WL 12874349, at *2 (Ariz. Super. Ct. Apr. 17, 2012) (holding a loan agreement between an investor and a medical marijuana dispensary "void as against public policy" because the formation of the contract was unlawful); *Bovard v. Am. Horse Enters., Inc.*, 247 Cal. Rptr. 340, 341 (Ct. App. 1988) (affirming decision that a paraphernalia business's contract "was illegal and void as contrary to public policy"); *Haeberle v. Lowden*, No. 2011CV709, 2012 WL 7149098, at *2 (Colo. Dist. Ct. Aug. 8, 2012) ("[U]nder the law's current state, the sale and use of marijuana, even for medical purposes, remains against the public policy of the United States. . . . Accordingly, the contract here is void and unenforceable.").

While the Restatement does provide that unenforceability may be "plain" in some "grave" cases, it also clarifies that "[i]n doubtful cases . . . a decision as to enforceability is reached only after a careful balancing, in the light of all the circumstances, of the interest[s] . . ." RESTATEMENT (SECOND) OF CONTRACTS § 178 cmt. a. Conflicting state and federal laws should be understood as "doubtful cases," and for marijuana paraphernalia, the cooperative federalism model created by the Paraphernalia Control Act's authorization exemption should warrant a careful balancing of the interests at stake.

146. RESTATEMENT (SECOND) OF CONTRACTS § 179.

147. *Id.* § 179 cmt. b ("The fact that the statute explicitly prohibits the making of a promise or the engaging in the promised conduct may be persuasive in showing a policy against enforcement of a promise but it is not necessarily conclusive.")

148. *Id.*

149. Congress explicitly renounced occupation of the entire field of controlled substance regulation in a reverse preemption clause. 21 U.S.C. § 903 (2012). For analyses on the issue of preemption of state marijuana laws by federal law, see, for example, Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015); and Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5 (2013).

150. See RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. b.

151. 789 F.3d 956, 958 (9th Cir. 2015).

unclean hands applied.”¹⁵² The required balancing revealed that the public policy interest in enforcing the contract far outweighed any interest against enforcement.¹⁵³ The Ninth Circuit concluded that “the clean hands doctrine should not be strictly enforced when to do so would frustrate a substantial public interest.”¹⁵⁴

Some states, mindful of courts’ tendency to decide against enforcement of marijuana-related contracts, have enacted statutes clarifying how these contracts should be treated. Colorado, for instance, enacted a statute providing that “[i]t is the public policy of the state of Colorado that a contract is not void or voidable as against public policy if it pertains to lawful activities authorized by [the state’s marijuana laws].”¹⁵⁵ The Colorado provision appears to thus far have served as an effective step in ensuring at least some marijuana contracts are enforced: in *Green Earth Wellness Center, LLC v. Atain Specialty Insurance Co.*, the U.S. District Court for the District of Colorado declined to follow other cases that had “concluded that the [CSA] . . . prevailed over state law” in the context of a contract dispute.¹⁵⁶ But the risk of a contrary decision is substantial. The Colorado Supreme Court has read the state’s contract protection statute narrowly, holding in one case that “an activity such as medical marijuana use that is unlawful under federal law is not a ‘lawful’ activity.”¹⁵⁷ Because nothing in the state’s contract protection statute indicates that contracts “pertain[ing] to lawful activities” must be read to mean contracts that are “lawful *under Colorado law*,” the court refused to enforce the contract at issue.¹⁵⁸ Oregon has enacted a provision similar to Colorado’s, but it is more explicit in its wording: “A contract is not unenforceable on the basis that manufacturing, distributing, dispensing, possessing or using marijuana is prohibited by federal law.”¹⁵⁹ No court has had occasion to interpret the Oregon provision. Notably, while Oregon’s law is more explicit than Colorado’s, it limits its protections to contracts related to marijuana, meaning that decisionmakers may decide the statute does not cover contracts related to marijuana paraphernalia.

152. *Id.* at 960.

153. *Id.* at 960–61 (reasoning that “[a] lawyer’s [m]isappropriation of a client’s property is a gross violation of general morality likely to undermine public confidence in the legal profession and therefore merits severe punishment” (second alteration in original) (quoting *Greenbaum v. State Bar*, 544 P.2d 921, 928 (Cal. 1976))).

154. *Id.* at 960 (quoting *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746, 753 (9th Cir. 1991)).

155. COLO. REV. STAT. § 13-22-601 (2018).

156. 163 F. Supp. 3d 821, 835 (D. Colo. 2016).

157. *Coats v. Dish Network, LLC*, 350 P.3d 849, 851–53 (Colo. 2015).

158. *Id.*

159. OR. REV. STAT. § 475B.535 (2017).

The availability of contract enforcement through the courts in states that have legalized marijuana is thus uncertain. While state statutes evincing a legislative intent to enforce marijuana-related contracts may prove a reliable solution, the available case law does not imbue total confidence. While not all encompassing, the Paraphernalia Control Act's authorization exemption may serve as a means of protecting marijuana paraphernalia businesses from consequences that attach to paraphernalia's unlawful status. By employing the authorization exemption, a state may "turn off" paraphernalia's federally unlawful status, thereby lessening the public policy interests against enforcing contracts involving marijuana paraphernalia. With their conduct authorized by state law, paraphernalia businesses would be able to enter into routine contracts with increased confidence that those contracts would later be protected.

II. THE AUTHORIZATION CONTINUUM

As the foregoing discussion illustrates, several adverse consequences can result from violations of the federal paraphernalia prohibition. The Paraphernalia Control Act's authorization exemption, however, offers a mechanism for states to protect industry participants from these effects. The Act exempts from its prohibition "any person *authorized by local, State, or Federal law* to manufacture, possess, or distribute [paraphernalia]."¹⁶⁰ Taking advantage of this exemption requires an understanding of what it means to "authorize" conduct. Because the term "authorized" does not have a clear, inherent meaning, there is little consensus on how it should be interpreted and what actions should be considered authorization by law.

But the significance that attaches to a party's status as a person "authorized" to engage in otherwise prohibited conduct warrants a fuller understanding of the term. This significance is not limited to the Paraphernalia Control Act. Usage of the term spans diverse areas of law. The aim of this Note is to provide a more comprehensive and nuanced understanding of the term "authorized" as it is used across the law by analyzing it in the context of the Paraphernalia Control Act.

Rather than possessing one intuitive meaning, the term "authorized" should be understood as existing along a continuum of possible meanings. The plain meaning of the word as evinced by dictionary definitions points in divergent directions: On one hand,

160. 21 U.S.C. § 863(f)(1) (2012) (emphasis added).

authorization might simply mean to “permit a thing to be done.”¹⁶¹ Under this definition, authorization is inherent, and inaction—that is, a lack of prohibition or regulation—is sufficient to authorize conduct. As explained by one court, this form of authorization follows from the logic that “if something is *explicitly* not prohibited, it is permitted.”¹⁶² On the other hand, authorization may connote a more affirmative form of permission; it may involve taking a positive action to make a thing legally valid.¹⁶³ Under this conception, authorization requires an official “sanction[ing]” or “endorse[ment].”¹⁶⁴ This definition is undoubtedly how most would understand the term at first blush.¹⁶⁵ But as Chief Justice Rehnquist once explained, limiting interpretation of the term “authorized” to such a narrow conception risks “mak[ing] a fortress out of the dictionary” by ignoring that the dictionary includes both broad and limited definitions of the term.¹⁶⁶ This restrictive interpretation of authorization is also inconsistent with the Supreme Court’s recent pronouncement in *Murphy v. National Collegiate Athletic Association* that authorizing conduct does not require affirmative sanctioning.¹⁶⁷ Between the narrow, affirmative conception of authorization and the broad, inherent conception of authorization lie more implied forms. The universe of possible implied authorizations creates a continuum that stretches from authorization through affirmative action to authorization through inaction.

Thus inheres the authorization continuum. While all forms existing along the continuum can be conceived of as “authorization,” the effectiveness of these forms gradually decreases (or increases) as one

161. *Authorize*, BLACK’S LAW DICTIONARY (6th ed. 1990); *Authorize*, BLACK’S LAW DICTIONARY (4th ed. 1968); *Authorize*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993); *Authorize*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/authorize> (last updated Mar. 1, 2019) [<https://perma.cc/4ZJH-WPE7>] [hereinafter *Authorize*, MERRIAM-WEBSTER]; see also *County of Washington v. Gunther*, 452 U.S. 161, 198 n.10 (1981) (Rehnquist, J., dissenting) (discussing definitions).

162. *Mich. Gun Owners, Inc. v. Ann Arbor Pub. Sch.*, 918 N.W.2d 756, 784 (Mich. 2018).

163. *Authorization*, OXFORD ENGLISH DICTIONARY (3d ed. 2014) (defining “authorization” as “formal permission or approval” and “the action of making [something] legally valid”).

