

# UP IN SMOKE? UNINTENDED CONSEQUENCES OF RETAIL MARIJUANA LAWS FOR PARTNERSHIPS

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*“When governors have asked me, and several have, I say that we don’t have the facts . . . . We don’t know what the unintended consequences are going to be . . . . What I do is urge caution. Make sure you look at it very thoroughly.”<sup>1</sup>*

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<sup>1</sup> Dan Balz, *Colorado Governor Urges Other States to “Be Cautious” About Pot Legalization*, WASH. POST (Feb. 21, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/02/21/colorado-governor-urges-other-states-to-be-cautious-about-pot-legalization> (quoting Colorado Governor John Hickenlooper’s advice to other governors about legalizing recreational marijuana sales).

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## INTRODUCTION

In 2012, when Colorado citizens petitioned to legalize the retail sale of marijuana in their state, Colorado Governor John Hickenlooper publicly opposed the ballot measure.<sup>2</sup> Among the other reasons for his opposition,<sup>3</sup> Governor Hickenlooper knew that it would put Colorado in uncharted territory as the first state to legalize recreational marijuana sales.<sup>4</sup> He worried about legalizing marijuana sales at the state level in the face of federal laws that make selling marijuana a crime.<sup>5</sup> Governor

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<sup>2</sup> John Ingold, *Colorado Gov. John Hickenlooper Opposes Marijuana-Legalization Measure*, DENVER POST (Sept. 12, 2012, 3:03 PM), [http://www.denverpost.com/ci\\_21530165/colorado-gov-john-hickenlooper-opposes-marijuana-legalization-measure](http://www.denverpost.com/ci_21530165/colorado-gov-john-hickenlooper-opposes-marijuana-legalization-measure) (noting Governor Hickenlooper’s opposition to the ballot initiative that would legalize the recreational use and retail sale of marijuana); see COLO. CONST. amend. 64 (codified as amended at COLO. CONST. art. XVIII, § 16), <http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2011-2012/30Final.pdf> (2012 ballot initiative legalizing recreational use and retail sale of marijuana).

<sup>3</sup> See Matt Ferner, *Gov. John Hickenlooper Opposes Legal Weed: ‘Colorado Is Known for Many Great Things, Marijuana Should Not Be One of Them’*, HUFFINGTON POST (Sept. 12, 2012, 7:54 PM), [http://www.huffingtonpost.com/2012/09/12/gov-john-hickenlooper-opp\\_n\\_1879248.html](http://www.huffingtonpost.com/2012/09/12/gov-john-hickenlooper-opp_n_1879248.html) (describing Hickenlooper’s opposition to Amendment 64 on the basis of concern for public health and the potential that young people would be saddled with felony records).

<sup>4</sup> See Chuck Slothower, *Hickenlooper: I Hate this Experiment*, DURANGO HERALD (Colo.) (Jan. 10, 2014, 1:49 PM), <http://www.durangoherald.com/article/20140110/NEWS01/140119986> (quoting Hickenlooper as saying: “I hate Colorado having to be the experiment.”); see also *infra* notes 23–46 and accompanying text for a brief history of marijuana legalization in the United States.

<sup>5</sup> See Ferner, *supra* note 3 (quoting Hickenlooper’s concern that “[f]ederal laws would remain unchanged in classifying marijuana as a Schedule I substance, and federal authorities

Hickenlooper knew that legalizing retail marijuana sales would come with “unintended consequences.”<sup>6</sup>

About the unintended consequences, at least, Governor Hickenlooper was right.<sup>7</sup> Currently, twenty-nine states and the District of Columbia have legalized the possession and/or sale of marijuana for medical or recreational use (or both),<sup>8</sup> despite the fact that federal law criminalizes it. Scholars have identified a host of practical and legal problems caused by the combination of state legalization and federal prohibition, in realms ranging from banking, taxation, legal representation, employment law, family law, and others.<sup>9</sup> Still, additional fields affected by marijuana legislation have yet to be addressed in depth.

One of these nascent fields is business law—that is, the unintended consequences of state marijuana legalization for business entities that engage in marijuana-related activities. A recent article suggests that these entities may lose important business law protections, such as limited liability.<sup>10</sup> Otherwise, the scholarly discussion has largely overlooked the ramifications of state marijuana legalization for state business entity laws. This Article introduces a significant, new business law discussion: the unintended consequences of state marijuana legalization for the formation and dissolution of partnerships. It bases its discussion in the laws of the first state to legalize retail marijuana sales, Colorado.<sup>11</sup>

This Article proceeds in four parts. Part I outlines the laws regulating marijuana at the federal and state levels, and the interplay between them, and establishes that Colorado’s marijuana laws implicate its partnership laws. Part II introduces Colorado’s partnership laws, with particular focus on the laws of partnership formation and

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have been clear they will not turn a blind eye toward states attempting to trump those laws”). See also *infra* text accompanying notes 14–33 for a description of marijuana’s legal status under federal law.

<sup>6</sup> See Balz, *supra* note 1 (quoting Governor Hickenlooper).

<sup>7</sup> This Article takes no position on whether the sale of marijuana *should* be legalized for medical or recreational purposes.

<sup>8</sup> *State Marijuana Laws in 2016 Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> (last updated Jan. 30, 2016). Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Washington, and the District of Columbia have legalized marijuana for recreational use. *Id.*

<sup>9</sup> See, e.g., Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 91–100 (2015); Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597 (2015); Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523 (2014); Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL F. 223.

<sup>10</sup> See generally Luke Scheuer, *The “Legal” Marijuana Industry’s Challenge for Business Entity Law*, 6 WM. & MARY BUS. L. REV. 511 (2015).

<sup>11</sup> See *infra* notes 47–48.

dissolution. It then identifies how inconsistencies between the state marijuana laws and the state partnership laws result in unintended consequences for partnerships. Next, it scrutinizes three potential arguments aimed at convincing a Colorado court that the statutory inconsistencies do not mandate the negative outcomes this Article identifies. Part III examines the practical consequences for partnerships of the inconsistencies between the marijuana and partnership laws; it then critiques several possible remedies for the problems posed before advocating an amendment of the state marijuana laws as the most promising solution. Finally, this Article concludes by advising states that legalize marijuana sales in the future to proceed slowly and learn from others' mistakes so that they may avoid unintended consequences of their own.

## I. THE MARIJUANA LAWS

Marijuana is subject to regulation at the federal, state, and local levels. This Part first describes marijuana's legal status under federal law. It then introduces the state laws<sup>12</sup> governing Colorado's marijuana-related businesses and briefly addresses the issue of whether state laws are preempted by federal laws regulating marijuana. Finally, this Part establishes how Colorado's marijuana laws are relevant to partnerships.

### A. *Federal Law*<sup>13</sup>

The federal Controlled Substances Act (CSA), enacted in 1970, criminalizes the sale of marijuana.<sup>14</sup> Section 841(a)(1) of the CSA provides that it is "unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," except as authorized by the CSA.<sup>15</sup> The CSA designates marijuana a "Schedule I" controlled substance, meaning it "has a high potential for abuse," "has no currently accepted medical use in treatment," and

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<sup>12</sup> Various Colorado localities have their own laws pertaining to the sale of marijuana. See, e.g., DENVER, COLO., REV. MUNICIPAL CODE ch. 6, art. V, §§ 6-200 to -219 (2013) (retail marijuana code for the City and County of Denver). For simplicity, this Article largely ignores the local laws.

<sup>13</sup> For a detailed history of marijuana regulation in the United States see Chemerinsky et al., *supra* note 9, at 81-90.

<sup>14</sup> Controlled Substances Act, 21 U.S.C. §§ 801-904 (2012).

<sup>15</sup> *Id.* § 841(a)(1).

“[t]here is a lack of accepted safety” for its use under medical supervision.<sup>16</sup> Schedule I is the most restrictive controlled substance designation in the CSA.<sup>17</sup> The only purpose authorized under the CSA for a Schedule I substance is its use in a federally authorized study; this means the manufacture, distribution, or dispensing of marijuana, or the possession with intent to do one of those things, is a federal crime—a felony.<sup>18</sup> Despite repeated calls to remove marijuana from Schedule I,<sup>19</sup> the federal government has consistently refused to do so,<sup>20</sup> and federal courts have upheld these refusals.<sup>21</sup>

Less consistent than the refusal to remove marijuana from Schedule I has been federal policy regarding enforcement of the CSA in the face of state medical and retail marijuana laws.<sup>22</sup> California became the first state to legalize the sale of marijuana for medical use in 1996 with the passage of Proposition 215,<sup>23</sup> and others soon followed California’s lead. When President Barack Obama was sworn into office in 2009, medical marijuana laws had been passed in thirteen states.<sup>24</sup> During his campaign, President Obama seemed friendly to state marijuana legalization, saying, “I’m not going to be using Justice Department resources to try to circumvent state laws on this issue.”<sup>25</sup> President Obama’s attorney general, Eric Holder, indicated shortly after

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<sup>16</sup> *Id.* § 812(b)(1), Schedule I (c)(10).

<sup>17</sup> *See id.* § 812(b).

<sup>18</sup> *Id.* § 841(b)(1)(B), (D).

<sup>19</sup> *See, e.g.,* All. for Cannabis Therapeutics v. Drug Enf’t Admin., 15 F.3d 1131 (D.C. Cir. 1994); All. for Cannabis Therapeutics v. Drug Enf’t Admin., 930 F.2d 936 (D.C. Cir. 1991); Nat’l Org. for Reform of Marijuana Laws v. Drug Enf’t Admin., 559 F.2d 735 (D.C. Cir. 1977); Respect States’ and Citizens’ Rights Act of 2013, H.R. 964, 113th Cong. (2013); Respect States’ and Citizens’ Rights Act of 2012, H.R. 6606, 112th Cong. (2012).

<sup>20</sup> *E.g.,* Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,688 (Aug. 12, 2016); Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40,552 (July 8, 2011).

<sup>21</sup> *See, e.g.,* Americans for Safe Access v. Drug Enf’t Admin., 706 F.3d 438, 440 (D.C. Cir. 2013) (holding the federal Drug Enforcement Agency’s denial of a petition to reschedule marijuana survived review under the arbitrary and capricious standard).

<sup>22</sup> *See* Chemerinsky et al., *supra* note 9, at 86–90 (discussing fluctuations in the federal government’s degree of antagonism toward marijuana following President Obama’s election); Scheuer, *supra* note 10, at 524–28 (calling the federal government’s responses to state marijuana laws “inconsistent” and describing the various responses).

<sup>23</sup> 1996 Cal. Leg. Serv. Prop. 215 (codified as the Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007)).

<sup>24</sup> *See* 28 *Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PROCON, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Feb. 24, 2017, 3:18 PM) (listing California (1996), Alaska (1998), Oregon (1998), Washington (1998), Maine (1999), Nevada (2000), Colorado (2000), Hawaii (2000), Montana (2004), Vermont (2004), Rhode Island (2006), New Mexico (2007), and Michigan (2008) as having medical marijuana laws in place prior to 2009).

<sup>25</sup> Tim Dickinson, *Obama’s War on Pot*, ROLLING STONE (Feb. 16, 2012), <http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216#ixzz3wz5COouj> (quoting President Obama).

President Obama took office that this campaign promise would be the new federal policy.<sup>26</sup> And, soon thereafter, Deputy Attorney General David Ogden released a memorandum to U.S. attorneys in states that had legalized medical marijuana with the following guidance regarding federal enforcement priorities:

As a general matter, pursuit of [federal] priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources.<sup>27</sup>

Thus, all signs from the early days of the Obama presidency indicated that the federal government would not enforce the CSA in states that legalized marijuana sales.

Despite these early indications, the federal government did not turn out to be as friendly to marijuana businesses as anticipated. A new Department of Justice memorandum from Deputy Attorney General Ogden to U.S. attorneys in 2011 declared that “[t]he Department of Justice is committed to the enforcement of the Controlled Substances Act in all States” and that

[t]he Ogden Memorandum was never intended to shield [commercial marijuana] activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law.<sup>28</sup>

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<sup>26</sup> See Stu Woo & Justin Scheck, *California Marijuana Dispensaries Cheer U.S. Shift on Raids*, WALL STREET J. (Mar. 9, 2009, 12:01 AM), <http://www.wsj.com/articles/SB123656023550966719> (“The attorney general signaled recently that states will be able to set their own medical-marijuana laws, which President Barack Obama said during his campaign that he supported. What Mr. Obama said then ‘is now American policy,’ Mr. Holder said.”).

<sup>27</sup> U.S. DEP’T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GENERAL, MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS: INVESTIGATIONS AND PROSECUTIONS IN STATES AUTHORIZING THE MEDICAL USE OF MARIJUANA 1–2 (Oct. 19, 2009), <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

<sup>28</sup> U.S. DEP’T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GENERAL, MEMORANDUM FOR UNITED STATES ATTORNEYS: GUIDANCE REGARDING THE OGDEN MEMO IN JURISDICTIONS SEEKING TO AUTHORIZE MARIJUANA FOR MEDICAL USE 1–2 (June 29, 2011), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>.

A wave of enforcement actions in California,<sup>29</sup> Montana,<sup>30</sup> and Colorado<sup>31</sup> followed shortly thereafter.

But, in yet another turn, after Colorado and Washington State passed initiatives permitting recreational marijuana sales,<sup>32</sup> a third memorandum from the Department of Justice suggested that the federal government would permit those laws to stand and would not seek to enforce the CSA against those operating in compliance with state laws.<sup>33</sup> The federal government's stance on enforcement of the CSA has clearly evolved over time. And yet, the ebb and flow of the federal government's enforcement vigor has not changed the fact that the sale of marijuana remains illegal at the federal level.