164. *Authorization*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “authorization” as “[o]fficial permission to do something; sanction or warrant” and “[t]he official document granting such permission”); *Authorize*, MERRIAM-WEBSTER, *supra* note 161 (defining “authorization” as “to endorse, empower, justify, or permit by or as if by some recognized or proper authority (such as custom, evidence, personal right, or regulating power)” and “to invest especially with legal authority”).

165. See, e.g., *Gunther*, 452 U.S. at 169 (“Although the word ‘authorize’ sometimes means simply ‘to permit,’ it ordinarily denotes affirmative enabling action.” (citing BLACK’S LAW DICTIONARY (5th ed. 1979))).

166. *Id.* at 198 n.10 (Rehnquist, J., dissenting) (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff’d*, 326 U.S. 404 (1945)).

167. 138 S. Ct. 1461, 1474 (2018) (holding that repeal of a prohibition constitutes authorization by law); see *infra* Section II.C.1 (discussing *Murphy*).

slides from one edge of the continuum to the other, as will be explored further in Part III. This Part begins by first presenting the outer edges of the continuum and then proceeds to discuss the possible meanings that lie between them.

A. Affirmative Authorization

Affirmative authorization occurs when deliberate action is taken to formally approve conduct. This interpretation of authorization is uncontroversial, and some consider it the term's "ordinary" meaning.¹⁶⁸ This Section discusses two principal forms of affirmative authorization: statutory authorization and authorization via licensure.

1. Affirmative Authorization via Statute

Statutory authorization is fairly straightforward: it involves a legislature enacting a statute that authorizes certain conduct. This is the most explicit form that authorization may take, although statutes may authorize conduct using different language and by employing different features, some of which may be more straightforward than others.

California's marijuana paraphernalia law provides an exemplar of affirmative authorization. When crafting legislation to legalize marijuana for recreational purposes, policymakers included language specifically designed to address the Paraphernalia Control Act.¹⁶⁹ California's law includes a number of features that ensure authorization is unambiguous. First, it makes it "lawful" to possess, transport, purchase, procure, use, manufacture, and give away marijuana "accessories" to persons over twenty-one years of age.¹⁷⁰ Next, it defines marijuana "accessories" to closely follow the federal definition of paraphernalia.¹⁷¹ Together, these two provisions are

168. See, e.g., *Gunther*, 452 U.S. at 169 (determining that "the word 'authorize' . . . ordinarily denotes affirmative enabling action").

169. Control, Regulate and Tax Adult Use of Marijuana Act, 2016 Cal. Legis. Serv. 1 (West) (codified as amended in scattered sections of CAL. BUS. & PROF. CODE, CAL. FOOD & AGRIC. CODE, CAL. HEALTH & SAFETY CODE, CAL. LAB. CODE, CAL. REV. & TAX. CODE, and CAL. WATER CODE).

170. See CAL. HEALTH & SAFETY CODE § 11362.1(a)(5) (West 2019) ("[I]t shall be lawful under state and local law . . . for persons 21 years of age or older to . . . [p]ossess, transport, purchase, obtain, use, manufacture, or give away cannabis accessories to persons 21 years of age or older without any compensation whatsoever.").

171. See *id.* § 11018.2:

"Cannabis accessories" means any equipment, products or materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, smoking, vaporizing, or

arguably sufficient on their own to affirmatively authorize conduct otherwise prohibited by the Paraphernalia Control Act: California’s law formally deems federally prohibited paraphernalia activities “lawful,” effectively shutting off the Paraphernalia Control Act’s attaching consequences, and while the state law uses the term “accessories” rather than “paraphernalia,” it clarifies through its definition that these items are the same as those prohibited by federal law. But California’s paraphernalia law goes one step further by detailing its express intent to authorize conduct otherwise prohibited by the Paraphernalia Control Act. The statute clarifies that by making paraphernalia-related activities lawful, it “intend[s] to meet the requirements of subsection (f) of Section 863 of Title 21 of the United States Code (21 U.S.C. Sec. 863(f))”—the Paraphernalia Control Act’s authorization exemption—“by authorizing, under state law, any person in compliance with this section to manufacture, possess, or distribute cannabis accessories.”¹⁷²

California’s explicit statutory mandate represents the most affirmative means of authorization. Not only does it unequivocally deem the otherwise unlawful activity “lawful,”¹⁷³ it also utilizes language from the Paraphernalia Control Act (“authorizing, under state law”), directly references the federal authorization exemption (“subsection (f) of Section 863 of Title 21 of the United States Code”), and, most importantly, codifies a clear intention to authorize prohibited conduct (“[the state law] is intended to meet the requirements of [the Paraphernalia Control Act’s authorization exemption]”).¹⁷⁴ By codifying this intent, the legislature transforms it into written law, which a court must then address when determining whether a litigant is “authorized.”¹⁷⁵ And because this law is free from ambiguity, courts

containing cannabis, or for ingesting, inhaling, or otherwise introducing cannabis or cannabis products into the human body.;

see also 21 U.S.C. § 863(d) (2012) (“The term ‘drug paraphernalia’ means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful . . .”).

172. CAL. HEALTH & SAFETY CODE § 11362.1(b). California’s paraphernalia law further makes clear that paraphernalia should not be subject to certain penalties imposed by the Paraphernalia Control Act, stating that items deemed “lawful” by the provision “are not contraband nor subject to seizure, and no conduct deemed lawful by this [provision] shall constitute the basis for detention, search, or arrest.” *Id.* § 11362.1(c).

173. *Id.* § 11362.1(a)(5).

174. *Id.* § 11362.1(b).

175. See J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION INCLUDING A DISCUSSION OF LEGISLATIVE POWERS, CONSTITUTIONAL REGULATIONS RELATIVE TO THE FORMS OF LEGISLATION AND TO LEGISLATIVE PROCEDURE 310 (1891) (“A legislative intention to be efficient as law must be set forth in a statute; it is therefore a written law.”).

are—theoretically, at least—bound to effectuate that intent given the cooperative federalism approach codified in the Paraphernalia Control Act.¹⁷⁶ Thus, California’s paraphernalia law is crafted in a manner that nearly ensures any litigant in violation of the federal paraphernalia ban will be found “authorized by local, State, or Federal law” to engage in otherwise prohibited activities.¹⁷⁷

While California’s law employs a number of features that indicate federally prohibited activities are affirmatively authorized, not all of these features are necessary to affirmatively authorize conduct. For example, a state may fail to reference the Paraphernalia Control Act’s authorization exemption but still use positive language that affirmatively authorizes. This positive, unambiguous language is a core feature of affirmative authorization. When a statute uses vague or negative language, such as by enacting an exemption to a prohibition, the statute’s ultimate effect may be to authorize conduct, but this effect must be implied.¹⁷⁸

2. Affirmative Authorization via Licensure

Licensing regimes offer another form of affirmative authorization. A license serves as a governmental body’s certification that the licensee may enjoy certain privileges. As defined by Professors Eric Biber and J.B. Ruhl, a license is “an administrative agency’s statutorily authorized, discretionary, judicially reviewable granting of permission to do that which would otherwise be statutorily prohibited.”¹⁷⁹

176. *See id.* (“The sole authority of the legislature to make laws is the foundation of the principle that courts of justice are bound to effect to its intention. When that is plain and palpable they must follow it implicitly.”); *id.* at 312 (explaining that intent should be sought “first of all in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation,” since “[i]t is not allowable to interpret what has no need of interpretation”); *see also* Section I.B.1 (discussing legislative history).

177. 21 U.S.C. § 863(f)(1) (2012).

178. *See* discussion *infra* Section II.C.1.

179. Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 146 (2014). Professors Biber and Ruhl explain that a license (or as they term it, a permit) must meet six elements: it must “(1) be explicitly delegated or implied by statute, (2) administrative, (3) discretionary, and (4) judicially reviewable, and that (5) it provide an affirmative grant of permission (6) allowing an act that would be otherwise statutorily prohibited.” *Id.* While Biber and Ruhl use the term “permit” in their article, they note that their definition applies no matter the nomenclature used: “Regardless of what a form of permission is called—permit, license, certificate, exemption, or something similar—all six elements must be satisfied for it to be a permit, and if all six elements are satisfied, it is a permit.” *Id.* The Administrative Procedures Act likewise specifies that permits and licenses are both a “form of permission.” 5 U.S.C. § 551(8) (2012) (defining a “license” as “an agency permit,

Licenses may be general—applicable to a class of persons—or specific—individually tailored to a single licensee. Specific licenses require an agency to conduct extensive factfinding and analysis of an applicant’s particular circumstances before a license issues,¹⁸⁰ whereas general licenses enable an agency to permit an entire class of individuals to engage in specified activities.¹⁸¹ Holders of general licenses thus enjoy the privileges of the license with little to no effort, and the agency avoids an ad hoc, fact-intensive determination.¹⁸² Under either model, the agency issuing the license retains discretion in determining whether the licensee meets statutorily specified conditions required for a license to issue.¹⁸³ In a general licensing regime, conditions set out in agency promulgations determine whether a person is issued a license, whereas in a specific licensing regime, the agency determines on a case-by-case basis whether each licensee has met the relevant conditions for licensure.¹⁸⁴ While they may differ in form, all licenses share the same core feature: they authorize a licensee to engage in an activity that is otherwise prohibited.¹⁸⁵

Some states and localities have implemented specific licensing regimes for sales of marijuana paraphernalia. West Virginia, for example, requires that before selling drug paraphernalia, a business receive a license to do so from the state tax commissioner.¹⁸⁶ A general business license is insufficient to authorize such sales; a business must separately obtain a paraphernalia license.¹⁸⁷ Washington, meanwhile, has taken a more general approach to licensing, allowing any business holding a marijuana retailer license to sell marijuana paraphernalia as well.¹⁸⁸

certificate, approval, registration, charter, membership, statutory exemption or *other form of permission*” (emphasis added).

180. See Biber & Ruhl, *supra* note 179, at 136–37 (defining specific permits).

181. See *id.* at 140–41 (describing a general permit as one issued by an agency “on its own initiative, with no particular applicant before it, that defines a broad category of activity and allows the entities engaging in that activity to take advantage of the permit with little or no effort on their part”).

182. See *id.* at 140.

183. See *id.* at 144–45 (“[T]here is no room for doubt that, however issued, . . . there is some degree of discretion involved in how the agency acts.”).

184. See *id.* at 146–47, 165–66 (distinguishing general and specific permitting systems).

185. *Id.* at 140–41, 155. Professors Biber and Ruhl also note other common features of licenses: application to specified activities and actors, a set duration for use, and a requirement that the regulated party meet certain conditions. *Id.* at 155.

186. W. VA. CODE § 47-19-1 (2018).

187. See *Business Registration – Drug Paraphernalia*, W. VA. ST. TAX DEP’T, <https://tax.wv.gov/Business/BusinessRegistration/Pages/BusinessRegistrationDrugParaphernalia.aspx> (last visited Apr. 30, 2019) [<https://perma.cc/A4CC-49HM>] (“This license is in addition to the business registration certificate.”).

188. WASH. ADMIN. CODE § 314-55-079 (2018).

Affirmative authorization, unlike other forms of authorization, requires direct contemplation of the conduct to be authorized. A license that is only tangentially related to prohibited conduct may, in some cases, constitute implied authorization, but it does not constitute affirmative authorization. For example, a license issued by a city zoning board to an all-purpose retail business, such as a grocery store, will not affirmatively authorize that business to sell marijuana paraphernalia.¹⁸⁹ This is because the sale of paraphernalia may not have been contemplated by the body that issued the license. An instance such as this presents uncertainty as to whether the licensee has in fact been authorized to engage in prohibited conduct and thus does not constitute affirmative authorization.

B. Authorization Through Inaction

Taking the broadest view of authorization, the term might mean merely “to permit” something to occur. Under this view, authorization would not require any positive action for permission to take hold. A person would thus be authorized to engage in any activity that is not regulated or prohibited. One court reasoned that this conception of authorization made sense given that, “[a]s a matter of rudimentary logic, if something is *explicitly* not prohibited, it is permitted.”¹⁹⁰

But this interpretation is improper for purposes of authorizing conduct by law. The Supreme Court agrees and recently explained in *Murphy v. National Collegiate Athletic Association* that “[a] State is not regarded as authorizing everything that it does not prohibit or regulate.”¹⁹¹ When the law speaks of “authorization,” that term “makes sense only against a backdrop of prohibition or regulation.”¹⁹² Decisionmakers, then, should not presume that the law “authorizes” conduct unless there is an express *need* for that conduct to be authorized due to an existing prohibition or regulation. To use an example posited by the *Murphy* Court, “no one would say that a State ‘authorizes’ its residents to brush their teeth,” even though that action is explicitly not prohibited.¹⁹³ To deem such a trivial action “authorized” by law would remove any value that a legislature has placed in the

189. See *Anderson v. United States*, Crim. No. L-00-033, 2009 U.S. Dist. LEXIS 107118, at *2–3 (D. Md. Nov. 16, 2009); see also *infra* note 242 (discussing case).

190. *Mich. Gun Owners, Inc. v. Ann Arbor Pub. Sch.*, 918 N.W.2d 756, 784 (Mich. 2018) (“The law is binary in this regard; conduct is either prohibited or it is not; there is not some Alice-in-Wonderland third realm of the law in which conduct is neither prohibited nor permitted.”).

191. 138 S. Ct. 1461, 1474 (2018).

192. *Id.* (“We commonly speak of state authorization only if the activity in question would otherwise be restricted.”).

193. *Id.*

word. When a law uses the term “authorized,” it should be assumed that the enacting legislature intended to give that word meaning, and adopting a broad view that all that is not prohibited is authorized erases that meaning.¹⁹⁴ Inaction, then, is not an effective means of authorizing conduct by law.

C. Implied Authorization

Between affirmative authorization and authorization through inaction lies implied authorization. This form of authorization is not static; instead, it may manifest itself in diverse ways. This Section explores three forms that implied authorization may take: authorization by repeal, authorization by delegation, and authorization through context.

1. Authorization by Repeal

When a prohibition is repealed or modified, the thing previously prohibited becomes “authorized.” This is the inverse of affirmative authorization: rather than affirmatively sanctioning conduct as permissible by enacting a statute or licensing regime expressly permitting the conduct, the state is implying that the conduct is permissible by removing an existing prohibition. This conclusion follows the Supreme Court’s recent clarification that repeal or modification of an existing prohibition are sufficient bases for authorizing conduct by law.¹⁹⁵

In *Murphy v. National Collegiate Athletic Association*, the Supreme Court addressed whether actions by New Jersey’s legislature violated the Professional and Amateur Sports Protection Act (“PASPA”), a federal law that prohibited any state from “authoriz[ing] by law” sports gambling.¹⁹⁶ In 2011, New Jersey voters approved an amendment to the state’s constitution that allowed the state legislature to authorize sports gambling,¹⁹⁷ and in 2012, in direct contravention of PASPA, the legislature enacted such a law.¹⁹⁸ Amateur and professional

194. See *id.* (explaining that “[n]o one would use the term” “authorized” to mean inaction).

195. *Id.*

196. *Id.*; see also Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, § 3702, 106 Stat. 4227, 4228 (1992) (previously codified at 28 U.S.C. § 3702) (deeming it “unlawful” for any state “to sponsor, operate, advertise, promote, license, or *authorize by law*” any form of sports gambling), *invalidated by Murphy*, 138 S. Ct. 1461.

197. N.J. CONST. art. IV, § 7, ¶ 2.

198. Act of Jan. 17, 2012, ch. 231, 2011 N.J. Laws 1723. In court, New Jersey did not deny that the law conflicted with PASPA; instead, it argued PASPA violated the Tenth Amendment’s anticommandeering rule by prohibiting states from modifying or repealing their laws. Nat’l

sports leagues challenged the New Jersey statute, and the law was eventually struck down by the Third Circuit.¹⁹⁹ In its decision, the Third Circuit provided a roadmap for how New Jersey might sidestep PASPA's prohibition on "authoriz[ations] by law."²⁰⁰ The court read PASPA's use of the term "authorized" to prohibit "affirmative" authorizations but not "negative" repeals and explained that New Jersey could repeal its prohibition without violating federal law.²⁰¹

The New Jersey legislature listened; in 2014, it repealed portions of the state's prohibition on sports gambling.²⁰² The repeal was challenged and struck down by the Third Circuit.²⁰³ Disavowing portions of the prior panel's decision, the court found that repeals fit within the meaning of the term "authorized" and thus violated PASPA.²⁰⁴ In reaching its decision, the court explained that "the word 'repeal' does not prevent us from examining what the provision *actually does*," which was to "grant[] permission to certain entities to engage in sports gambling."²⁰⁵

The Supreme Court affirmed the Third Circuit's decision to focus on the effect of the state's action rather than the terminology used to describe that action.²⁰⁶ The Court rejected the narrow definition of authorization posited by the sports leagues—that "the *primary* definition of 'authorize' " means "[t]o empower" and that authorization

Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551, 561–62 (D.N.J. 2013) ("Defendants argue that PASPA requires New Jersey to prohibit sports wagering in violation of the Anti-Commandeering principle set forth in *New York v. United States*." (citation omitted)), *rev'd sub nom. Murphy*, 138 S. Ct. 1461; *see also id.* (noting intervenor's argument "that PASPA violates principles of federalism through 1) a 'negative command prohibiting [New Jersey] from enacting any law legalizing or licensing Sports Betting,' and 2) an 'affirmative command requiring [New Jersey] to maintain State laws criminalizing sports betting.'" (alterations in original)).

199. Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013), *rev'd sub nom. Murphy*, 138 S. Ct. 1461.

200. *Id.* at 231–33.

201. *Id.* at 232:

We do not see how having *no law* in place governing sports wagering is the same as authorizing it by law. . . . [T]he lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law. The right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people.

(emphasis added).