### B. *Colorado's Marijuana Laws and Federal Preemption*

Despite federal law's prohibitions on selling marijuana, states continue to pass legislation legalizing it under state law. At the time of this Article, eight states—Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington—and the District of Columbia have passed laws legalizing recreational marijuana sales,<sup>34</sup>

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<sup>29</sup> See Press Release, U.S. Drug Enf't Adm., California's Top Federal Law Enforcement Officials Announce Enforcement Actions Against State's Widespread and Illegal Marijuana Industry (Oct. 7, 2011), <http://www.dea.gov/pubs/pressrel/pr100711.html> (describing "coordinated enforcement actions targeting the illegal operations of the commercial marijuana industry in California").

<sup>30</sup> See John S. Adams, *Medicinal Marijuana Raids in Montana Stun Advocates*, USA TODAY (Mar. 18, 2011, 12:16 AM), [http://usatoday30.usatoday.com/news/nation/2011-03-18-medmarijuanaraids18\\_ST\\_N.htm](http://usatoday30.usatoday.com/news/nation/2011-03-18-medmarijuanaraids18_ST_N.htm) (reporting twenty-six raids on Montana's medical marijuana facilities across thirteen cities).

<sup>31</sup> See *Medical Marijuana Crackdown in Colorado: 10 More Dispensaries near Schools Forced to Shut Down*, HUFFINGTON POST (Sept. 19, 2012, 9:50 AM), [http://www.huffingtonpost.com/2012/09/19/medical-marijuana-crackdo\\_n\\_1896385.html](http://www.huffingtonpost.com/2012/09/19/medical-marijuana-crackdo_n_1896385.html) (noting that fifty-seven Colorado medical marijuana dispensaries located near schools had complied with orders from U.S. Attorney John Walsh to shut down since January 2012).

<sup>32</sup> See *infra* note 36 and accompanying text.

<sup>33</sup> See U.S. DEP'T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GENERAL, MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: GUIDANCE REGARDING MARIJUANA ENFORCEMENT 2-3 (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (suggesting the Department of Justice would not challenge state laws legalizing marijuana unless "state enforcement efforts are not sufficiently robust to protect against the harms" identified as the federal government's enforcement priorities).

<sup>34</sup> See *supra* note 8. The District of Columbia's marijuana legislation technically does not authorize recreational marijuana sales; rather, it permits a person to possess, use, purchase, and transport marijuana, but not to transfer it to another person for remuneration. Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Initiative of 2014, D.C. Act 20-565 (Dec. 3, 2014) (codified as amended at D.C. CODE ANN. § 48-904.01 (West 2001) (effective Feb. 26, 2015)), <http://lims.dccouncil.us/Download/33230/B20-1064-SignedAct.pdf>. This leaves the District of Columbia in a somewhat strange situation, in that it is legal under D.C. law to

each beginning with a ballot initiative.<sup>35</sup> Colorado's and Washington's ballot initiatives passed in 2012.<sup>36</sup> Alaska's, the District of Columbia's, and Oregon's ballot initiatives passed in 2014.<sup>37</sup> Successful initiatives in California, Maine, Massachusetts, and Nevada followed in 2016.<sup>38</sup> Sales

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possess, use, and even purchase marijuana for recreational purposes, but it is not legal to sell it. *See id.* § 48-904.01(a)(1).

<sup>35</sup> For an overview of the ballot initiative process and history, see K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 228–48 (2005) (describing the history of ballot initiatives and the relative benefits and drawbacks of the ballot initiative process).

<sup>36</sup> *See* COLO. CONST. amend. 64 (codified as amended at COLO. CONST. art. XVIII, § 16), <http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2011-2012/30Final.pdf>; 2012 *Colorado Ballot Measures Results*, POLITICO, <http://www.politico.com/2012-election/results/ballot-measures/colorado> (last updated Nov. 19, 2012, 2:48 PM); Initiative Measure No. 502 (Wash. 2011) (codified as amended in scattered sections of WASH. REV. CODE §§ 69.50, 46.20, 46.61, 46.04), [http://sos.wa.gov/\\_assets/elections/initiatives/i502.pdf](http://sos.wa.gov/_assets/elections/initiatives/i502.pdf); 2012 *Washington Ballot Measures Results*, POLITICO, <http://www.politico.com/2012-election/results/ballot-measures/washington> (last updated Nov. 19, 2012, 2:48 PM).

<sup>37</sup> *See Ballot Measure No. 2-13PSUM: An Act to Tax and Regulate the Production, Sale, and Use of Marijuana*, ALASKA DIVISION OF ELECTIONS (2014), <https://www.elections.alaska.gov/doc/bml/BM2-13PSUM-ballot-language.pdf>; 2014 *Alaska Ballot Measures Results*, POLITICO, <http://www.politico.com/2014-election/results/map/ballot-measures/alaska> (last updated Dec. 17, 2014, 2:31 PM); Initiative Measure No. 71 (D.C. 2014) (codified as amended at D.C. CODE ANN. § 48-904.01 (2013)), [https://www.dcboee.org/pdf\\_files/pn\\_1587.pdf](https://www.dcboee.org/pdf_files/pn_1587.pdf); 2014 *District of Columbia Ballot Measures Results*, POLITICO, <http://www.politico.com/2014-election/results/map/ballot-measures/district-of-columbia> (last updated Dec. 17, 2014, 2:31 PM); Measure 91: Text of Measure (Or. 2014) (codified as amended at OR. REV. STAT. § 475B (2015)), <http://www.oregon.gov/olcc/marijuana/documents/measure91.pdf>; 2014 *Oregon Ballot Measures Results*, POLITICO, <http://www.politico.com/2014-election/results/map/ballot-measures/oregon> (last updated Dec. 17, 2014, 2:31 PM). Though the District of Columbia's recreational marijuana law went into effect in early 2015, an act of Congress effectively blocked the sale and taxation of recreational marijuana in the District. *See Consolidated and Further Continuing Appropriations Act, 2015*, Pub. L. No. 113-235, § 809(a), 128 Stat. 2130, 2394 (“None of the Federal funds contained in this Act may be used to enact or carry out any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act . . .”); Joseph Henchman & Morgan Scarboro, *Marijuana Legalization and Taxes: Lessons for Other States from Colorado and Washington*, TAX FOUND. (May 12, 2016), <http://taxfoundation.org/article/marijuana-legalization-and-taxes-lessons-other-states-colorado-and-washington>. However, thanks to an order issued in 2016 by the Superior Court of the District of Columbia upholding the Local Budget Autonomy Act of 2012, which permits the District to spend its revenues without first receiving a congressional appropriation, recreational marijuana sales could be possible if the D.C. statute were amended to permit transfers of recreational marijuana for remuneration. *See Local Budget Autonomy Act of 2012*, 60 D.C. Reg. 1724 (July 25, 2013); Council of D.C. v. DeWitt, No. 2014 CA 2371 B, 2016 WL 1109117 (D.C. Super. Ct. Mar. 18, 2016); Chloe Sommers, *D.C. Superior Court Clears Hurdle for Legal Marijuana Sales*, MARIJUANA TIMES (Mar. 30, 2016), <https://www.marijuanatimes.org/d-c-superior-court-clears-hurdle-for-legal-marijuana-sales>; *see also supra* note 34.

<sup>38</sup> *See* Letter from Lance H. Olson, Partner, Olson Hagel & Fishburn L.L.P., to Ashley Johansson, Initiative Coordinator, Office of the Attorney Gen. (Dec. 7, 2015), [https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20\(Marijuana\)\\_1.pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20(Marijuana)_1.pdf); 2016 *California Ballot Measures Election Results*, POLITICO, <http://www.politico.com/2016-election/results/map/ballot-measures/california> (last updated Dec. 13, 2016, 1:57 PM); Marijuana Legalization



of retail marijuana began in Colorado in January 2014,<sup>39</sup> in Washington in July 2014,<sup>40</sup> in Oregon in October 2015,<sup>41</sup> and in Alaska in October 2016.<sup>42</sup> Licensing of retail marijuana stores is scheduled to begin in California in January 2018,<sup>43</sup> in Massachusetts in July 2018,<sup>44</sup> and in Nevada in early 2018.<sup>45</sup> There is not yet a target start date for Maine.<sup>46</sup> Many of the issues raised herein apply equally to all of the states that have legalized retail marijuana sales, though this Article focuses on just one state's laws to avoid duplicative analysis.<sup>47</sup> This Section outlines

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Act, ME. REV. STAT. ANN. tit. 7 §§ 2441–2454 (2004), <http://www.regulatemaine.org/wp-content/uploads/2015/10/initiative-text.pdf>; *2016 Maine Ballot Measures Election Results*, POLITICO, <http://www.politico.com/2016-election/results/map/ballot-measures/maine> (last updated Dec. 13, 2016, 1:57 PM); *2016 State Election Question 4: Legalization, Regulation, and Taxation of Marijuana*, SECRETARY OF THE COMMONWEALTH OF MASS., [http://www.sec.state.ma.us/ele/ele16/full\\_text-question-4.htm](http://www.sec.state.ma.us/ele/ele16/full_text-question-4.htm) (last visited Mar. 2, 2017); *2016 Massachusetts Ballot Measures Election Results*, POLITICO, <http://www.politico.com/2016-election/results/map/ballot-measures/massachusetts> (last updated Dec. 13, 2016, 1:57 PM); BARBARA K. CEGAVSKE, SEC'Y OF STATE, STATE OF NEVADA: STATEWIDE BALLOT QUESTIONS 2016, at 14–17 (2016), <http://nvsos.gov/sos/home/showdocument?id=4434>; *2016 Nevada Ballot Measures Election Results*, POLITICO, <http://www.politico.com/2016-election/results/map/ballot-measures/nevada> (last updated Dec. 13, 2016, 1:57 PM).

<sup>39</sup> See Michael Martinez, *Colorado's Recreational Marijuana Stores Make History*, CNN, <http://www.cnn.com/2013/12/31/us/colorado-recreational-marijuana> (last updated Jan. 1, 2014, 8:47 PM).

<sup>40</sup> See Kirk Johnson, *Sales of Recreational Marijuana Begin in Washington State*, N.Y. TIMES, July 9, 2014, at A12.

<sup>41</sup> See Or. Liquor Control Comm'n, *Frequently Asked Questions*, OREGON.GOV, [http://www.oregon.gov/olcc/marijuana/Pages/Frequently-Asked-Questions.aspx#Personal\\_Use](http://www.oregon.gov/olcc/marijuana/Pages/Frequently-Asked-Questions.aspx#Personal_Use) (last visited Feb. 8, 2017) (noting that limited quantities of recreational marijuana became available for sale by participating medical marijuana dispensaries on October 1, 2015, and that licensing of retail stores was scheduled to begin in fall 2016).

<sup>42</sup> Laurel Andrews, *Marijuana Milestone: Alaska's First Pot Shop Opens to the Public in Valdez*, ALASKA DISPATCH NEWS (Oct. 29, 2016), <https://www.adn.com/alaska-marijuana/2016/10/29/anticipation-builds-as-alaskas-first-marijuana-store-set-to-open-to-the-public>.

<sup>43</sup> Melia Robinson, *Here's When You Can Start Legally Buying Weed in States that Just Legalized It*, BUS. INSIDER (Nov. 10, 2016, 11:16 AM), <http://www.businessinsider.com/when-can-you-buy-legal-weed-2016-11>.

<sup>44</sup> David Ingram, *Massachusetts Delays Retail Sales of Marijuana Six Months*, BANGOR DAILY NEWS (Dec. 28, 2016, 7:46 PM), <http://bangordailynews.com/2016/12/28/politics/massachusetts-delays-retail-sales-of-marijuana-six-months> (reporting that Massachusetts legislators voted to delay the licensing of retail marijuana stores until July 1, 2018).

<sup>45</sup> See *Retail Marijuana: Frequently Asked Questions*, NEV. DEP'T. OF TAX'N., [https://tax.nv.gov/FAQs/Retail\\_Marijuana](https://tax.nv.gov/FAQs/Retail_Marijuana) (last visited Jan. 12, 2017) (stating that the Department of Taxation has one year after the law's January 1, 2017, effective date to implement regulations and begin accepting license applications).

<sup>46</sup> See Robinson, *supra* note 43 (stating that retail sales in Maine may be delayed “possibly for years”).

<sup>47</sup> This Article examines Colorado's laws rather than those of the other states that have legalized recreational marijuana sales because Colorado was the first state in which retail marijuana stores actually opened. Its retail marijuana laws are fairly well developed, in contrast to states that have just recently legalized recreational marijuana sales and have not yet promulgated regulations (e.g., Maine). The partnership law issues raised below would be equally relevant in any of the other states that has legalized recreational marijuana sales, given

Colorado's retail<sup>48</sup> marijuana laws and briefly considers whether those laws are preempted by the CSA.