202. Act of Oct. 17, 2014, ch. 62, 2014 N.J. Laws 602, 602.

203. Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 832 F.3d 389, 396–97 (3d Cir. 2016) (en banc), *rev'd sub nom. Murphy*, 138 S. Ct. 1461.

204. *Id.* ("The word 'authorize' means, inter alia, '[t]o empower; to give a right or authority to act,' or '[t]o permit a thing to be done in the future.'" (alterations in original) (quoting BLACK'S LAW DICTIONARY (6th ed. 1990))).

205. *Id.* at 397 (emphasis added).

206. *Murphy*, 138 S. Ct. at 1474 ("When a State completely or partially repeals old laws . . . it 'authorize[s]' that activity." (alteration in original)).

therefore “requires affirmative action.”²⁰⁷ Instead, it adopted New Jersey’s definition—that to “authorize” simply means to “permit” and that, as such, “any state law that has the *effect* of permitting sports gambling, including a law totally or partially repealing a prior prohibition, amounts to an authorization.”²⁰⁸ The Court’s decision makes clear that the term “authorized” does not connote a requirement that conduct be affirmatively authorized; instead, conduct can be authorized based on the ultimate effect of a state action.

Statutory exemptions serve a similar function. By enacting an exemption, a legislature excludes a specified activity from the need to obtain permission before engaging in that activity.²⁰⁹ Removing the need to obtain permission to engage in an activity implies that the activity is authorized and thus “removes . . . the need to take any additional steps to establish compliance with the law.”²¹⁰ While not framed in positive terms, a statutory exemption still evinces a will by the legislature to exclude an act from a prohibition. As with repeals, the effect of a statutory exemption is to imply that the exempted conduct is authorized. Oregon’s paraphernalia statute presents an example. While Oregon prohibits the sale, delivery, and manufacture of “drug paraphernalia,” it expressly removes certain activities related to marijuana paraphernalia from this prohibition.²¹¹ Specifically, Oregon law provides that the general state prohibition on paraphernalia “do[es] not apply to a person who sells or delivers marijuana paraphernalia.”²¹² Through this exemption, the legislature removes specific conduct from the general prohibition as well as the need to take additional steps to ensure compliance with Oregon law.²¹³ The effect of this action is to authorize a person to engage in that conduct.

Authorization by repeal may resemble authorization through inaction given that both are predicated on a lack of prohibition. But authorization by repeal requires that a legislature take deliberate steps to repeal an existing prohibition. In doing so, the legislature expresses a manifest intent *not* to prohibit conduct, which has the effect of authorizing that conduct. Authorization by inaction, on the other hand, does not involve a legislature taking deliberate action but instead involves the legislature refraining from taking action and thus does not indicate an intent sufficient to authorize conduct by law.

207. *Id.* (alteration in original).

208. *Id.* at 1473 (emphasis added).

209. See Biber & Ruhl, *supra* note 179, at 146.

210. *Id.*

211. OR. REV. STAT. § 475.525(1), (5)(a) (2017).

212. *Id.* § 475.525(5)(a).

213. See Biber & Ruhl, *supra* note 179, at 146.

2. Authorization by Delegation

Implied authorization and affirmative authorization may sometimes blur near the edges, as is the case with authorization by delegation. This form of authorization occurs when Congress delegates to states the power to take some action and in turn authorizes a state's subsequent exercise of that delegated power.²¹⁴ To be considered a form of authorization, whether affirmative or implied, a delegated power must be a grant of permission rather than an affirmative duty to act, since the term authorization should be understood as providing permission rather than imposing a requirement.²¹⁵ When a power is narrowly and explicitly delegated, such that it specifies all possible conditions necessary for its exercise, the federal government's authorization may appear more affirmative.²¹⁶

To constitute implied authorization, the state must have some discretion in how it exercises the delegated power. By providing discretion, the federal government implicitly authorizes the manner in which a state chooses to implement that power.²¹⁷ This occurs when Congress delegates power using broad or ambiguous terms. By not providing specifications for how states should exercise their delegated power, the federal government entrusts the state to work out the details of the delegation.²¹⁸ Congressional delegation to administrative agencies provides an apt analogy: when Congress delegates power to an agency using board terms, this grant "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."²¹⁹

Thus, a congressional delegation of power to states can be understood as an implicit authorization of a state's subsequent actions in exercising that power. Even when Congress does not affirmatively authorize a specific state action when delegating power, decisionmakers should construe Congress as implying authorization for a state to fill

214. While I discuss the relationship between federal and state governments here, the principle holds for smaller polities as well. For example, if a state delegates power to a city to take some action, the state authorizes the city's subsequent exercise of that delegation.

215. *Cf.* Biber & Ruhl, *supra* note 179, at 147–48 (explaining this concept in the context of permits).

216. *Cf. id.* at 146–47.

217. *Cf. id.* (explaining that, in the context of permits, if a "statute leaves some judgment to the agency as to whether a qualification is met (for example, whether the applicant is of good character), the element of discretion is satisfied and the form of permission is a permit").

218. *Cf.* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 165 (2007) (holding that "Congress entrust[s] [an] agency to work out" the details of matters related to a congressional delegation).

219. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

any gaps and ambiguities left in the delegation.²²⁰ The broad language used in the Paraphernalia Control Act's authorization exemption, then, can be understood as an implied authorization by Congress that states possess discretion in the manner by which they exercise the power delegated to them.

3. Authorization Through Context

Authorization may also be implied through context. Contextual authorization occurs when conduct must necessarily be authorized in order for surrounding and interrelated circumstances to be properly considered. This commonly occurs when statutes conflict and the proper reading of one or both statutes requires a finding of authorization. Authorization is implied in such instances since a contextual and holistic reading of the statutes together necessitates a finding of authorization.

Consider how a statute legalizing marijuana use might be read to impliedly authorize the use of marijuana paraphernalia. As an example, New Mexico prohibits marijuana use but permits the use of medical marijuana by qualified patients.²²¹ The state also prohibits the use and possession of paraphernalia.²²² While qualified medical marijuana patients are affirmatively authorized to possess and use the substance,²²³ they are not affirmatively authorized to possess or use related paraphernalia.²²⁴ This means that the general paraphernalia prohibition applies to qualified patients. A holistic reading of the state's marijuana laws might indicate that by authorizing qualified patients to use marijuana, New Mexico has impliedly authorized those patients to use and possess marijuana paraphernalia as well. To conclude otherwise would be to allow qualified patients to use marijuana but to prohibit them from accessing the instrumentalities necessary for its use, which thwarts their ability to engage in authorized conduct. For New Mexico's medical marijuana law to be given proper effect, then, there is a colorable argument that marijuana paraphernalia use must necessarily be impliedly authorized.

220. Cf. Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1285 (2008) ("Put simply, whether or not Congress has expressly authorized an agency to decide questions of statutory interpretation, courts must construe gaps and ambiguities in regulatory statutes as implicit delegations of policymaking authority to administrative agencies.").

221. N.M. STAT. ANN. § 30-31-23(A) (2018).

222. *Id.* § 30-31-25.1(A)–(B).

223. *See id.* § 26-2B-4(A).

224. *See id.* §§ 26-2B-1 to -7.

A separate state statute buttresses this conclusion. New Mexico requires that marijuana paraphernalia seized by state law enforcement officials be immediately returned upon determination that the person possessing or using the paraphernalia is a “qualified” medical marijuana patient.²²⁵ This statute does not, however, affirmatively authorize qualified patients to possess or use paraphernalia; it only requires return of those items when seized. Again, reading the marijuana laws together would seem to necessarily imply that qualified patients are authorized to possess and use marijuana paraphernalia. If this were not the case, then the statute would logically be read to require law enforcement officials to aid qualified patients in violating the state paraphernalia prohibition by returning seized paraphernalia.

Authorization may also be implied when it is not included as part of an affirmative prohibition. For example, Oregon’s paraphernalia statute makes it “unlawful for a person to sell or deliver . . . marijuana paraphernalia to a person who is under 21 years of age.”²²⁶ By affirmatively prohibiting paraphernalia sales to a specific class of persons—persons under twenty-one—the statute makes sense only if it is implied that the prohibition does not apply to persons outside of that class—persons over twenty-one. This follows the long-standing principle of interpretation that enumeration of one class of persons to be affected by a provision implies the exclusion of unenumerated classes.²²⁷

Because authorization exists along a continuum, the effectiveness of contextual authorization may vary significantly based on what circumstances are alleged to imply authorization. To be authorized through context, the conduct in question must necessarily be implied by the surrounding circumstances, such that those circumstances only make sense if the conduct in question is authorized. Thus, while there is a cognizable argument that New Mexico’s medical marijuana law and paraphernalia return provision only make sense if paraphernalia use is impliedly authorized for qualified patients, other situations purportedly authorizing conduct may be too indirect. For example, in *In re Ultra Trimmer*, a trademark applicant was denied

225. *See id.* § 26-2B-4(G):

Cannabis, paraphernalia or other property seized from a qualified patient or primary caregiver in connection with the claimed medical use of cannabis shall be returned immediately upon the determination by a court or prosecutor that the qualified patient or primary caregiver is entitled to the protections of the provisions of the Lynn and Erin Compassionate Use Act

226. OR. REV. STAT. § 475B.376(2) (2017) (emphasis added).

227. SUTHERLAND, *supra* note 175, at 413 (“Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of the other; there is then a natural inference that its application is not intended to be general.”).

federal trademark registration because his mark was intended for use on unlawful marijuana paraphernalia—specifically, a “trimming machine for trimming leaves, plants, flowers and buds.”²²⁸ The applicant argued that the surge of states legalizing the sale and use of marijuana necessarily implied that he was authorized to sell his product and that it was therefore lawful and registrable.²²⁹ This argument was appropriately rejected.²³⁰ Such a relationship is too tangential to warrant a finding that conduct has been contextually authorized. Contextual authorization requires that parties point to some direct implication of authorization by identifying a context in which authorization is necessary for the surrounding circumstances to be properly understood.

While this Note has analyzed contextual authorization through the lens of marijuana paraphernalia, the principle holds for other uses of the term as well. Case law pertaining to the federal Anti-Injunction Act (“AIA”),²³¹ for example, presents two instances of authorization through context: (1) authorization of specific conduct that necessarily follows authorization of more general conduct and (2) authorization in order to effectuate a law’s broader purpose. The AIA prohibits federal courts from intervening in state proceedings but includes numerous exceptions of instances where courts may intervene.²³² One exception is the ability to intervene in state proceedings when doing so has been “expressly authorized by Act of Congress.”²³³ This exception created substantial dispute among courts as to its meaning due to the

228. *In re Ultra Trimmer, L.L.C.*, No. 86479070, 2016 TTAB LEXIS 563, at *1–2 (T.T.A.B. Nov. 29, 2016).

229. *Id.* at *13 (detailing the applicant’s argument that because marijuana “has been deemed lawful to some extent in a total of forty-two states and the District of Columbia,” the use of equipment for manufacturing marijuana was “by rational extension” also lawful).

230. The panel hearing the matter rejected this argument because the applicant could not point to an affirmative form of authorization, such as “a license or other manifestation of authorization from any local, State, or Federal governmental authority.” *Id.* at *15. It also determined that despite the applicant’s contention, DOJ guidance documents—specifically the Obama administration’s Cole Memorandum—provided no refuge for the applicant, since “‘policy statements, agency manuals, and enforcement guidelines’ all ‘lack the force of law.’” *Id.* at *15–16 (quoting *In re JJ206, LLC*, 120 U.S.P.Q.2d (BNA) 1568, 1571 n.18 (T.T.A.B. 2016)). As this Note has attempted to demonstrate, however, requiring affirmative authorization misunderstands the term’s range of meanings. While the defendant’s argument was appropriately rejected, the panel should have provided justifications for doing so other than a simple lack of affirmative authorization. See discussion *infra* note 242.

231. 28 U.S.C. § 2283 (2012).

232. *Id.*; see also Larry C. Vaughan, Comment, *Federal Injunctions of State Court Labor Proceedings*, 39 TENN. L. REV. 301 (1972).

233. 28 U.S.C. § 2283.

interpretive difficulty presented by the phrase “expressly authorized.”²³⁴

In interpreting the AIA, the Supreme Court held that “authorization” need not be affirmative and can instead be implied.²³⁵ In *Mitchum v. Foster*, the Court addressed whether Section 1983 of the Civil Rights Act of 1871 constituted an exception to the AIA.²³⁶ Section 1983 allows any person deprived by a state actor of a right conferred by law to seek redress by bringing a “suit in equity.”²³⁷ While Section 1983 does not include any language referring to the AIA and does not affirmatively authorize conduct prohibited by the AIA, the *Mitchum* Court explained that the “express” authorization contemplated in the AIA could be implied based on whether “an Act of Congress . . . could be given its intended scope only by the stay of a state court proceeding.”²³⁸ Because Congress intended Section 1983 to serve as a means of protection against unconstitutional state actions—including unconstitutional judicial actions—Congress must necessarily have authorized federal stays of state court proceedings when it authorized “suit[s] in equity,” as this authorization was required to carry out the law’s protective purpose.²³⁹ The Court thus implied authorization on two bases: first, authorization was implied to effectuate the AIA’s general purpose, and second, authorization of “suit[s] in equity” necessarily encompassed authorization of the more specific “federal injunctive relief against a state court proceeding.”²⁴⁰ The AIA illustrates that whether an action is “authorized” can be of serious consequence in the administration of justice, and this significance calls for a more comprehensive understanding of the term’s many possible meanings.

234. See Vaughan, *supra* note 232, at 314–15, 317; see also *Mitchum v. Foster*, 407 U.S. 225, 226 (1972) (explaining that interpretation of the statute has “divided the federal courts”). Numerous courts have lamented the generally worded provision as “unfortunate.” See, e.g., *Studebaker Corp. v. Gittlin*, 360 F.2d 692, 696–97 (2d Cir. 1966) (“[E]xactly what is required by the statutory term is unclear; the courts are left to bear the burden of uncertainty in construing language widely recognized to be ‘unfortunate’ to say the least.”).

235. See *Mitchum*, 407 U.S. at 237 (“[I]t is evident that, in order to qualify under the ‘expressly authorized’ exception of the anti-injunction statute, a federal law need not contain an express reference to that statute. . . . [A] federal law need not expressly authorize an injunction of a state court proceeding in order to qualify as an exception.”); see also *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511, 516 (1955) (noting that “no prescribed formula is required; an authorization need not expressly refer to § 2283”).

236. *Mitchum*, 407 U.S. at 226.

237. 42 U.S.C. § 1983 (2012).

238. 407 U.S. at 236–38 (explaining that in order to qualify as “expressly authorized,” a law need not explicitly refer to the AIA, nor must it authorize prohibited conduct in an affirmative manner).

239. *Id.* at 242.

240. *Id.*

* * *

As this Part has sought to demonstrate, the term “authorized” should not be narrowly construed; instead, it should be understood as existing along a continuum of possible meanings. In the abstract, the word can be taken so far as to mean a mere lack of prohibition. For the purposes of authorization *by law*, however, this broad conception of authorization is unreasonable. But authorization need not be affirmatively granted either.²⁴¹ Between authorization by inaction and affirmative authorization, there exist a plethora of implied forms.

Understanding the wide range of forms that authorization may take can inform not only how legislation is written but how it is argued and interpreted as well. Many decisionmakers have failed to recognize the breadth of possible meanings the term “authorized” can take; instead, they have read the word narrowly to require explicit, affirmative action.²⁴² But as the Supreme Court recently clarified in

241. See *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1474 (2018).

242. For example, in *In re Ultra Trimmer*, discussed *supra* notes 228–230, the Trademark Trial and Appeal Board rejected that a trademark applicant’s conduct was impliedly authorized because he could not point to “a license or other manifestation of authorization from any local, State, or Federal governmental authority.” *In re Ultra Trimmer, L.L.C.*, No. 86479070, 2016 TTAB LEXIS 563, at *15 (T.T.A.B. Nov. 29, 2016). Of course, the Board had good reason to find the applicant’s conduct was not impliedly authorized, given that the applicant could not adequately connect a trend of state marijuana legalization with an implied authority to deal in marijuana paraphernalia. See *id.* But requiring the defendant to show authorization through affirmative means, such as a license, too narrowly construes the forms that authorization may take.

Similarly, in *Anderson v. United States*, a defendant convicted of violating the Paraphernalia Control Act for operating a chain of grocery stores that sold drug paraphernalia argued that his conduct was impliedly authorized because his retail business was licensed by a local zoning board. *Anderson v. United States*, Crim. No. L-00-033, 2009 U.S. Dist. LEXIS 107118, at *2–3, *9 (D. Md. Nov. 16, 2009). The District of Maryland rejected this argument because there was no evidence of affirmative authorization; the defendant could “point to no local, state, or Federal laws authorizing him to possess or distribute drug paraphernalia.” *Id.* at *10. The defendant also argued that his conduct was authorized because U.S. Customs and Border Protection had permitted him to import the paraphernalia at issue. *Id.* at *9. The court rejected this argument as well, finding that while the agency had allowed the importation of paraphernalia, it had not affirmatively authorized the subsequent distribution or sale of the imported items. *Id.* at *10.