### 1. The Colorado State Laws

The 2012 ballot initiative that amended the Colorado constitution to legalize retail marijuana sales added section 16, Personal Use and Regulation of Marijuana (Retail Marijuana Amendment),<sup>49</sup> to the state's constitution. The Retail Marijuana Amendment makes personal use of marijuana legal for persons twenty-one and older and declares an intent that marijuana be taxed and regulated in a manner similar to alcohol.<sup>50</sup> Among other things, it legalizes the retail sale of marijuana and requires the Colorado Department of Revenue to adopt regulations necessary to implement the Retail Marijuana Amendment's provisions relating to retail marijuana sales.<sup>51</sup>

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that each of them (except for Massachusetts) has adopted the Uniform Partnership Act (1997) promulgated by the Uniform Law Commission (Uniform Partnership Act (1997)). See Uniform Partnership Act, ALASKA STAT. §§ 32.06.201–.06.997 (2007); Uniform Partnership Act of 1994, CAL. CORP. CODE §§ 16100–16962 (West 2014); Colorado Uniform Partnership Act (1997), COLO. REV. STAT. ANN. §§ 7-64-101 to -1206 (West 2006); Uniform Partnership Act of 2010, D.C. CODE ANN. §§ 29-601.01 to -611.01 (West 2015); Uniform Partnership Act, ME. REV. STAT. ANN. tit. 31, §§ 1001–1105 (2011); Uniform Partnership Act (1997), NEV. REV. STAT. ANN. §§ 87.4301–.4357 (West 2005); Oregon Revised Partnership Act, OR. REV. STAT. §§ 67.005–67.990 (2016); Washington Revised Uniform Partnership Act, WASH. REV. CODE §§ 25.05.005–.05.907 (2016); see also *infra* note 138. Accordingly, the partnership act of each state that has adopted the Uniform Partnership Act (1997) has language pertaining to partnership dissolution substantially identical to § 7-64-801(1)(d) of the Colorado Uniform Partnership Act (1997), discussed below. See ALASKA STAT. § 32.06.801(4); CAL. CORP. CODE § 16801(4); COLO. REV. STAT. § 7-64-801(1)(d); D.C. CODE ANN. § 29-608.01(4); ME. REV. STAT. ANN. tit. 31, § 1081(4); NEV. REV. STAT. ANN. § 87.4351(4); OR. REV. STAT. § 67.290(4); WASH. REV. CODE § 25.05.300(4); see also *infra* notes 105–09 and accompanying text. Though Massachusetts has not adopted the Uniform Partnership Act (1997), its partnership act contains the same concept as § 7-64-801(1)(d) of the Colorado Uniform Partnership Act (1997). See Uniform Partnership Act, MASS. GEN. LAWS ANN. ch. 108A, § 31(3) (West 2011) (providing for dissolution upon the occurrence of “any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership”). Because all of these states' partnership acts contain substantially similar language pertaining to partnership dissolution, the same problems identified in this Article could arise under any of these states' marijuana laws. See *infra* notes 128–37 and accompanying text.

<sup>48</sup> Both medical and recreational marijuana sales have been legalized in Colorado. See Colorado Medical Marijuana Code, COLO. REV. STAT. ANN. §§ 12-43.3-101 to -1102 (West 2010) (Medical Marijuana Code); Colorado Retail Marijuana Code, COLO. REV. STAT. ANN. §§ 12-43.4-101 to -1101 (West 2010). To avoid repetition, this Article focuses primarily upon the laws pertaining to retail marijuana.

<sup>49</sup> COLO. CONST. art. XVIII, § 16.

<sup>50</sup> *Id.* § 16, cl. 1(a), (b), 3–4.

<sup>51</sup> See *id.* § 16, cl. 4–5.

After the Retail Marijuana Amendment was added to the state constitution, the Colorado General Assembly passed the Colorado Retail Marijuana Code (Code).<sup>52</sup> The Code generally sets out the state licensing rules and procedures for businesses that plan to engage in retail marijuana sales and empowers a newly created state licensing authority (now known as the “Marijuana Enforcement Division,” a division of Colorado’s Department of Revenue) to promulgate rules for the regulation and control of the retail marijuana business.<sup>53</sup> Further, the Code makes it unlawful to buy, sell, or otherwise acquire or transfer retail marijuana except in compliance with the Code and with the Retail Marijuana Amendment.<sup>54</sup>

Finally, in 2013 the Marijuana Enforcement Division adopted a set of rules (Rules)<sup>55</sup> regulating the licensing and operation of businesses engaged in the retail sale of marijuana as permitted by the Rules, the Code, and the Retail Marijuana Amendment (such laws, collectively, the “Marijuana Laws,” and such businesses, “Retail Marijuana Businesses”). The Rules lay out detailed procedures for applying for retail marijuana licenses from the Marijuana Enforcement Division, requirements for premises licensed to house Retail Marijuana Businesses’ operations, and regulations governing the operation of various types of Retail Marijuana Businesses, including stores and cultivation, manufacturing, and testing facilities, among other things.<sup>56</sup> The Rules also authorize the Marijuana Enforcement Division to enforce the Marijuana Laws, including by making arrests for violations of those laws.<sup>57</sup>

## 2. Federal Preemption of the Marijuana Laws

When states and the federal government regulate the same subject matter, the question arises which one takes precedence in the case of conflict. This question—the question of preemption—is a complicated one as it pertains to whether the CSA preempts the Marijuana Laws.<sup>58</sup> The preemption doctrine arises out of the Constitution’s Supremacy

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<sup>52</sup> Colorado Retail Marijuana Code, COLO. REV. STAT. §§ 12-43.4-101 to -1101.

<sup>53</sup> See *id.* §§ 12-43.4-201 to -701.

<sup>54</sup> *Id.* § 12-43.4-901(2)(a).

<sup>55</sup> See Retail Marijuana Code, 1 COLO. CODE REGS. § 212-2 (2013) (amended 2017).

<sup>56</sup> See *id.* §§ 212-2.201 to -712.

<sup>57</sup> See *id.* § 212-2.1201.

<sup>58</sup> As constitutional law is not this Article’s focus, the discussion of preemption herein is brief. For an in-depth discussion of the preemption issues described in this Section, see Chemerinsky et al., *supra* note 9, at 102–13; Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147, 158–62 (2012); Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 9–15 (2013) [hereinafter Mikos, *Preemption*].

Clause, which provides that federal law is the “supreme Law of the Land,” such that federal law supersedes conflicting state laws.<sup>59</sup> Courts have found preemption to occur when Congress includes express preemption language within a statute, when “Congress intends federal law to occupy the field,” when it is impossible to comply simultaneously with both state and federal law, and when the state law frustrates the purpose or operation of the federal law.<sup>60</sup> Thus, the CSA could preempt the Marijuana Laws if it were found that an impermissible “conflict” (in any of these senses) exists between the Marijuana Laws and the CSA.<sup>61</sup>

Countervailing the preemption doctrine is the Tenth Amendment’s anti-commandeering doctrine, which prevents the federal government from forcing states to enact laws or requiring state officers to assist in enforcing federal laws within the state.<sup>62</sup> Under the anti-commandeering doctrine, “[a] state can constitutionally decide not to criminalize conduct under state law even if such conduct offends federal law. While states cannot stop the federal government from enforcing federal law within their territory, the federal government cannot command the state to create a law criminalizing the conduct.”<sup>63</sup> Accordingly, the anti-commandeering doctrine prevents the federal government from requiring states to enact or maintain laws that criminalize marijuana sales.<sup>64</sup>

Section 903 of the CSA contains express language pertaining to preemption, providing that the CSA trumps state law in the event of a “positive conflict”:

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.<sup>65</sup>

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<sup>59</sup> U.S. CONST. art. VI, cl. 2.

<sup>60</sup> See Chemerinsky et al., *supra* note 9, at 105.

<sup>61</sup> See *id.* at 102.

<sup>62</sup> See U.S. CONST. amend. X; *Printz v. United States*, 521 U.S. 898, 912 (1997) (noting “state legislatures are *not* subject to federal direction” and rejecting the idea that state officers would have to participate actively in implementing federal law); *New York v. United States*, 505 U.S. 144, 162 (1992) (“While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”).

<sup>63</sup> Chemerinsky et al., *supra* note 9, at 103.

<sup>64</sup> *Id.* at 102–03.

<sup>65</sup> Controlled Substances Act, 21 U.S.C. § 903 (2012).

Some scholars have argued that the CSA does not preempt state marijuana laws because section 903's preemption language is written narrowly.<sup>66</sup> Among these, leading constitutional law scholar Dean Erwin Chemerinsky et al. argue that there is no "positive conflict" between permissive state laws and the CSA as required for preemption under section 903 because

[i]t is not physically impossible to comply with both the CSA and state marijuana laws[, since] nothing in the more liberal state laws requires anyone to act contrary to the CSA. Only if a state law required a citizen to possess, manufacture, or distribute marijuana in violation of federal law would it be impossible for a citizen to comply with both state and federal law.<sup>67</sup>

Courts that have applied section 903 in challenges to state marijuana laws have tended to read it more broadly<sup>68</sup> than Chemerinsky et al. do, though they have not ruled uniformly either for or against preemption.<sup>69</sup> This lack of uniformity reflects the fact that the Supreme

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<sup>66</sup> See, e.g., Chemerinsky et al., *supra* note 9, at 107 ("[T]he CSA does not preempt more lenient state marijuana laws because such state laws are consistent with the CSA's purposes and objectives."); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1423–24 (2009) ("States may continue to legalize marijuana because Congress has not preempted—and more importantly, may not preempt—state laws that merely permit (i.e., refuse to punish) private conduct the federal government deems objectionable.")

<sup>67</sup> Chemerinsky et al., *supra* note 9, at 106.

<sup>68</sup> See Mikos, *Preemption*, *supra* note 58, at 13–15 (observing instances in which courts struck down state marijuana laws based on an assumption that Congress intended the CSA to preempt all conflicts).

<sup>69</sup> Cases in which courts found the CSA preempted state marijuana laws include *People v. Crouse*, 2017 CO 5, ¶ 8 (state medical marijuana law requiring law enforcement officials to return seized medical marijuana to patients was preempted because of a positive conflict with the CSA); *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225, 1230 (D.N.M. 2016) (finding state medical marijuana laws did not compel employer to accommodate employee's medical marijuana use because of conflict with the CSA); *Forest City Residential Management ex rel. Plymouth Square Dividend Housing Ass'n v. Beasley*, 71 F. Supp. 3d 715, 727 (E.D. Mich. 2014) (state medical marijuana statute conflicted with CSA and was therefore preempted); *Montana Caregivers Ass'n v. United States*, 841 F. Supp. 2d 1147, 1148 (D. Mont. 2012), *aff'd*, 526 F. App'x 756 (9th Cir. 2013) (medical marijuana raid was not unconstitutional because CSA trumped state medical marijuana statute); and *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*, 230 P.3d 518, 529 (Or. 2010) (state statute affirmatively authorizing medical marijuana use was preempted as an obstacle to the implementation of the CSA's purposes and objectives). Courts finding no preemption include *In re Rent-Rite Super Kegs West Ltd.*, 484 B.R. 799, 805 (Bankr. D. Colo. 2012) (finding no preemption of the Retail Marijuana Amendment or the section of Colorado's constitution authorizing medical marijuana use because "both make it clear that their provisions apply to state law only" and "[a]bsent from either enactment is any effort to impede the enforcement of federal law" (footnote omitted) (citation omitted)); *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 141 (Ariz. 2015) (finding no preemption of state medical marijuana statute by the CSA for lack of a positive conflict and commenting that "the CSA does not expressly preempt state drug laws or exclusively govern the field"); *Kirby v. County of Fresno*, 195 Cal. Rptr. 3d 815, 832 (Ct. App. 2015), *review denied*,

Court has not yet spoken definitively on this issue.<sup>70</sup> The Court's ultimate ruling on the CSA's preemptive power is somewhat difficult to predict.<sup>71</sup>

In light of the uncertainties regarding the CSA's preemptive power—and for the sake of argument—this Article assumes that the CSA does not preempt the Marijuana Laws. That is to say, this Article assumes that the use and sale of marijuana in accordance with the Marijuana Laws is legal under Colorado state law but illegal under federal law.

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(Ct. App. 2016) (state statute preventing arrest of medical marijuana users with a qualifying identification card for certain medical marijuana-related activities was not preempted by the CSA); and *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 541 (Mich. 2014) (state medical marijuana statute was not preempted because there was no positive conflict with the CSA).

<sup>70</sup> The Supreme Court has touched upon the CSA's preemptive power in *Gonzales v. Raich*, in which the Court held that the CSA was a valid use of Congress's power to regulate under the Commerce Clause, even as applied to use of medical marijuana that was permitted under California law. 545 U.S. 1, 9 (2005). Some courts have relied upon *Raich* in suggesting that the CSA generally preempts state law regulating marijuana. *See, e.g.*, *United States v. McWilliams*, 138 F. App'x 1, 2 (9th Cir. 2005) (stating *Raich* forecloses the argument that compliance with state medical marijuana act provides a shield against criminal liability under the CSA and suggesting the CSA preempts state law); *United States v. Washington*, 887 F. Supp. 2d 1077, 1100 (D. Mont. 2012), *adhered to on reconsideration*, No. CR 11-61-M-DLC, 2012 WL 4602838 (D. Mont. Oct. 2, 2012) (stating that, after *Raich*, "under the Supremacy Clause of the Constitution there is no viable Tenth Amendment claim based on federal prosecution of marijuana distribution activity that is legal under state law"). Yet the Court in *Raich* did not expressly state that the California law was preempted; based on this, other courts have declined to interpret *Raich* as standing for the proposition that the CSA preempts state marijuana laws. *Accord* *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 825 (Ct. App. 2008); *see* *White Mountain Health Ctr., Inc. v. Maricopa County*, 386 P.3d 416, 429 n.18 (Ariz. Ct. App. 2016) ("*Raich* addressed whether the CSA's criminalization of marijuana... was constitutional under the Commerce Clause, not whether state laws permitting medical marijuana were preempted by the CSA."); *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 673 (Ct. App. 2007), *cert. denied*, 555 U.S. 1044 (2008) (noting the sole issue in *Raich* was not preemption, but rather "whether Congress had the constitutional authority under the Commerce Clause to prohibit the manufacture and possession of marijuana"); *see also* Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1490 (2006) (observing that the Supreme Court did not invalidate California's marijuana laws on preemption or other grounds); Mikos, *Preemption*, *supra* note 58, at 101 (noting the Supreme Court has not yet opined upon whether the CSA preempts state marijuana laws). Further muddling the debate, the Supreme Court also cautioned in *Printz v. United States* that the anti-commandeering rule is limited in scope, observing that it does not eliminate state officials' duty "to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law." 521 U.S. 898, 913 (1997).