As with the Board’s decision in *In re Ultra Trimmer*, the *Anderson* court had good reason to reject that the defendant was impliedly authorized to engage in federally unlawful conduct: The retail license upon which the defendant relied was for an all-purpose business—a grocery store—rather than a marijuana paraphernalia business, see *id.* at *9, and therefore failed to sufficiently imply authorization since paraphernalia had not been contemplated at the time the license was issued. Further, the court may have reasoned that the U.S. Customs and Border Protection’s permission to import paraphernalia did not imply authorization to engage in other activities, since the agency may not have sufficiently contemplated the subsequent sale and distribution of that imported paraphernalia. *Id.* These reasons may warrant rejecting that the defendant was impliedly authorized, but they should be explicated. Instead, the court failed to provide justifications for rejecting the implied authorization argument and broadly concluded that a lack of affirmative authorization meant that the defendant did not fall within the Paraphernalia Control Act’s scope. *Id.* By rejecting the possibility that conduct may be impliedly authorized,

Murphy, this interpretation is flawed and places too much emphasis on form rather than substance.²⁴³ This Note aims to better equip courts in interpreting the term “authorized” by presenting a framework of the permissible forms that authorization may take.

Whether a specific form of authorization is effective will depend on the law at issue. Because there are different paths to authorizing conduct, courts will need to look at the law holistically and pragmatically when interpreting the term.²⁴⁴ To illustrate how this might be done, the next Part analyzes the term “authorized” as it used in the Paraphernalia Control Act.

III. AUTHORIZING CONDUCT PROHIBITED BY THE PARAPHERNALIA CONTROL ACT

As the previous Part demonstrated, “authorization” can be understood as existing along a continuum. The forms that occur along this continuum will inevitably vary in their degree of effectiveness. This Part analyzes how the different forms of authorization that stretch the continuum might fare for purposes of authorizing conduct under the Paraphernalia Control Act and analyzes whether the anticipated results make normative sense.

decisionmakers evince a general misunderstanding of the range of meanings that the term “authorized” can take. Even when decisionmakers reach the same result, they should ground their determinations in reasons for rejecting implied authorization rather basing them on a rejection of implied authorization as a permissible means of authorizing conduct.

243. See *Murphy*, 138 S. Ct. at 1474.

244. Of course, analyzing the language used in a statute is always the first step in statutory interpretation. See, e.g., *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) (“The starting point for our interpretation of a statute is always its language.”); see also Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 6–9 (2003) (explaining that looking for a “plain meaning” is often the first step courts take when interpreting statutes). But other indicia must also be examined to accurately determine a law’s meaning. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 416–17 (1989) (“Statutory terms are not self-defining, and words have no meaning before or without interpretation. . . . [S]tatutory terms are indeterminate standing ‘by themselves,’ and, even more important, they never stand by themselves. The significance of congressional enactments necessarily depends on the context and on background understandings about how words should be understood.”); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 984 (1995) (arguing that a holistic approach to interpretation is necessary because “the nature of language” means that “legal rules will leave a variety of gaps and ambiguities; there will be no ordinary or literal meaning in many cases”); see also *Nix v. Hedden*, 149 U.S. 304, 306–07 (1893) (“[D]ictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court.”); Phillip A. Rubin, Note, *War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles*, 60 DUKE L.J. 167, 191 (2010) (explaining that dictionaries “should be used only to say what a word *could* mean, not what it *must* mean”).

A. Affirmative Authorization

Affirmative authorization offers the most reliable means for authorizing conduct under the Paraphernalia Control Act's authorization exemption. Few decisionmakers have analyzed the authorization exemption, but of those that have, there is a tendency to require affirmative authorization. When presented with arguments that a defendant's conduct is implicitly authorized, courts often reject the possibility of implied authorization without explication.²⁴⁵ Of course, these cases may have come out differently had they been decided after the *Murphy* Court's pronouncement that authorization need not be affirmative.²⁴⁶ Even still, case law indicates a preference for a showing that authorization has been affirmatively granted.

Provisions of the CSA related to the Paraphernalia Control Act also suggest that courts may require litigants to point to more affirmative forms of authorization to fall within the authorization exemption's scope.²⁴⁷ The CSA's departure from traditional burden of proof rules is one such provision. While criminal statutes typically require the government to prove a defendant is not protected by a statutory exemption,²⁴⁸ the CSA mandates that defendants invoking statutory exemptions bear the burden of proving the exemption's application using clear and convincing evidence.²⁴⁹ Any exemption

245. See cases discussed *supra* note 242.

246. *Murphy*, 138 S. Ct. at 1474.

247. See GREENAWALT, *supra* note 57, at 27 (explaining that when courts find that a statute's wording does not provide a clear directive, they must next examine other provisions of the same statute); SUTHERLAND, *supra* note 175, at 317–18 (“[T]he most natural exposition of a statute [is] to construe one part by another, for that expresses the meaning of the makers The words and meanings of one part may lead to and furnish an explanation of the sense of another.”); see also *Gonzales v. Oregon*, 546 U.S. 243, 273 (2006) (employing this method of interpretation in the context of the CSA).

248. See, e.g., *United States v. Vuitch*, 402 U.S. 62, 70 (1971) (“It is a general guide to the interpretation of criminal statutes that when an exception is incorporated in the enacting clause of a statute, the burden is on the prosecution to plead and prove that the defendant is not within the exception.”); *United States v. Matthews*, 749 F.3d 99, 104–05 (1st Cir. 2014) (explaining that the typical burden rules do not apply to the CSA based on Congress's clear intent in establishing otherwise).

249. See 21 U.S.C. § 885(a)(1) (2012):

It shall not be necessary for the United States to negative any exemption or exception set forth in this subchapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this subchapter, and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.;

see also *United States v. Hill*, 935 F.2d 196, 199–200 (11th Cir. 1991) (“[T]he burden of going forward to prove a statutory exception is on the defendant. Once the defendant has produced clear and convincing evidence that the conduct fits within an exception, the burden of persuasion is on the government.”).

under the CSA is thus treated as an affirmative defense “‘rather than an element of the offense’ for the government to prove.”²⁵⁰ This high standard of proof suggests that for purposes of the Paraphernalia Control Act, courts may refuse to imply authorization and may instead require that defendants establish affirmative authorization.

Courts and other decisionmakers have largely failed to provide a rationale for requiring affirmative authorization, and the possible justifications for requiring such a demanding form are unconvincing. For example, there may be concerns that determining whether conduct has been “authorized” is administratively difficult. In this case, a court might consider an affirmative statement of authorization more appealing than an implication of authorization since this would avoid the difficulty of analyzing the surrounding circumstances to determine whether authorization has been implied. But decisionmakers are frequently tasked with analyzing a situation to determine whether a statutory condition has been met,²⁵¹ and the Paraphernalia Control Act’s authorization exemption should be treated no differently. Moreover, the stakes that attach to a finding of authorization in the context of a criminal statute such as the Paraphernalia Control Act warrant a court’s full attention.²⁵² As noted above, the authorization exemption is treated as an affirmative defense,²⁵³ and one would expect courts to fully analyze whether a defendant may employ that defense, even if doing so is inconvenient.

Another possible rationale involves the error costs associated with erroneously authorizing conduct.²⁵⁴ Legal decisionmaking often involves weighing the costs of Type I errors (wrongful determinations that favor plaintiffs or prosecutors, such as an erroneous conviction) against the costs of Type II errors (wrongful determinations that favor defendants, such as an erroneous acquittal).²⁵⁵ In the context of the

250. *Matthews*, 749 F.3d at 104 (quoting *United States v. Forbes*, 515 F.2d 676, 680 n.9 (D.C. Cir. 1975)); see also *United States v. Polan*, 970 F.2d 1280, 1282–83, 1283 n.1 (3d Cir. 1992) (holding that for CSA-related crimes, the burden is not on the government to prove that a defendant lacks authorization).

251. See, e.g., *Murphy*, 138 S. Ct. at 1474.

252. See *supra* Section I.C.1 (discussing penalties for violating the Paraphernalia Control Act).

253. See *supra* notes 248–250 and accompanying text.

254. See Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 B.Y.U. L. REV. 1, 5 (“Error costs are the social costs associated with erroneous legal judgments and are a function of several variables.”).

255. See Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1521 (2001) (“Systems that operate under uncertainty always balance type I and type II errors . . .”). This is well understood in the criminal context, see Mark Glover, *Probate-Error Costs*, 49 CONN. L. REV. 613, 622–24 (2016), but occurs in the civil context as well. See, e.g., Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 634–37 (2018) (discussing decisionmakers’ balancing of error costs in corporate litigation); Jonathan R. Macey &

Paraphernalia Control Act, decisionmakers' insistence on a showing of affirmative authorization may be motivated by a fear of committing Type II errors—that is, decisionmakers may be wary of mistakenly finding a party authorized and thus erroneously allowing that party to avoid the Act's penalties. But this potential rationale is inadequate given that the substantial risk of Type I errors in this context should be weighed more heavily than the risk of Type II errors.²⁵⁶ Where criminal penalties are involved, it is well understood that erroneously subjecting a party to those penalties through Type I errors is worse than erroneously allowing a party to avoid the penalties through Type II errors.²⁵⁷ In other words, forcing a party to face the Paraphernalia Control Act's host of enumerated penalties, including imprisonment, by erroneously finding the party *not* authorized is more dangerous than the alternative. Indeed, balancing the potential error costs associated with a determination of whether a party is authorized should militate toward decisionmakers implementing a more lenient standard when interpreting whether an alleged authorization meets the Paraphernalia Control Act's exemption.²⁵⁸

Should states choose the certainty of affirmative authorization, they have two routes for authorizing conduct using this form: enacting

Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 662–65 (1992) (statutory interpretation); Joseph Scott Miller, *Error Costs & IP Law*, 2014 U. ILL. L. REV. 175, 178–79 (intellectual property).