<sup>71</sup> *See* David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 625 (2013) ("[I]t is far from clear that a majority of the Supreme Court will redefine anti-commandeering doctrine at the expense of preemption in order to save state marijuana legalization laws.").

### C. *Application of the Marijuana Laws to Partnerships*

With this understanding of the Marijuana Laws in place, the next question is why those laws matter to partnerships. Quite simply, the Marijuana Laws matter to partnerships because the laws implicitly authorize partnerships to participate in the Retail Marijuana Business. The Retail Marijuana Amendment declares it not unlawful to do, among many other things, the following: purchase marijuana from a “marijuana cultivation facility” or “marijuana product manufacturing facility”;<sup>72</sup> sell marijuana to consumers pursuant to a valid license to operate a “retail marijuana store”;<sup>73</sup> deliver or transfer marijuana to a “marijuana testing facility”;<sup>74</sup> or sell marijuana to a “marijuana cultivation facility, a marijuana product manufacturing facility, or a retail marijuana store” pursuant to a valid license to operate a “marijuana cultivation facility.”<sup>75</sup> Each of these terms is defined in the Retail Marijuana Amendment’s definitions section, and each definition begins with the phrase “means an entity”—as in, “‘Marijuana testing facility’ means an entity licensed to analyze and certify the safety and potency of marijuana.”<sup>76</sup> “Entity” is not itself a defined term in the Retail Marijuana Amendment.<sup>77</sup> But, both according to the ordinary meaning of the term,<sup>78</sup> and also specifically under the Colorado Uniform Partnership Act (1997) (Partnership Act)<sup>79</sup> and the Colorado Corporations and Associations Act,<sup>80</sup> a general partnership or limited liability partnership (LLP) is an “entity.”<sup>81</sup> Therefore, since the Retail

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<sup>72</sup> COLO. CONST. art. XVIII, § 16, cl. 4(b).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* § 16, cl. 4(c).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* § 16, cl. 2(l) (emphasis added).

<sup>77</sup> *See id.* § 16, cl. 2 (definitions section).

<sup>78</sup> *Black’s Law Dictionary* defines “entity” as “[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members or owners.” *Entity*, BLACK’S LAW DICTIONARY (10th ed. 2014). Partnerships under the Colorado Uniform Partnership Act (1997) clearly fit within this definition.

<sup>79</sup> Colorado Uniform Partnership Act (1997), COLO. REV. STAT. ANN. §§ 7-64-101 to -1206 (West 2006).

<sup>80</sup> Colorado Corporations and Associations Act, COLO. REV. STAT. ANN. §§ 7-90-101 to -1005 (West 2006).

<sup>81</sup> Section 7-64-201 of the Partnership Act provides “[a] partnership is an entity distinct from its partners.” § 7-64-201. “Partnership,” as used here, refers to both general and limited liability partnerships: the Partnership Act’s definitions section defines “partnership” by reference to the meaning set forth in section 7-64-202(1), which in turn provides, in relevant part, that “[a] limited liability partnership is for all purposes a partnership.” *Id.* §§ 7-64-101(19), -202(1). Section 7-90-102(20) of the Colorado Corporations and Associations Act defines “entity” as “a domestic entity or a foreign entity.” *Id.* § 7-90-102(20). The term “domestic entity” is defined to include, in relevant part, “a domestic general partnership.” *Id.* § 7-90-102(13).

Marijuana Amendment contemplates that the various marijuana-related activities listed therein will be engaged in by “entities,” the amendment permits general partnerships and LLPs—as “entities”—to engage in those activities.

While the Retail Marijuana Amendment implicitly refers to partnerships in its definitions that use the term “entity,” the Code does so explicitly by means of various definitions and operative provisions contemplating actions by “persons.” For instance, the Code provides that the state will issue licenses to various “persons”—including retail marijuana stores, retail marijuana cultivation facilities, retail marijuana products manufacturers, and retail marijuana testing facilities—for the purpose of cultivating, manufacturing, distributing, selling, and testing retail marijuana and related products.<sup>82</sup> “Person” is defined, in relevant part, as “a natural person, *partnership*, association, company, corporation, limited liability company, or organization.”<sup>83</sup> Accordingly, the Code provides that partnerships are one type of “person” that may engage in the Retail Marijuana Business pursuant to the Retail Marijuana Amendment and the Code (such a partnership, a “Retail Marijuana Partnership”).

The Rules implicate partnerships in much the same way as do the Retail Marijuana Amendment and the Code, and also discuss partnerships explicitly. Like the Retail Marijuana Amendment, the Rules define each of the various retail marijuana businesses—retail marijuana cultivation facilities, retail marijuana products manufacturing facilities, and retail marijuana stores—as an “entity.”<sup>84</sup> This means a partnership could operate any of these retail marijuana businesses under the Rules, since the term “entity” comprises partnerships. Further, like the Code, the Rules include partnerships in the definition of “Person.”<sup>85</sup> This term is relevant because the Rules also define an “Applicant” for a retail marijuana license under the Rules and a “Licensee” holding a retail

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<sup>82</sup> See Colorado Retail Marijuana Code, COLO. REV. STAT. § 12-43.4-401(1) (2010). Additionally, a “licensee” is “a *person* licensed or registered pursuant to [the Code].” *Id.* § 12-43.4-103(5) (emphasis added). “Retail marijuana cultivation facility,” “retail marijuana products manufacturer,” “retail marijuana store,” and “retail marijuana testing facility” are all defined in section 12-43.4-103 of the Code by reference to their corresponding terms in the Retail Marijuana Amendment. See *id.* § 12-43.4-103(16), (19), (20), (21); COLO. CONST. art. XVIII, § 16, cl. 2(h), (j), (l), (n); see also *supra* text accompanying note 76.

<sup>83</sup> COLO. REV. STAT. § 12-43.4-103(13) (emphasis added).

<sup>84</sup> See Retail Marijuana Code, 1 COLO. CODE REGS. § 212-2.103 (2013) (amended 2017). Unlike the Retail Marijuana Amendment, the Rules define “Retail Marijuana Testing Facility” as a “public or private laboratory,” rather than an “entity.” See *id.*

<sup>85</sup> *Id.* (defining “Person,” in relevant part, as “a natural person, *partnership*, association, company, corporation, limited liability company, or organization” (emphasis added)).



marijuana license under the Code as a “Person.”<sup>86</sup> Putting this together, a partnership is a “Person” that could be an “Applicant” or a “Licensee” under the Rules. Moreover, the intent to permit partnerships to engage in the Retail Marijuana Business is clear in several of the Rules that expressly refer to general partnerships, LLPs, and limited partnerships (LPs) as “Closely Held Business Entit[ies]” that may be “Applicants” for retail marijuana licenses.<sup>87</sup> In sum, all of the Marijuana Laws are consistent in that they permit partnerships<sup>88</sup> to engage in the Retail Marijuana Business.

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<sup>86</sup> See *id.* (defining “Applicant” as “a Person that has submitted an application for licensure or registration, or for renewal of licensure or registration, pursuant to [the Rules] that was accepted by the Division for review but has not been approved or denied by the State Licensing Authority” and “Licensee” as “any Person licensed or registered pursuant to the [Code]”).

<sup>87</sup> See *id.* § 212-2.201(A)(4)(e)(iii)(D), 205(C). The Rules define “Closely Held Business Entity” as an “entity” under section 7-90-102 of the Colorado Corporations and Associations Act that has no more than fifteen owners, each of whom is a natural person and a U.S. citizen, and each of whom has an “Associated Key License,” as defined in the Rules. *Id.* § 212-2.103; see *supra* note 81 regarding the definition of “entity” under the Colorado Corporations and Associations Act.

<sup>88</sup> As a technical matter, it should be noted that “partnership,” as used in section 12-43.4-103(13) of the Code and rule 103 of the Rules, almost certainly includes LPs, though nowhere in the Marijuana Laws is the term “partnership” expressly defined. See COLO. CONST. art. XVIII, § 16, cl. 2 (definitions); Colorado Retail Marijuana Code, COLO. REV. STAT. § 12-43.4-103 (same); Retail Marijuana Code, 1 COLO. CODE REGS. § 212-2.103 (same). The term “partnership” as used in the Partnership Act includes only those partnerships that are formed under title 7, articles 60 or 64 of the Colorado Revised Statutes and comparable statutes of other jurisdictions—i.e., the statutes governing general and limited liability partnerships. See Colorado Uniform Partnership Act (1997), COLO. REV. STAT. § 7-64-202(2) (“[A]n association is not a partnership under this article if it is formed under a statute other than: (a) [Article 64]; (b) Article 60 of this title; or (c) A comparable statute of another jurisdiction.”). Thus, an LP is not a “partnership” under the Partnership Act. This exclusion in the Partnership Act is clearly intentional. The *second sentence* of section 7-60-106(2) of the Partnership Act’s predecessor statute, Colorado’s Uniform Partnership Law, provides that article 60 “appl[ies] to limited partnerships except insofar as the statutes relating to such partnerships are inconsistent herewith.” Uniform Partnership Law, COLO. REV. STAT. § 7-60-106(2) (1963). Yet section 7-64-202(2)(c) of the Partnership Act, which is the more recent statute, provides that “[a] partnership that is subject to article 60 of this title by reason of the *first sentence* of subsection (2) of section 7-60-106 shall be deemed to be formed under article 60 for purposes of this subsection (2).” § 7-64-202(2)(c) (emphasis added). In other words, LPs—which are subject to Colorado’s Uniform Partnership Law only by operation of the *second sentence* of section 7-60-106(2)—are not “partnerships” under the Partnership Act. But given the broad and inclusive definition of “person” in the Code and in the Rules, it seems unlikely that the drafters intended to exclude LPs from the definition of “person” by not referring to them expressly. It is more plausible that the word “partnership” in this definition is intended to include all forms of partnerships recognized under Colorado law, including general partnerships, LLPs, and LPs. (Colorado also recognizes limited liability limited partnerships, which are omitted in this discussion to avoid unnecessary complication. See § 7-64-1002(1) (providing for registration of limited liability limited partnerships).) Bolstering the argument that the term “partnership” in the Code and the Rules includes LPs, the Rules specifically mention LPs as a type of entity that may be an “Applicant” thereunder. See § 212-2.205(C) (“If the Applicant for any license pursuant to the Retail Code is a general partnership, limited partnership, limited liability partnership . . .”). Even if a court did construe the term “partnership” in the Code’s and Rules’

## II. PARTNERSHIP FORMATION AND DISSOLUTION

To understand why the Marijuana Laws create problems for partnerships, it is important to understand the relevant Colorado laws governing partnerships, particularly—for this Article—with respect to partnership formation and dissolution. Colorado partnerships are governed by one of two partnership statutes. Partnerships<sup>89</sup> formed prior to January 1, 1998, are governed by Colorado's Uniform Partnership Law (Uniform Partnership Law).<sup>90</sup> Partnerships<sup>91</sup> formed after January 1, 1998, or those electing to be so covered, are governed by the Partnership Act.<sup>92</sup> This Article focuses upon the more recent statute, since new partnerships formed to engage in the Retail Marijuana Business would be subject to its provisions.

This Part first describes the formation of partnerships under the Partnership Act and then explains their dissolution under that statute. Next, it argues that, although the Marijuana Laws authorize partnerships to engage in the Retail Marijuana Business, partnerships legally cannot do so because partnership common law prevents them from forming for that purpose and because the Partnership Act would cause them to dissolve automatically if they were formed for that purpose. Finally, this Part presents three interpretations of Colorado law that, if adopted by a court, would avoid mandatory dissolution of Retail Marijuana Partnerships. It then concludes that a Colorado court would be unlikely to adopt these interpretations.

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definitions of “person” to exclude LPs because of the definition of “partnership” in the Partnership Act (which seems unlikely), an LP could plausibly fall under the catch-all category of an “organization” and be considered a “person” in that way. *See* §§ 12-43.4-103(13), 212-2.103 (including “organization” in the definition of “Person”).

<sup>89</sup> As used here, “partnerships” includes LLPs, as Colorado's Uniform Partnership Law also governs LLPs formed prior to January 1, 1998. *See* §§ 7-60-144 to -154 (provisions governing LLPs). Section 7-60-106 of Colorado's Uniform Partnership Law makes clear that an LLP is a “partnership” for purposes of such law. *Id.* § 7-60-106 (“A partnership . . . includes, without limitation, a limited liability partnership.”).

<sup>90</sup> §§ 7-60-101 to -154; *see* § 7-64-1205(1) (stating that the Partnership Act only governs partnerships formed after January 1, 1998, unless a partnership formed earlier elects to be governed by the Partnership Act pursuant to section 7-64-1205(2) thereof, or a partnership formed after that date is continuing the business of a partnership that dissolved pursuant to section 7-60-141 of the Uniform Partnership Law).

<sup>91</sup> Again, this includes both general and limited liability partnerships. *See supra* note 81.

<sup>92</sup> § 7-64-1205(1).

### A. Formation

It is relatively simple to form a partnership. In Colorado, “the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.”<sup>93</sup> As this implies, there is no statutorily required state filing necessary to form a general partnership, unless the partnership will be operated under a trade name.<sup>94</sup> The persons wishing to form a partnership may simply start operating as one (assuming they will not conduct business under a trade name), with or without a written contract governing their relationship, otherwise known as a partnership agreement.<sup>95</sup> To form an LLP, an association meeting the requirements for a general partnership need only file with the secretary of state a statement of registration containing the statutorily prescribed information.<sup>96</sup>

However, the formation of partnerships is not entirely without constraints. Relevant here, partnerships cannot be formed for an illegal purpose, or for a lawful purpose that will be pursued in an unlawful way.<sup>97</sup> Moreover, courts will not enforce partnership agreements

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<sup>93</sup> *Id.* § 7-64-202(1). The second clause of this provision reflects the fact that partnerships may be implied by law when the parties’ acts meet the statutory definition of a partnership. *See* *Yoder v. Hooper*, 695 P.2d 1182, 1187 (Colo. App. 1984), *aff’d*, 737 P.2d 852 (Colo. 1987); *see also* *Grau v. Mitchell*, 397 P.2d 488, 489 (Colo. 1964) (en banc) (defining partnership as a “contract, *express or implied*, between two or more competent persons to place their money, effects, labor or skill . . . into a business” (emphasis added)). “Business” is defined broadly to “include[] every trade, occupation, and profession.” § 7-64-101(2). The Retail Marijuana Business would clearly fall within the term “business.”

<sup>94</sup> The Colorado Revised Statutes require the filing of a statement of trade name with the secretary of state if a general partnership transacting business in Colorado will be operating under any name other than the true name of each of the partnership’s partners. COLO. REV. STAT. §§ 7-71-101, -103 (2004) (effective May 30, 2006). To avoid undue complication, this Article overlooks the related fees, licenses, etc. that may be required for the operation of various partnerships.

<sup>95</sup> *See* Colorado Uniform Partnership Act (1997), COLO. REV. STAT. ANN. § 7-64-101(20) (West 2006) (defining “Partnership agreement” as “the agreement, whether written, oral, or implied, among the partners that governs relations among the partners and between the partners and the partnership”); *see also* *W. Gas Processors, Ltd. v. Enron Gas Processing Co.*, CIV.A. No. 87-A-1472, 1988 WL 73307, at \*24 (D. Colo. July 7, 1988) (referring to a partnership agreement as a “contract”).

<sup>96</sup> § 7-64-1002(1), (3). The information required in a statement of registration includes the partnership’s name, the address of its principal office, and the name and address of its registered agent. *Id.* § 7-64-1002(3). *See supra* notes 81, 88 for a discussion of LLPs as partnerships.

<sup>97</sup> 59A AM. JUR. 2D *Partnership* § 53 (2016) (“A partnership formed for illegal purposes or to pursue a lawful purpose in an unlawful manner is invalid and unenforceable.” (footnotes omitted)); *see* *Mann v. Friden*, 287 P.2d 961, 964 (Colo. 1955) (en banc) (“A partnership can only be created by a contract of the parties and that contract is one whereby they agree to place their money, effects, labor and skill in a *lawful* business . . . .” (emphasis added)). In fact,

pertaining to partnerships formed for an illegal purpose, and generally decline to aid the parties in actions arising out of such partnerships.<sup>98</sup> This Article refers to this doctrine as the “illegal purpose doctrine.”

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associations of two or more persons to carry out an illegal purpose may constitute conspiracies. See *Lockwood Grader Corp. v. Bockhaus*, 270 P.2d 193, 196 (Colo. 1954) (en banc) (elements of civil conspiracy under Colorado law are “(1) two or more persons . . . ; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof”); *Denver Jobbers’ Ass’n v. People*, 21 Colo. App. 326, 370 (1912) (“A combination of two or more persons to effect an illegal purpose, either by legal or illegal means . . . is a common-law conspiracy.” (quoting *State v. Stewart*, 59 Vt. 273, 286 (1887))).

<sup>98</sup> See *McMullen v. Hoffman*, 174 U.S. 639, 670 (1899) (refusing to grant relief to a partner in a partnership formed for the purpose of performing construction work won by the partners’ submitting separate, fictitious bids). As to the partnership agreement, the *McMullen* Court stated the following:

[N]o court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract.

*Id.* at 654; see also *Union Pac. Ry. Co. v. Kennedy*, 20 P. 696, 698–99 (Colo. 1889) (accounting and other relief refused for a partner invested in a quarry partnership that operated in violation of the U.S. homestead statutes on the ground that the partnership was invalid, noting where “both parties were to partake of the fruits to be derived from an act to be done in violation of [the] law. . . and the same is made to appear to a court of justice in an action brought to enforce the contract, the court simply leaves the parties where it finds them, and refuses any relief”); cf. *Sender v. Simon*, 84 F.3d 1299, 1307 (10th Cir. 1996) (finding a partnership agreement for a limited partnership an illegal contract and refusing to enforce it “based upon ‘the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction’” (quoting *Merrill v. Abbott*, 77 B.R. 843, 857 (Bankr. D. Utah 1987))). However, if it is possible to sever the illegal portion of a partnership agreement from the legal portion, courts may do so and enforce the legal portion. See *Union Pac. Ry. Co.*, 20 P. at 698 (observing that, if the legal part of a contract for a joint adventure “could be separated from the illegal part, then it might, perhaps, be considered as two contracts, and the legal contract enforced”). Additionally, a Colorado court’s willingness to enforce a partnership agreement for a Retail Marijuana Partnership may be influenced by a section of the Colorado Revised Statutes that declares 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 Retail Marijuana Amendment and the Code. COLO. REV. STAT. ANN. § 13-22-601 (West 2014). Before concluding that a Colorado court would enforce a partnership agreement for a Retail Marijuana Partnership on the basis of this provision, it is important to distinguish between illegality and violation of public policy. Both are grounds for refusal to enforce a contract. See *Waddell v. Traylor*, 64 P.2d 1273, 1275 (Colo. 1937) (en banc) (“Courts will not lend their aid to the enforcement of terms of a contract which will result in the consummation of a criminal act, or one contrary to the public policy of the state.”). However, they are distinct grounds. Not all conduct that violates public policy is illegal. For example, the Colorado Supreme Court has held that a waiver of attorney’s fees in a marital agreement would violate public policy and be unenforceable if one spouse lacked the financial resources to litigate the dissolution of the marriage. *In re Marriage of Ikeler*, 161 P.3d 663, 670 (Colo. 2007) (en banc). Yet such an agreement to waive attorney’s fees is not illegal; it is not a criminal act or otherwise in violation of applicable law. Retail marijuana sales pose a different problem: they are illegal, as a criminal violation of the CSA. And so, while section 13-22-601 would prevent a court from voiding a

### B. *Dissolution*

Formation is the beginning of the partnership, and dissolution is the beginning of its end. Dissolution is a technical concept referring to a change in the relation of the partners that ends a partnership's legal existence as a partnership.<sup>99</sup> Dissolution triggers the winding up process;<sup>100</sup> once dissolution occurs, the partnership continues only to wind up its business.<sup>101</sup> Winding up involves selling off the partnership's assets, settling accounts, and distributing proceeds to the partners.<sup>102</sup> Once the winding up process is complete, the partnership is terminated.<sup>103</sup>

The Partnership Act specifies various causes of dissolution.<sup>104</sup> Among these causes is “[a]n event that makes it unlawful for all or substantially all of the business of the partnership to be continued” unless such illegality is cured within ninety days after the partnership has notice of the event.<sup>105</sup> Dissolution under this provision is mandatory and automatic;<sup>106</sup> the Partnership Act does not merely provide a right for the partners to elect to dissolve in the face of unlawful activity or to petition a court to order dissolution for illegality.<sup>107</sup> Moreover, the mandatory dissolution provision cannot be waived or varied by agreement of the partners.<sup>108</sup> This means that once it becomes unlawful

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contract pertaining to retail marijuana because it violates Colorado's public policy, this section does not have the power to prevent such a contract from being voidable as illegal.

<sup>99</sup> See 59A AM. JUR. 2D *Partnership* § 539 (2016).

<sup>100</sup> *Id.*

<sup>101</sup> Colorado Uniform Partnership Act (1997), COLO. REV. STAT. ANN. § 7-64-802(1) (West 2006). The Partnership Act does, however, provide a means whereby partners may waive the right to terminate the partnership and have its business wound up, in which case the partnership carries on as if dissolution had never happened. See *id.* § 7-64-802(2).

<sup>102</sup> 59A AM. JUR. 2D *Partnership* § 539 (2016).

<sup>103</sup> § 7-64-802(1).

<sup>104</sup> See *id.* § 7-64-801(1).

<sup>105</sup> *Id.* § 7-64-801(1)(d).

<sup>106</sup> See *id.* § 7-64-801(1) (“A partnership is dissolved, and its business *shall* be wound up, only upon the occurrence of any of the following events . . .” (emphasis added)).

<sup>107</sup> However, section 7-64-801(1)(e) of the Partnership Act does permit partners to apply to the court for dissolution on various grounds, including that “[t]he economic purpose of the partnership is likely to be unreasonably frustrated” and “[i]t is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement.” *Id.* §§ 7-64-801(1)(e)(I), (III). If the partnership's business became unlawful, a partner could presumably petition the court to order dissolution under one of these provisions.

<sup>108</sup> See *id.* § 7-64-103(2) (“The partnership agreement may not . . . [v]ary the requirement to wind up the partnership business in cases specified in section 7-64-801(1)(d) . . .”). Because “partnership agreement” is defined broadly, any agreement among the partners would constitute a “partnership agreement.” See *supra* note 95.

for a partnership's business to be continued the partnership dissolves and must, unavoidably, wind up.<sup>109</sup>

### C. *Interplay Between the Laws and the Problems Created*

With the foregoing partnership law background in mind, this Section argues that Colorado's legalizing retail marijuana sales by means of the Marijuana Laws has unintended consequences for partnerships because selling marijuana remains illegal under federal law. Specifically, it contends that partnerships cannot legally form to engage in the Retail Marijuana Business and that, if they were able to form for that purpose, they would automatically dissolve.

#### 1. Formation

As noted earlier, partnership common law provides that partnerships cannot be formed for an illegal purpose.<sup>110</sup> Thus, if the Retail Marijuana Business is "illegal," it follows logically that partnerships cannot be formed to engage in this business. A prospective partner in a Retail Marijuana Partnership might argue that a partnership is not formed for an illegal purpose if its business purpose is authorized under state law, regardless of whether this purpose is a violation of

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<sup>109</sup> It is worth noting that the situation would be different under the most recent version of the Uniform Partnership Act (1997), a prior version of which was the basis for the Partnership Act. *See infra* note 138. The Uniform Partnership Act (1997) was amended in 2013 to reflect efforts to harmonize all the uniform acts for unincorporated organizations. UNIF. P'SHIP ACT 6 (UNIF. LAW COMM'N 2015) (prefatory note to 2011 and 2013 harmonization amendments), [http://www.uniformlaws.org/Shared/Docs/Partnership/UPA%20\\_Final\\_2014\\_2015aug19.pdf](http://www.uniformlaws.org/Shared/Docs/Partnership/UPA%20_Final_2014_2015aug19.pdf). Among the harmonizing amendments were changes to section 801 of the Uniform Partnership Act (1997), the dissolution section. In relevant part, the amended section 801 reads as follows:

A partnership is dissolved, and its business must be wound up, upon the occurrence of any of the following: . . .

(4) on application by a partner, the entry, by [the appropriate court] of an order dissolving the partnership on the grounds that:

(A) the conduct of all or substantially all the partnership's business is unlawful . . .

*Id.* § 801. If the Partnership Act were amended to reflect this language, there would be little problem in practice with respect to partnership dissolution under Colorado's current marijuana regulatory regime. *See infra* text accompanying notes 128–40. It is unlikely that a partner in a Retail Marijuana Partnership would request a court order for dissolution on the grounds that its business is "unlawful"—unless, of course, there were a falling out among the partners and one partner were seeking dissolution under this provision because it could not be obtained by other means. And if this were to happen, it is possible that the court might disallow the dissolution application on the grounds of bad faith on the part of the complaining partner.

<sup>110</sup> *See supra* notes 97–98 and accompanying text.

federal law.<sup>111</sup> However, this argument does not comport with the generally understood meaning of “illegal.” *Black’s Law Dictionary* defines illegal as “[f]orbidden by law; unlawful.”<sup>112</sup> Similarly, the *Oxford English Dictionary* defines it as “[n]ot legal or lawful; contrary to, or forbidden by, law.”<sup>113</sup> Cases involving the illegal purpose doctrine have not adopted a meaning of “illegal” other than its ordinary meaning.<sup>114</sup> And, according to this plain meaning, the Retail Marijuana Business is “illegal” because federal law forbids it.

Nonetheless, a court could interpret the illegal purpose doctrine as permitting partnerships to form for a purpose authorized under state law, even if it is illegal under federal law. Though this is theoretically possible, nothing in the jurisprudence suggests that a court would do such a thing.<sup>115</sup> Cases that contemplate formation of partnerships for an illegal purpose do not tend to analyze the distinction between illegality under state versus federal law.<sup>116</sup> Moreover, in a different context, the Colorado Supreme Court has declined to declare marijuana use “lawful” for purposes of a state statute because it remains prohibited under federal law.<sup>117</sup> Even in states in which the sale of marijuana (for medical or recreational purposes) has been legalized under state law, the courts remain cognizant of the fact that selling marijuana remains “illegal” under federal law.<sup>118</sup> Accordingly, the illegal purpose doctrine should

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<sup>111</sup> See also *infra* text accompanying notes 167–76.

<sup>112</sup> *Illegal*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>113</sup> *Illegal*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

<sup>114</sup> See, e.g., *Union Pac. Ry. Co. v. Kennedy*, 20 P. 696, 697 (Colo. 1889) (partnership agreement was illegal as in violation of the U.S. homestead statutes); *Morelli v. Ehsan*, 756 P.2d 129, 132 (Wash. 1988) (en banc) (partnership agreement was illegal under state statutes barring the practice of medicine by unlicensed persons).