256. See Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1504–05 (1999) (“[B]ecause the cost to an innocent defendant of criminal punishment may well exceed the social benefit of one more conviction of a guilty person . . . , Type I errors are more serious than Type II errors in criminal cases and therefore are weighted more heavily”); Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 487 (2000) (“The wrongful conviction of an innocent defendant (a ‘false positive’) is much costlier than the wrongful acquittal of a criminal (a ‘false negative’).”).

257. See Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 72 (2008) (“Under the prevalent moral vision, it is better to acquit a guilty defendant than to convict and punish an innocent person.”); see also Glover, *supra* note 255, at 624 (“The law tilts the scales of justice [in favor of criminal defendants] out of recognition that a false-positive outcome in the form of a wrongful conviction is worse [than] a false-negative outcome in the form of an erroneous acquittal.”).

258. See Lee, *supra* note 254, at 25–27 (explaining that the asymmetric balance of error costs accounts for higher standard of proof requirements in criminal proceedings). The balance of error costs may be asymmetrical in noncriminal cases, as well, and may warrant a more burdensome standard of proof “because of the perceived hardships resulting from an error.” *Id.* at 27. The greater these perceived hardships, “the stricter the procedural and decisional requirements authorizing the denial of a person’s liberty or property.” Stein, *supra* note 257, at 70–71 (“This ‘least harm principle’ animates the Supreme Court’s constitutional requirements for procedures and decisions in both criminal and civil trials. . . . In the domain of decisionmaking, [these requirements] regulate the imposition of decisional risks by the rules allocating the burden of proof.”). As such, the unenumerated consequences that attach to violations of the Paraphernalia Control Act may warrant stricter procedures related to deprivation if the hardships accompanying those consequences are determined to be sufficiently burdensome.

a statute or implementing a licensing regime. A statutory form of affirmative authorization is of course the most reliable means of authorizing conduct. California's paraphernalia statute provides guidance for other states looking to authorize conduct prohibited by the Paraphernalia Control Act.²⁵⁹ The law implements a number of features that unambiguously authorize conduct: it specifies that conduct prohibited by the Paraphernalia Control Act is "lawful";²⁶⁰ defines paraphernalia so as to parallel the Paraphernalia Control Act's definition;²⁶¹ codifies an express "intent[] to meet the requirements" of the Act, to which it includes a citation; and copies the language used by the authorization exemption, specifying that it "authoriz[es], under state law," the prohibited conduct.²⁶² The elements included in California's paraphernalia law plainly direct a decisionmaker to find that the state has employed the authorization exemption.

Decisionmakers have not unequivocally answered whether both authorization via statute and authorization via licensure would sufficiently constitute authorization by law.²⁶³ Reading the CSA in its entirety, however, suggests that a licensing regime would be sufficient to place a litigant within the authorization exemption's scope. While manufacture and distribution of controlled substances are prohibited, the CSA provides that the Attorney General may, upon application, "authorize" pharmacists and researchers to dispense or conduct research with controlled substances.²⁶⁴ The Attorney General may also revoke this authorization if an actor's state-issued license has been suspended, revoked, or denied by the state.²⁶⁵ According to the CSA, a suspended, revoked, or denied license means that an actor is "no longer authorized by State law" to manufacture or distribute controlled

259. See *supra* Section II.A.1 (discussing California's paraphernalia law).

260. See CAL. HEALTH & SAFETY CODE § 11362.1(a)(5) (West 2019) ("[I]t shall be lawful under state and local law . . . for persons 21 years of age or older to . . . [p]ossess, transport, purchase, obtain, use, manufacture, or give away cannabis accessories to persons 21 years of age or older without any compensation whatsoever.").

261. *Id.* § 11018.2.

262. *Id.* § 11362.1(b) (codifying an intention "to meet the requirements of subsection (f) of Section 863 of Title 21 of the United States Code (21 U.S.C. Sec. 863(f)) by authorizing, under state law, any person in compliance with this section to manufacture, possess, or distribute cannabis accessories").

263. The District of Maryland, for instance, rejected that the defendant's license authorized conduct and, in doing so, failed to express whether a license could ever be sufficient to do so. *Anderson v. United States*, Crim. No. L-00-033, 2009 U.S. Dist. LEXIS 107118 (D. Md. Nov. 16, 2009); see *supra* note 242. The Trademark Trial and Appeal Board, on the other hand, has indicated that a license would be sufficient to authorize conduct. *In re Ultra Trimmer, L.L.C.*, No. 86479070, 2016 TTAB LEXIS 563, at *15 (T.T.A.B. Nov. 29, 2016).

264. 21 U.S.C. § 823(f) (2012).

265. *Id.* § 824(a)(3) (emphasis added).

substances.²⁶⁶ This provision indicates that a valid state-issued license is sufficient to constitute “authoriz[ation] by State law.” Reading the CSA holistically, marijuana paraphernalia enterprises holding valid state licenses that contemplate paraphernalia should be considered “authorized” by law to engage in conduct the Paraphernalia Control Act otherwise prohibits.

To increase the likelihood that a license meets the authorization exemption, states should directly relate the license to the conduct prohibited by the Paraphernalia Control Act.²⁶⁷ Both specific and general licenses may be appropriate for authorizing conduct under the Act. A general licensing regime—that is, one that applies to a class of persons—might involve, for instance, a state agency issuing licenses to sell marijuana paraphernalia to all persons licensed to operate dispensaries.²⁶⁸ A specific licensing regime, on the other hand, would involve an individually tailored determination of whether an applicant may be granted a license. A hybrid system could exist as well, in which those who do not receive a license through the general licensing scheme are permitted to apply for an individual license. Because states with legalized marijuana already delegate authority to state agencies to license dispensaries, implementing a paraphernalia licensing regime would pose few administrative or fiscal burdens. The same agency that oversees marijuana dispensaries could also oversee marijuana paraphernalia enterprises, and many of the processes used for licensing dispensaries could be translated to the paraphernalia context.

States may find that a licensing regime offers benefits not encompassed by statutory authorization. A primary benefit of using a licensing regime is the ability to collect excise taxes and application fees from marijuana paraphernalia businesses.²⁶⁹ Licensing also allows states to change the conditions of licensure and implement product standards more easily than through a statutory regime. A licensing regime could be changed through rather informal agency actions, whereas a statutory regime would require amendment by the legislature. Moreover, a licensing regime enables states to ensure licensees are abiding by state marijuana laws. States are better equipped to, for example, police sales to minors under a licensing

266. *Id.*

267. *See supra* Section II.A.2 (explaining that affirmative authorization via licensure requires direct contemplation of the conduct to be authorized).

268. Of course, the agency would need to retain some discretion in issuing the license in order for it to be considered a license rather than a statutory mandate. Biber & Ruhl, *supra* note 179, at 146. The agency’s promulgation of general licensing conditions—in this example, being licensed to operate a dispensary—meets this requirement. *Id.*

269. *See* JIM LEITZEL, REGULATING VICE: MISGUIDED PROHIBITIONS AND REALISTIC CONTROLS 161–62 (2008) (arguing that licensing is necessary to collect excise taxes).

regime than under a statutory regime.²⁷⁰ The threat of revocation may also increase regulatory compliance by the licensee in ways that a statutory regime cannot.²⁷¹

As between the different licensing regimes available to a state, a specific regime with individually tailored licenses may allow a greater degree of flexibility than general licenses. Specific licenses allow for more control over which applicants are authorized and allow the issuing agency to negotiate specific terms with the applicant.²⁷² This discretion better enables a state to police the quality of marijuana-related paraphernalia sold and the actions of the licensed enterprises. Policing the quality of the paraphernalia on the market protects the public by ensuring that marijuana paraphernalia consumers are not sold unsafe products.²⁷³ Quality control also provides reputational benefits to licensees since a license issued by a state agency can serve as a “stamp of approval” used to signal product quality to consumers. General licenses, on the other hand, are less administratively burdensome, as the act of licensing occurs primarily at the rulemaking stage and does not involve a fact-intensive inquiry into whether a license should issue.²⁷⁴

A state may also choose to combine these two regimes by enacting a statute similar to California’s but stipulating that persons are only authorized if they are licensed by a specified state agency. A hybrid system of authorization allows states to benefit from the certainty of statutory authorization while also benefiting from the control over those authorized that a licensing regime offers.

B. Authorization Through Inaction

Authorization through inaction is the least likely form to constitute authorization for purposes of the Paraphernalia Control Act. Under this form of authorization, a party is considered authorized to engage in conduct by virtue of that conduct lacking regulation or

270. See Mikos, *supra* note 149, at 18 (explaining that licensing regimes for marijuana dispensaries are designed to, among other things, “prevent unlawful sales to minors”).