<sup>115</sup> In cases involving the illegal purpose doctrine it is often unnecessary for the court to consider both state and federal law because the business purpose at issue is clearly prohibited under a state statute. See, e.g., *Monar v. Hurt*, 791 N.E.2d 280, 283 (Ind. Ct. App. 2003) (partnership formed to operate gambling devices at bars and taverns was illegal under Indiana statutes); *Nahas v. George*, 99 N.E.2d 898, 901 (Ohio 1951) (partnership’s business of selling alcohol was in violation of the express provisions of the Ohio statute); *Morelli*, 756 P.2d at 132 (partnership to operate a medical clinic was illegal under Washington statutes barring the practice of medicine by unlicensed persons because it included a non-physician partner).

<sup>116</sup> E.g., *McMullen v. Hoffman*, 174 U.S. 639, 649 (1899) (finding agreements to make fraudulent bids for contracting work “illegal in their nature and tendency”); *Rutkin v. Reinfeld*, 229 F.2d 248, 255–56 (2d Cir. 1956) (partnership formed to import liquor into the United States in violation of the Constitution’s Prohibition Amendment was illegal); *Johnston v. Senecal*, 109 N.E.2d 467, 467–68 (Mass. 1952) (finding a partnership purpose of entertaining public officials to be illegal as a matter of public policy); *Nahas*, 99 N.E.2d at 901 (finding a purpose of selling alcohol without a liquor permit to be illegal under Ohio statutes and public policy).

<sup>117</sup> See *infra* text accompanying notes 152–55.

<sup>118</sup> E.g., *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 204 (Cal. 2008) (“No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users.” (citations omitted)); *People v. Crouse*, 2017 CO 5, ¶ 2 (“Distribution of marijuana . . . remains unlawful under federal law.”).

prevent Retail Marijuana Partnerships from forming as legally cognizable entities.

An issue that bears on whether a partnership formed to engage in the Retail Marijuana Business is legally cognizable is whether the state recognizes its formation. Such recognition could be administrative, for example, by accepting a filed trade name registration, or judicial, by enforcing rights under a partnership agreement or otherwise granting relief to the partnership and/or the partners. Either form of recognition would clearly appear to sanction Retail Marijuana Partnerships and imply that Colorado does recognize their formation, despite their being formed for an illegal purpose.<sup>119</sup>

This question of state recognition is particularly relevant for LLPs, since LLPs require the delivery of a statement of registration to the secretary of state.<sup>120</sup> After a qualifying statement of registration is

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<sup>119</sup> A similar concern comes up in the context of taxation—that is, does acceptance of a tax return from a business engaged in the marijuana trade constitute recognition of that business as a legitimate enterprise? The Internal Revenue Service (IRS) is able to avoid this quagmire in part because section 61(a) of the Internal Revenue Code, which defines “gross income,” does not “differentiate between income derived from legal sources and income derived from illegal sources.” I.R.S. Chief Counsel Memorandum 201504011 from Matthew A. Houtsma, Associate Area Counsel to W. Thomas McElroy, Jr. (Jan. 23, 2015) [hereinafter I.R.S. Chief Counsel Memorandum 201504011], <https://www.irs.gov/pub/irs-wd/201504011.pdf> (citing *James v. United States*, 366 U.S. 213, 218 (1961)); I.R.C. § 61(a) (2017). This means the IRS can collect federal income tax on the taxable income of a marijuana business while still acknowledging that the business is illegal under federal law. See I.R.S. Chief Counsel Memorandum 201504011, *supra*. Some other jurisdictions incorporate language in their tax documents that seeks to avoid the appearance of sanctioning illegal enterprises. For example, the City of San José, California Marijuana Business Tax Return specifies that paying the required municipal tax on marijuana businesses “does not authorize unlawful business.” CITY OF SAN JOSE FIN. DEP’T., MARIJUANA BUSINESS TAX RETURN (2013), <https://www.sanjoseca.gov/DocumentCenter/View/1280>. Of course, those who file tax returns for businesses that are illegal under federal law put themselves at risk of criminal prosecution. See, e.g., *United States v. Mick*, 263 F.3d 553, 567 (6th Cir. 2001) (federal income tax returns were admissible evidence in bookmaker’s criminal prosecution).

<sup>120</sup> The same problem arises for other types of business entities, including LPs, limited liability companies (LLCs), and corporations, as all of these are required to file organizational documents with the state—i.e., their formation requires some state action. See Colorado Uniform Limited Partnership Act of 1981, COLO. REV. STAT. ANN. § 7-62-201(1) (West 2006) (effective 1981) (certificate of limited partnership); Colorado Limited Liability Company Act, COLO. REV. STAT. ANN. § 7-80-204(1) (effective 1990) (LLC articles of organization); Colorado Business Corporation Act, COLO. REV. STAT. ANN. § 7-102-102(2)(b)(I) (effective Aug. 5, 2008) (articles of incorporation). This again raises the question of whether acknowledging their registration sanctions a business that remains illegal under federal law, and whether this sanction has any meaningful consequences. The other wrinkle related to filing organizational documents is the potential inclusion of a statement of purpose in those documents—specifically, including as the entities’ stated purpose engaging in the Retail Marijuana Business. None of these entities’ filings *requires* a statement of purpose. See § 7-62-201(1) (mandatory contents of a certificate of limited partnership do not include a statement of purpose); § 7-80-204(1) (mandatory contents of an LLC’s articles of organization do not include a statement of purpose); § 7-102-102(2)(b)(I) (“The articles of incorporation may but need not state: . . . [t]he purpose or purposes for which the corporation is incorporated . . .”). Neither does an LLP’s



delivered to the secretary, the secretary files it.<sup>121</sup> This filing is “conclusive” evidence that “all conditions precedent to registration” as an LLP have been met.<sup>122</sup> Thus, unlike formation of general partnerships, LLP formation requires state action. And, arguably, if the secretary of state files the statement of registration, the state has sanctioned the LLP’s formation.<sup>123</sup>

Does a Retail Marijuana Partnership’s legal existence truly depend upon whether the state has filed paperwork on that partnership’s behalf? Probably not—at least not for purposes of determining the rights of third parties in dealing with that partnership. The very way in which

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statement of registration require a statement of purpose. See Colorado Uniform Partnership Act (1997), COLO. REV. STAT. ANN. § 7-64-1002(3) (West 2006) (listing the mandatory contents of an LLP’s statement of registration). But organizers of an LP, LLC, or corporation could choose to include a statement of purpose in their filings. See § 7-62-201(1)(e) (certificate of limited partnership shall state “[a]ny other matters relating to the limited partnership or the certificate the general partners determine to include therein”); § 7-80-204(1)(h) (LLC articles of organization shall state “[a]ny other matters relating to the limited liability company or the articles of organization the persons forming the limited liability company determine to include therein”); § 7-102-102(2)(b)(I) (“[A]rticles of incorporation may but need not state: . . . [t]he purpose or purposes for which the corporation is incorporated . . .”). In contrast, the LLP statement of registration does not permit inclusion of optional information. See § 7-64-1002(3). An organizer who chooses to include in the filed organizational documents that the purpose of the entity is to engage in the Retail Marijuana Business runs the risk of drawing attention to the prohibition against formation for an illegal purpose (not to mention being engaged in a business prohibited under federal law). Even a statement that the purpose of the entity is to engage in any lawful act or activity for which such entity may be organized under the relevant state entity law (a common formulation) could be problematic, given that the Retail Marijuana Business is illegal under federal law and state entity law generally requires that the purpose for which entities are formed must be a lawful one. See, e.g., UNIF. LTD. P’SHP ACT 2001 § 104(b) (UNIF. LAW COMM’N 2001) (“A limited partnership may be organized under this [Act] for any lawful purpose.”); 18A AM. JUR. 2D *Corporations* § 159 (2016) (“Under most corporation statutes, corporations may be organized for any lawful business or purpose.”); 54 C.J.S. *Limited Liability Companies* § 1, Westlaw (databased updated 2016) (“A limited liability company may be formed for any lawful purpose . . .”). The safer course of action—albeit one that relies upon form over function—is to omit a statement of purpose altogether.

<sup>121</sup> See § 7-64-1002(1) (statement of registration as an LLP is delivered to the secretary of state for filing pursuant to part 3 of article 90, title 7); Colorado Corporations and Associations Act, COLO. REV. STAT. ANN. § 7-90-306(1) (West 2006) (providing that the secretary of state shall file a document delivered to the secretary for filing if it complies with the filing requirements set forth in § 7-90-301).

<sup>122</sup> § 7-64-1002(7).

<sup>123</sup> A contrary argument could be made on the basis of section 7-90-306(1) of the Colorado Revised Statutes, which provides that “[t]he secretary of state has no duty to determine whether the document [delivered to the secretary for filing] complies with any or all requirements of any law.” § 7-90-306(1). It is left to the person delivering the document to the secretary of state to affirm that the delivery of the document for filing is done “in conformity with the requirements of [part 3, article 90, title 7 of the Colorado Revised Statutes], the constituent documents, and the organic statutes, and that the individual in good faith believes . . . the document complies with . . . part 3, the constituent documents, and the organic statutes.” *Id.* § 7-90-301.5. In this vein, it can be argued that the secretary’s filing is purely ministerial and does not constitute the state’s sanction of the LLP’s business.

partnerships are formed—i.e., two or more persons associate as co-owners to carry on a business for profit—means that once persons do the acts that the law recognizes as forming a partnership, a partnership is formed. As noted above, the state is not necessarily involved in the formation of general partnerships unless they are operating under a trade name.<sup>124</sup> So, if two or more persons associate to carry on as co-owners the Retail Marijuana Business for profit, they will have formed a legally cognizable Colorado partnership, at least as between third parties and the partnership.<sup>125</sup>

This is a different question than the question of whether an association of persons who participate in the Retail Marijuana Business would be recognized as a partnership for purposes of determining their rights as among themselves. In this instance, there is not the same need to protect innocent parties—since all of the co-owners would necessarily not be innocent if they have come together to participate in an “illegal” business<sup>126</sup>—so there is not the same rationale for recognizing their association as a partnership and adjudicating the parties’ rights as if there were a partnership.<sup>127</sup> Thus, as between the co-owners, the illegal

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<sup>124</sup> See *supra* text accompanying notes 93–95.

<sup>125</sup> One primary reason why the law recognizes the partnership’s formation when third parties are concerned is to protect innocent third parties against loss. For example, if a person were hit by a truck owned by a partnership that was negligently driven by one of the partnership’s employees in the course of making a marijuana delivery on behalf of the partnership, the injured person could look not only to the partnership’s assets for recovery, but also to the individual partners’ assets if the partnership’s assets were insufficient to pay the judgment. See § 7-64-306(1) (partners are jointly and severally liable for partnership obligations); § 7-64-307(3), (4)(a) (a creditor may satisfy a claim against the partnership from a partner’s personal assets if the creditor obtains a judgment against both the partnership and such partner and a writ of execution against the judgment has gone unsatisfied in whole or in part). If the law provided otherwise, parties could escape such personal liability by conducting themselves as a partnership in practice but not formalizing the relationship as a “partnership” so as to avoid vicarious personal liability. Estoppel is another means by which the law seeks to prevent this result, both for partnerships and for other types of entities, such as corporations. See § 7-64-308 (liability of a purported partner); 8 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 3910, Westlaw (database updated Sept. 2016) (corporations by estoppel). The partnership formulation of estoppel, known in the Partnership Act as “liability of a purported partner,” provides that if a person represents himself as someone else’s partner (but is not actually partners with that other person), the purported partner will be liable to a third party who relied upon the representation of partnership and entered into a transaction with the “partnership” because of it. § 7-64-308(1). More broadly, the doctrine of estoppel provides that when a person contracts or otherwise deals with another as a part of a business entity, she is then estopped from later denying being a part of that entity in an action based upon or arising out of that contract or dealing. See 8 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 3910.

<sup>126</sup> See Scheuer, *supra* note 10, at 535 (suggesting that investors in marijuana businesses should not have limited liability because “a marijuana business’s entire purpose is to sell marijuana, a crime under federal law”).

<sup>127</sup> Along these lines, it is notable that the provisions for liability of a purported partner are included in Part III of the Partnership Act, Relations of Partners to Persons Dealing with

purpose doctrine should still apply to deny their association's existence as a legal partnership.

## 2. Dissolution

Even assuming, for the sake of argument, that partnerships could form to engage in the Retail Marijuana Business, their legal existence would be quite brief because of the Partnership Act's dissolution provisions. The problem lies in the relatively mundane term "unlawful" that appears in section 7-64-801(1)(d) of the Partnership Act. As discussed above,<sup>128</sup> this section provides that partnerships dissolve and must wind up if an event occurs that makes it "unlawful" for all, or substantially all, of their business to be continued. "Unlawful" is not defined, either for purposes of section 7-64-801(1)(d) or in the Partnership Act's definitions section.<sup>129</sup> Neither is "unlawful" qualified

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Partnership, and not in Part IV, Relations of Partners to Each Other and to Partnership. See Colorado Uniform Partnership Act (1997), COLO. REV. STAT. §§ 7-64-301 to -308 (Part III); § 7-64-401 to -406 (Part IV).

<sup>128</sup> See *supra* text accompanying notes 105–09.

<sup>129</sup> See §§ 7-64-101 (definitions section), -801 (dissolution section). Nor is the phrase "substantially all" defined. See § 7-64-101. The purpose of this phrase is made clear in comment 7 to section 801 of the Uniform Partnership Act (1997), which provides that "[t]he 'all or substantially all' proviso is intended to avoid dissolution for insubstantial or innocent regulatory violations." UNIF. P'SHIP ACT § 801 cmt. 7 (UNIF. LAW COMM'N 1997), [http://www.uniformlaws.org/shared/docs/partnership/upa\\_final\\_97.pdf](http://www.uniformlaws.org/shared/docs/partnership/upa_final_97.pdf). Thus, a partnership probably would not dissolve if, for example, it owned an ice cream truck that sold an ice cream bar in Denver twenty minutes after sunset, in violation of Denver city ordinances. See DENVER, COLO. REV. MUNICIPAL CODE ch. 23, art. III, § 23-54(7) (2016) (barring ice cream vendor sales between sunset and 10:00 a.m.). However, comment 7 does not address the question of exactly how much of the partnership's business must be unlawful before dissolution is triggered. Both the Code and the Rules permit retail marijuana stores to sell items other than marijuana, such as clothing. See Colorado Retail Marijuana Code, COLO. REV. STAT. ANN. § 12-43.4-402(7) (West 2010) (specifying products that licensed retail marijuana stores may sell, including "nonconsumable products such as apparel"); Retail Marijuana Code, 1 COLO. CODE REGS. § 212-2.402(H) (2013) (amended 2017) (prohibiting Retail Marijuana Stores from selling consumable products other than Retail Marijuana Products). Imagine a partnership that operates a retail marijuana store that sells both retail marijuana and marijuana-themed t-shirts. Is this partnership's business the sale of marijuana (unlawful under the CSA) or the sale of clothing (lawful)? If fifty percent of the partnership's revenue comes from marijuana sales and the other fifty percent comes from t-shirt sales, is the Retail Marijuana Business "substantially all" of this partnership's business? What if t-shirt sales constitute eighty percent of the partnership's revenue? Or is sales volume, rather than revenue, the relevant inquiry, assuming that marijuana commands a higher price than t-shirts on a per-unit basis? There is no Colorado case law providing guidance on the issue of what constitutes "substantially all" of a partnership's business. Some jurists have commented that the phrase seems to mean, roughly, "very slightly less than all." See *Cont'l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1155 (7th Cir. 1990) ("Substantially all" sounds like 'less than all, but not much less.');

Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342, 377 (Del. Ch. 2004) ("A fair and succinct equivalent to the term 'substantially all'

by reference to state law—section 7-64-801(1)(d) simply says a partnership dissolves if it becomes “unlawful” to continue its business. If “unlawful” is not expressly limited to state law, it seemingly refers to both state and federal law—which would mean that if a partnership’s business becomes unlawful under either state or federal law the partnership automatically dissolves. Therefore, strictly speaking, no general or limited liability partnership would be able to engage in the Retail Marijuana Business because even if the partnership were able to form for that purpose,<sup>130</sup> it would dissolve and would be required to wind up as soon as it had been formed.<sup>131</sup>

This interpretation of “unlawful” is consistent with dictionary definitions and the term’s plain meaning. *Black’s Law Dictionary* defines “unlawful” as “[n]ot authorized by law; illegal,” “[c]riminally punishable,” or “[i]nvolving moral turpitude.”<sup>132</sup> Similarly, the *Oxford English Dictionary* defines it as “[c]ontrary to law; prohibited by law; illegal.”<sup>133</sup> Like its synonym “illegal,”<sup>134</sup> “unlawful” is thus unbounded by

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would . . . be ‘essentially everything.’”). The Internal Revenue Service interprets “substantially all” to mean at least eighty-five percent of whatever is being measured. *See Cont’l Can Co.*, 916 F.2d at 1158 (noting that “[s]ubstantially all” is one of those phrases with a special legal meaning” and listing examples of tax statutes and regulations that quantify the phrase as meaning eighty-five percent or more). In keeping with these definitions, a Colorado court could decide that the Retail Marijuana Business constitutes “substantially all” of a partnership’s business if at least eighty-five percent of the partnership’s revenue (or sales volume, or profits, or some other quantifiable measure) comes from selling retail marijuana—though other factors (the parties’ written and oral agreements and conduct, the partnership’s tax filings, etc.) could certainly also be important to the court’s determination.

<sup>130</sup> This Article’s contention remains that partnerships cannot form to engage in the Retail Marijuana Business. *See supra* notes 110–27 and accompanying text.

<sup>131</sup> The landscape is less complicated for LPs, LLCs, and corporations on the subject of dissolution than it is for general and limited liability partnerships, in large part because of differences in the ways that the dissolution provisions in each entity’s governing statute are drafted. In brief, none of the statutes pertaining to LPs, LLCs, or corporations provides for the same type of automatic and unavoidable dissolution as does the Partnership Act in the event the entity’s business becomes unlawful. *See* Colorado Uniform Limited Partnership Act of 1981, COLO. REV. STAT. §§ 7-62-801 to -802 (providing for dissolution of LPs); Colorado Limited Liability Company Act, COLO. REV. STAT. §§ 7-80-801, -810 (providing for dissolution of LLCs); Colorado Business Corporation Act, COLO. REV. STAT. §§ 7-114-101 to -102.5 (providing for dissolution of corporations). Because of this, there is less reason to believe that the inconsistencies between state and federal marijuana law will be problematic for these other entities as pertains to dissolution. LLCs and corporations are theoretically vulnerable to a dissolution proceeding brought by the attorney general on the grounds that they are “exceed[ing] or abus[ing] the authority conferred upon [them] by law,” as permitted under the LLC and corporation statutes. *See* § 7-80-810 (LLCs); § 7-114-301 (corporations). Yet it is highly unlikely that Colorado’s attorney general would bring such a proceeding to attack a domestic entity for engaging in business specifically authorized under state statutory and regulatory authority. Thus, the unintended consequence of mandatory dissolution appears to be a problem only for general and limited liability partnerships.

<sup>132</sup> *Unlawful*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>133</sup> *Unlawful*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

reference to any particular source or body of law. Its plain meaning is inclusive of both state and federal law. As a matter of statutory construction, courts strive to interpret statutes in accordance with the plain meaning of their terms, unless there is a clear indication that some meaning other than the plain meaning was intended.<sup>135</sup> There is no indication in section 7-64-801(1)(d), or elsewhere in the Partnership Act, that “unlawful” has any other meaning than its plain meaning. Accordingly, “unlawful” should be given its ordinary meaning in construing section 7-64-801(1)(d).

Applying this ordinary meaning, the Retail Marijuana Business is unlawful. Though it is authorized by the Marijuana Laws, it is illegal, prohibited by law, and criminally punishable under the CSA. Unless it is somehow qualified, “unlawful” permits no equivocation—an activity either is unlawful or it is not. To be lawful (as in, not unlawful),<sup>136</sup> an activity must be wholly lawful; a fair interpretation of the term does not contemplate lawfulness (or unlawfulness) in part. This means that an activity that is permitted under state law but prohibited under federal law must be deemed unlawful, the same way that an activity that is permitted under federal law but prohibited under state law would be considered unlawful by that state.<sup>137</sup> And so, a judge should deem the Retail Marijuana Business “unlawful” for purposes of section 7-64-801(1)(d) of the Partnership Act when applying the plain meaning of the term.

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<sup>134</sup> See *supra* text accompanying notes 112–14. Section 7-64-801(1)(d) of the Partnership Act uses “illegal[]” in the second clause of the provision (i.e., “a cure of illegality within ninety days after the partnership has notice of the event is effective retroactively to the date of the event for purposes of this section”), which bolsters the argument that “unlawful,” as used here, is a synonym of “illegal.” See COLO. REV. STAT. § 7-64-801(1)(d); see also *People v. Barrus*, 232 P.3d 264, 268 (Colo. App. 2009) (“[T]he term ‘illegal’ is typically synonymous with the term ‘unlawful.’” (citing BLACK’S LAW DICTIONARY (8th ed. 2004))).

<sup>135</sup> See, e.g., *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (“The plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’ In such cases, the intention of the drafters, rather than the strict language, controls.” (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982))); *Marks v. Koch*, 284 P.3d 118, 123 (Colo. App. 2011) (“When a statute does not define its terms but the words used are terms of common usage, we may refer to dictionary definitions to determine the plain and ordinary meanings of those words.”).

<sup>136</sup> *Black’s Law Dictionary* defines “lawful” as “[n]ot contrary to law; permitted or recognized by law.” *Lawful*, BLACK’S LAW DICTIONARY (10th ed. 2014); accord *Lawful*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (“According or not contrary to law, permitted by law.”). “Unlawful” is considered an antonym of “lawful.” E.g., *O’Brien v. Walker*, 35 Haw. 104, 142 (1939) (“The word ‘lawful’ is an antonym of ‘unlawful’ or ‘illegitimate.’”).

<sup>137</sup> For example, smoking in a bar or restaurant is not prohibited as a matter of federal law, but it is prohibited by the Colorado Clean Indoor Air Act. See Colorado Clean Indoor Air Act, COLO. REV. STAT. ANN. § 25-14-204(1)(l), (m) (West 2008) (banning smoking in all indoor areas, including food service establishments and bars). Smoking in a bar or restaurant would therefore be considered “unlawful” in Colorado.

Colorado courts—and courts of other jurisdictions, for that matter<sup>138</sup>—have not yet construed the term “unlawful” as used in this section of the Partnership Act, or as used in business entity law generally.<sup>139</sup> Nor is there reference to the term in the legislative discussions regarding the Partnership Act or its predecessor law.<sup>140</sup> Colorado courts have, however, grappled with unlawful’s antonym, lawful, in the context of an employment discrimination case. In *Coats v.*

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<sup>138</sup> The Uniform Partnership Act (1997) was drafted by the Uniform Law Commission to replace the Commission’s 1914 Uniform Partnership Act. UNIF. LAW COMM’N, UNIFORM PARTNERSHIP ACT (UPA) (1997) (LAST AMENDED 2013): SUMMARY 1 (2015), [http://www.uniformlaws.org/Shared/Docs/Partnership/upa%20last%20amended%202013%20summary\\_Jan%202015\\_GH%20edits.pdf](http://www.uniformlaws.org/Shared/Docs/Partnership/upa%20last%20amended%202013%20summary_Jan%202015_GH%20edits.pdf). Colorado adopted the Uniform Partnership Act (1997) via House Bill 97-1237, which was signed into law on May 21, 1997, effective January 1, 1998. Colorado Uniform Partnership Act (1997), H.B. 97-1237, 61st Gen. Assemb., Reg. Sess. (Colo. 1997). As of the date of this Article, thirty-nine states, plus the District of Columbia and the U.S. Virgin Islands, have adopted some version of the Uniform Partnership Act (1997), and a fortieth introduced a bill in 2017 for the act’s enactment. See *Legislative Fact Sheet—Partnership Act (1997) (Last Amended 2013)*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Partnership%20Act%20\(1997\)%20\(Last%20Amended%202013\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Partnership%20Act%20(1997)%20(Last%20Amended%202013)) (last visited Jan. 20, 2017) (listing states that have enacted the act). Section 7-64-1201 of the Partnership Act provides that the Partnership Act “shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of [the Partnership Act] among states enacting it.” § 7-64-1201. Thus, another state’s court’s construction of the term “unlawful” would certainly be relevant and instructive for Colorado courts.

<sup>139</sup> There are no Colorado cases invoking either section 7-64-801(1)(d) of the Partnership Act or its predecessor provision, section 7-60-131(c) of the Uniform Partnership Law. The question of a partnership business’s unlawfulness has arisen primarily when parties have sought the court’s assistance in the dissolution process or in enforcing the parties’ rights under a partnership agreement or other contract. See, e.g., *Thompson v. McCormick*, 370 P.2d 442, 447 (Colo. 1962) (en banc); *Searles v. Haynes*, 130 N.E.2d 482 (Ind. Ct. App. 1955) (en banc); *Brower v. Johnson*, 352 P.2d 814 (Wash. 1960); *Williams v. Burrus*, 581 P.2d 164, 166 (Wash. Ct. App. 1978). Courts have considered whether a particular partnership business was unlawful under the relevant statute, but have not addressed the meaning of “unlawful” for purposes of partnership dissolution statutes generally. See, e.g., *Brower*, 352 P.2d at 816–18. In other contexts, courts have found it unnecessary to define “unlawful” because it is a commonly understood term. See, e.g., *United States v. Williamson*, 746 F. 3d 987, 991 (10th Cir. 2014) (“The meaning of *unlawful* is common knowledge and ordinarily does not need to be defined.” (citing *Atchison, Topeka & Santa Fe Ry. Co. v. Preston*, 257 F.2d 933, 937 (10th Cir. 1958) (“[A] court is not required to define words and phrases which are familiar to one of ordinary intelligence.” (alteration in original) (citation omitted)))).

<sup>140</sup> The comments to the Uniform Partnership Act (1997) do not provide any further clarity. The drafters’ comments to the relevant section provide the following:

Section 801(4) continues the basic rule in [the predecessor to the Uniform Partnership Act (1997)] and provides for dissolution if it is unlawful to continue the business of the partnership, unless cured. The “all or substantially all” proviso is intended to avoid dissolution for insubstantial or innocent regulatory violations. If the illegality is cured within 90 days after notice to the partnership, it is effective retroactively for purposes of this section. The requirement that an uncured illegal business be wound up cannot be varied in the partnership agreement.