271. See LEITZEL, *supra* note 269, at 162 (“With licenses highly valued, license holders will be reluctant to risk losing their license through inappropriate actions, including failure to enforce the various regulations governing vice sale and consumption.”). This threat also serves to increase regulatory compliance by the public by placing licensees in enforcement roles.

272. See Biber & Ruhl, *supra* note 179, at 169 (detailing the features of specific licenses).

273. Cf. U.S. DEP’T OF THE TREASURY ET AL., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 11 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf [<https://perma.cc/5FSK-7RSK>] (noting that occupational licenses are beneficial when “low-quality practitioners” can inflict harm and consumers cannot evaluate a provider’s quality).

274. See Biber & Ruhl, *supra* note 179, at 164–66 (distinguishing general and specific licenses).

prohibition. For marijuana paraphernalia, this form of authorization is likely inapplicable because most if not all states have previously prohibited or regulated paraphernalia in some manner. Even if a state has never prohibited or regulated paraphernalia, decisionmakers are unlikely to find inaction sufficient to meet the Paraphernalia Control Act's requirement that conduct be "authorized *by law*."²⁷⁵ Considering inaction as constituting authorization "by law" might create unintended consequences for interpreting other uses of the term "authorized," and it is unclear whether any court would risk such consequences.

Normatively, one might wonder whether this makes sense for states that have not prohibited or regulated marijuana paraphernalia. For example, if a state has banned paraphernalia for a number of controlled substances but has refrained from including marijuana paraphernalia in that prohibition, marijuana paraphernalia's exclusion should not be read as an accident.²⁷⁶ Instead, the state should be understood as likely intending to permit citizens to engage in conduct related to marijuana paraphernalia. In these circumstances, there is a colorable argument that the state has authorized, through inaction, conduct related to marijuana paraphernalia. This instance of possible authorization blurs slightly with authorization that occurs through context, since the surrounding circumstances—that is, the express prohibition on other forms of paraphernalia—inform how marijuana paraphernalia's exclusion from the prohibition should be interpreted.

C. Implied Authorization

Relying on implied authorization for purposes of the Paraphernalia Control Act will likely result in varying degrees of effectiveness. Case law indicates judicial apprehension to authorizing conduct implicitly, but these cases were largely decided before the Supreme Court clarified that authorization need not be affirmative.²⁷⁷ There is likely to be disagreement among courts and other decisionmakers as to what forms of implied authorization are sufficient for purposes of the Paraphernalia Control Act.

275. 21 U.S.C. § 863(f)(1) (2012) (emphasis added).

276. See SUTHERLAND, *supra* note 175, at 413 ("Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of the other; there is then a natural inference that its application is not intended to be general.").

277. See, e.g., *Anderson v. United States*, Crim. No. L-00-033, 2009 U.S. Dist. LEXIS 107118 (D. Md. Nov. 16, 2009); *CannaKorp, Inc. v. United States*, 234 F. Supp. 3d 1345 (Ct. Int'l Trade 2017); *In re Ultra Trimmer, L.L.C.*, No. 86479070, 2016 TTABLEXIS 563 (T.T.A.B. Nov. 29, 2016); see also *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1473–74 (2018).

Some forms of implied authorization are more easily reconciled with the authorization exemption. Authorization by repeal, for example, should be considered sufficient to meet the exemption following the Supreme Court's decision in *Murphy*.²⁷⁸ Thus, a state's repeal of a prohibition on activities related to marijuana paraphernalia should imply that the state has authorized those activities. This sort of repeal would likely entail a state removing marijuana paraphernalia from a statute prohibiting paraphernalia. Similarly, a statutory exemption, such as Oregon's marijuana paraphernalia exemption, should be considered sufficient authorization.²⁷⁹

Ultimately, affirmative authorization offers states a more certain path for shutting off the Paraphernalia Control Act's prohibition, since implied authorization may allow courts to avoid a finding that conduct is "authorized." Of course, one would not expect all arguments of implied authorization to meet the authorization exemption. For example, a decisionmaker is not likely to find that legalization of marijuana without any reference to paraphernalia constitutes authorization. Although, there is a colorable argument that legalizing marijuana use implies the ability to access the instrumentalities necessary for its use.²⁸⁰ But even if a decisionmaker was receptive to finding that marijuana legalization implied authorization of marijuana paraphernalia activities, it would likely only find that legalization implied the authorization to possess and use paraphernalia, not the sale, distribution, or manufacture of paraphernalia.

Even a law that authorizes certain activities related to marijuana paraphernalia is unlikely to be interpreted as authorizing other, unenumerated paraphernalia-related activities, regardless of whether context suggests they should be authorized. For example, if a state authorizes the sale of paraphernalia, there is a plausible argument that the state has authorized the distribution and possibly even the manufacture of paraphernalia as well. To sell paraphernalia requires the ability to transport it and necessarily implies that some actor is manufacturing that paraphernalia. In this context, it seems that the authorization of sales would contextually authorize paraphernalia manufacture and distribution—if not, businesses would be provided the ability to sell paraphernalia but prevented from making it themselves or procuring it from a third party. But decisionmakers

278. *Murphy*, 138 S. Ct. at 1473–74; see *supra* Section II.C.1.

279. OR. REV. STAT. § 475.525(5)(a) (2017).

280. See *supra* Section II.C.3.

may nonetheless be reluctant to allow these activities if not expressly enumerated.

Normatively, it seems that decisionmakers should be receptive to at least some instances of implied authorization and should defer to the intent evinced by state authorities where appropriate. General principles of delegation support permitting implied authorization. Delegating power to take some action to subordinate units of government demonstrates Congress's decision to provide those subordinate units of government with a certain degree of autonomy.²⁸¹ This delegation evinces a desire for subordinate governments to implement policies that satisfy the preferences and values of their citizens.²⁸² This desire should be respected by decisionmakers when determining whether a state has authorized conduct otherwise prohibited by the Paraphernalia Control Act. And while congressional motivation for the authorization exemption is uncertain, it is evident that Congress presumed that state regulations might displace the federal legislative scheme. Indeed, the Supreme Court has noted that the CSA "explicitly contemplates a role for the States in regulating controlled substances."²⁸³ This is evidenced by the CSA's reverse preemption clause, which disclaims regulation for any "subject matter which would otherwise be within the authority of the State."²⁸⁴ Through its enactment of the authorization exemption, Congress expressly placed paraphernalia-related activities within states' authority, and thus disclaimed regulation should states choose to employ the authorization exemption. Whether states choose to authorize conduct in an affirmative manner or more implicitly, decisionmakers should defer to the state's intent after holistically analyzing the circumstances surrounding a purported authorization.

281. See Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 106 (1990) (theorizing the reasons for federal delegations of authority to subordinate governmental units).

282. See *id.*; Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 210 (1997) ("Congress delegates power to states, moreover, in order to satisfy preferences for state-level regulation and for state citizens' values.").

283. *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006). In *Gonzales v. Oregon*, the Court found that an Oregon statute permitting the use of controlled substances in physician-assisted suicides could not be preempted by the CSA. *Id.* at 248–49, 270–71. The Oregon laws were, according to the Court, "an example of the state regulation . . . that the CSA presupposes." *Id.* at 271.

284. See 21 U.S.C. § 903 (2012):

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

CONCLUSION

Congress places myriad prohibitions on citizens' conduct but sometimes delegates to states the power to "authorize" persons to engage in the conduct covered by those prohibitions. Whether a party is considered "authorized" holds much significance, as illustrated by the Paraphernalia Control Act's enumerated penalties and automatically attaching consequences. Despite the weight that the law places on whether a person is "authorized," that term's meaning is underexplored and not fully understood.

This Note has sought to demonstrate through lens of the Paraphernalia Control Act that authorization exists along a continuum of possible meanings. On one end of the continuum lies affirmative authorization and on the other end lies authorization through inaction. But these are not the only two forms that authorization may take; between these two ends lie more implied forms of authorization. As this Note has shown, authorization need not be affirmative to be effective. Instead, whether a particular form of authorization is sufficient to "authorize by law" will depend on the surrounding circumstances.

While this Note has focused on how the term "authorized" should be understood for purposes of employing the Paraphernalia Control Act's authorization exemption, the importance of a nuanced understanding is not so limited. Diverse areas of law implicate the term, and innumerable stakeholders are affected by how it is interpreted. Understanding authorization as existing along a continuum will allow decisionmakers to more accurately determine whether a party is authorized to engage in prohibited conduct and will ensure that state law is properly effectuated.

*Breanna C. Philips**

* J.D. Candidate, 2019, Vanderbilt University Law School; B.A., 2013, University of Washington. I would like to thank Professor Robert Mikos for sparking my interest in this topic and the editors and staff of the *Vanderbilt Law Review* for their dedication and thoughtful comments. Finally, I thank my friends and family for their steadfast support and, in particular, my mother, Cheryl Cole, for her love, patience, and many sacrifices.