UNIF. P’SHP ACT § 801 cmt. 7 (UNIF. LAW COMM’N 1997), [http://www.uniformlaws.org/shared/docs/partnership/upa\\_final\\_97.pdf](http://www.uniformlaws.org/shared/docs/partnership/upa_final_97.pdf). Neither the term “unlawful” nor the term “illegal” is further defined. See *id.*

*Dish Network, L.L.C.*,<sup>141</sup> the Colorado Court of Appeals considered whether medical marijuana use constituted a “lawful activity” under Colorado’s Lawful Activities Statute (Lawful Activities Statute).<sup>142</sup> The statute prohibits Colorado employers from terminating employees based on the employees’ engaging in “lawful activity” off-premises during their nonworking hours, with certain exceptions.<sup>143</sup> The plaintiff, Brandon Coats, a man who held a Colorado license to use medical marijuana, was terminated from his employment with Dish Network, L.L.C. (Dish) following a positive drug test for marijuana, which violated Dish’s drug policy.<sup>144</sup> Coats filed an action against Dish, claiming his termination violated the Lawful Activities Statute; Dish defended on the grounds that medical marijuana use was not a “lawful activity” because it was prohibited under federal law.<sup>145</sup>

In a split decision, the Colorado Court of Appeals dismissed Coats’s claim, holding that medical marijuana use is not a “lawful activity” for purposes of the Lawful Activities Statute because at the time of Coats’s termination marijuana use was illegal under federal law.<sup>146</sup> In so holding, the court first looked to the statute to see if “lawful activity” was a defined term.<sup>147</sup> Since it was not, the court next looked to the *Black’s Law Dictionary* definition of the word “lawful,” which means “permitted by law.”<sup>148</sup> The court then determined that medical marijuana use could not be “lawful” because the term implies an activity that is permitted by both state and federal law.<sup>149</sup> The court found persuasive the fact that there was no reference in the legislative history

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<sup>141</sup> Coats v. Dish Network, L.L.C. (*Coats I*), 2013 COA 62.

<sup>142</sup> COLO. REV. STAT. ANN. § 24-34-402.5 (West 2015).

<sup>143</sup> *Id.*

<sup>144</sup> *Coats I*, 2013 COA 62, ¶ 4.

<sup>145</sup> *Id.* ¶¶ 8–14. Dish also argued that medical marijuana use was prohibited under state law, and the trial court accepted this argument on the theory that the Colorado constitution provided an affirmative defense from prosecution for medical marijuana use but did not establish a state constitutional right to that use. *Id.* ¶ 6. This claim was not reached on appeal. *See id.* ¶¶ 6–7; Coats v. Dish Network, L.L.C. (*Coats II*), 2015 CO 44, ¶ 21 (en banc) [hereinafter, together with *Coats I*, *Coats*].

<sup>146</sup> *Coats I*, 2013 COA 62, ¶ 23. The dissenting judge, Judge Webb, would have held that the term “lawful” as used in the Lawful Activities Statute only refers to Colorado state law, under which medical marijuana use is “at least lawful,” and not to federal law. *Id.* ¶ 56 (Webb, J., dissenting).

<sup>147</sup> *See id.* ¶ 12 (majority opinion).

<sup>148</sup> *See id.* ¶ 13.

<sup>149</sup> *Id.* ¶ 14. As the court put it,

because activities conducted in Colorado, including medical marijuana use, are subject to both state and federal law, for an activity to be “lawful” in Colorado, it must be permitted by, and not contrary to, both state and federal law. Conversely, an activity that violates federal law but complies with state law cannot be “lawful” under the ordinary meaning of that term.

*Id.* (citation omitted).

to the term “lawful,” so there was no indication whether the legislature intended the word to include activities prohibited only under federal law.<sup>150</sup> The appellate court also rejected Coats’s argument that including activity that is permitted under both state and federal law within the scope of “lawful activity” “improperly ‘compels’ Colorado to enforce federal criminal law.”<sup>151</sup>

The Colorado Supreme Court affirmed, holding that “an activity such as medical marijuana use that is unlawful under federal law is not a ‘lawful’ activity.” for purposes of the Lawful Activities Statute.<sup>152</sup> Relying upon its earlier construction of the term “lawful,” the supreme court agreed with the appellate court “that the commonly accepted meaning of the term ‘lawful’ is ‘that which is ‘permitted by law’ or, conversely, that which is ‘not contrary to, or forbidden by law.’”<sup>153</sup> Like the appellate court, the supreme court also rejected Coats’s argument that the statutory language should be limited by state law, stating “[n]othing in the language of the statute limits the term ‘lawful’ to state law. Instead, the term is used in its general, unrestricted sense, indicating that a ‘lawful’ activity is that which complies with applicable ‘law,’ including state and federal law.”<sup>154</sup> Because medical marijuana use remained prohibited under the CSA and “unlawful under federal law,” this use could not be a lawful activity under the Lawful Activities Statute.<sup>155</sup>

Though *Coats* construed an employment statute, its reasoning is equally applicable to a business entity statute.<sup>156</sup> As in the Lawful

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<sup>150</sup> *See id.* ¶ 17.

<sup>151</sup> *Id.* ¶ 22 (relying upon *People v. Watkins*, 2012 COA 15, ¶ 33).

<sup>152</sup> *Coats II*, 2015 CO 44, ¶ 4 (en banc).

<sup>153</sup> The court cited its earlier opinion in *People v. Schuett* for the proposition that the ordinary meaning of “lawful” is “in accordance with the law or legitimate.” *Id.* ¶ 17 (quoting *People v. Schuett*, 833 P.2d 44, 47 (Colo. 1992)). The court noted that this meaning accords with the meaning given to the term by courts of other jurisdictions. *See id.* (citing cases).

<sup>154</sup> *Id.* ¶ 18. The court also noted the lack of any evidence that the Colorado legislature intended activities that are prohibited under federal law to be protected by the Lawful Activities Statute. *Id.* ¶ 20. The Colorado Supreme Court has since adhered to its interpretation of “lawful” in *Coats II*, stating: “Consistent with our holding in *Coats* . . . we again find that conduct is ‘lawful’ only if it complies with both federal and state law.” *People v. Crouse*, 2017 CO 5, ¶ 18.

<sup>155</sup> *Coats II*, 2015 CO 44, ¶ 19.

<sup>156</sup> It is clear from *Crouse* that the Colorado Supreme Court’s interpretation of “lawful” in *Coats II* was not specific to the particular statute at issue in *Coats*, nor to the employment context. Police arrested Crouse, a registered medical marijuana patient, for cultivation and possession of marijuana with intent to manufacture; they also seized from him fifty-five marijuana plants and nearly three kilograms of marijuana. *Crouse*, 2017 CO 5, ¶ 4. Crouse was acquitted at trial and requested that the court order the police to return the seized marijuana and plants to him under a provision of the Colorado constitution that requires law enforcement officials to return marijuana taken from medical marijuana patients upon their acquittal. *Id.* ¶ 5. The supreme court held that the statute provision was preempted by the CSA because compliance with the return provision would require law enforcement officials to “distribute” marijuana in violation of the CSA. *Id.* ¶¶ 5, 19. In so holding, the supreme court also found that



Activities Statute, nothing in the Partnership Act suggests that the Colorado legislature intended for “unlawful”<sup>157</sup> to have any other meaning than its ordinary meaning. And nothing in the language of the Partnership Act or in its legislative history suggests that the Colorado General Assembly intended for business activities that are prohibited under federal law to be excluded from the meaning of “unlawful” in the Partnership Act. Therefore, applying *Coats*, the Retail Marijuana Business is “unlawful” for purposes of section 7-64-801(1)(d) of the Partnership Act, and partnerships formed for that purpose (assuming formation is possible) dissolve automatically immediately after formation.

#### D. *Can These Consequences Be Avoided?*

Preventing partnerships from forming to engage in the Retail Marijuana Business or mandating their dissolution as soon as they are formed is surely not the Marijuana Laws’ intended outcome. This Section presents—and largely rejects—three arguments that could be made to persuade a Colorado court to find that Retail Marijuana Partnerships do not face automatic dissolution.<sup>158</sup>

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the conflict could not be avoided on the basis of a CSA provision that immunizes law enforcement officers who are “lawfully engaged” in enforcement of laws pertaining to controlled substances. *Id.* ¶ 18. The court reasoned that, if the officers gave the marijuana back to Crouse, they “could not be ‘lawfully engaged’ in law enforcement activities given that such conduct would violate federal law.” *Id.* It seems likely that the Colorado Supreme Court will apply the same interpretation of “lawful” to a business entity statute as it has applied in *Coats II* and *Crouse*.

<sup>157</sup> Admittedly, *Coats* construed the word “lawful” and not its antonym. Yet is unlikely that the prefix “un-” would have a substantive effect on the court’s analysis. *Black’s Law Dictionary* defines “un-” as a prefix meaning “[n]ot;” or “[c]ontrary to; against.” *Un-*, BLACK’S LAW DICTIONARY (10th ed. 2014). Hence, “unlawful” means “not lawful.” Applying this same process to the court’s definition of “lawful,” “unlawful” would mean “that which is not permitted by law or, conversely, that which is contrary to, or forbidden by law.” Similarly, an “unlawful” activity would be “that which does not comply with applicable law, including state and federal law.” Applying the supreme court’s analysis to the facts of *Coats*, medical marijuana use would be “unlawful” for purposes of the Lawful Activities Statute because such use does not comply with federal law (i.e., the CSA).

<sup>158</sup> None of these arguments is especially helpful with respect to the formation issue. See *infra* notes 160, 164, and 168 for a discussion of why the particular arguments do not resolve the problem of illegal formation. Since the illegal purpose doctrine arises from common law, the formation problem would best be avoided by either a judicial ruling that the Retail Marijuana Business is not an illegal purpose within the meaning of the illegal purpose doctrine, or a legislative amendment specifically to this end. See *supra* text accompanying notes 115–18; see also *infra* text accompanying notes 206–09 and 219–21.

### 1. Preemption of the Partnership Act

The first argument comes from the Retail Marijuana Amendment's express preemption language. Subsection (8) of the Retail Marijuana Amendment provides that "[a]ll provisions of this section . . . shall supersede conflicting state statutory, local charter, ordinance, or resolution, and other state and local provisions."<sup>159</sup> One could argue that section 7-64-801(1)(d) of the Partnership Act is a "conflicting" statutory provision within the meaning of subsection (8) of the Retail Marijuana Amendment and therefore is superseded by the constitutional provisions, with the effect that there is no automatic dissolution<sup>160</sup> for Retail Marijuana Partnerships.

This argument probably will be unavailing because Colorado courts are unlikely to find a conflict<sup>161</sup> between subsection (8) of the Retail Marijuana Amendment and section 7-64-801(1)(d) of the Partnership Act. As a threshold matter, nothing in the language of subsection (8) (or the remainder of the Retail Marijuana Amendment) expressly implicates the Partnership Act or indicates the drafters' intent to preempt the Partnership Act. Nor can it fairly be said that a constitutional amendment legalizing recreational marijuana sales is aimed at regulating Colorado's partnerships such that the Retail Marijuana Amendment occupies the field of partnership regulation.

Further, there is no actual conflict between section 7-64-801(1)(d) and the Retail Marijuana Amendment. The Retail Marijuana Amendment makes it "not unlawful" under Colorado law to engage in

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<sup>159</sup> COLO. CONST. art. XVIII, § 16, cl. 8.

<sup>160</sup> Even finding that the Retail Marijuana Amendment preempts the Partnership Act with respect to partnership dissolution probably does not avoid the formation problem, since the amendment's preemption language contemplates a conflict with a statute or regulatory provision. The illegal purpose doctrine comes not from a statute, but rather from the common law. The doctrine is therefore outside the Retail Marijuana Amendment's express preemption language.

<sup>161</sup> Colorado's preemption doctrine for resolving state law conflicts borrows from its cases resolving conflicts between state and federal laws. *Colo. Mining Ass'n v. Bd. of Cty. Comm'rs*, 199 P.3d 718, 723 (Colo. 2009) (en banc). The Colorado Supreme Court has explained Colorado's preemption doctrine for federal law conflicts as follows:

Federal law preempts state law when Congress expresses clear intent to preempt state law; when there is outright or actual conflict between federal and state law; when compliance with both federal and state law is physically impossible; when there is an implicit barrier within federal law to state regulation in a particular area; when federal legislation is so comprehensive as to occupy the entire field of regulation; or when state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

*Dep't of Health v. Mill*, 887 P.2d 993, 1004 (Colo. 1994) (en banc) (citing *Frontier Airlines, Inc. v. United Air Lines, Inc.*, 758 F. Supp. 1399, 1407 (D. Colo.1989)).

the Retail Marijuana Business. Section 7-64-801(1)(d) of the Partnership Act contemplates dissolution when the partnership's business becomes unlawful, without specifying a particular source of law that, if violated, would trigger dissolution. It would be a different situation if the Partnership Act imposed dissolution, for example, for unlawful business activity *such as engaging in the sale or distribution of marijuana*.

Nor is it impossible to comply with both the Retail Marijuana Amendment and section 7-64-801(1)(d) of the Partnership Act. For instance, if a partnership were formed to engage in the fracking industry and fracking subsequently became unlawful under Colorado law, the partnership's dissolution under the Partnership Act would not implicate the Retail Marijuana Amendment in any way. Perhaps one could argue that the Partnership Act's dissolution provisions are an obstacle to accomplishing the objectives of the Retail Marijuana Amendment's drafters, but this is somewhat of a weak argument; section 7-64-801(1)(d) of the Partnership Act simply has nothing to do with whether marijuana sales are lawful under Colorado law. The unintended consequences under section 7-64-801(1)(d) come because marijuana sales remain unlawful under federal law, not because of a conflict between the Partnership Act and the Retail Marijuana Amendment. Consequently, a court should reject the argument that the Retail Marijuana Amendment preempts section 7-64-801(1)(d) of the Partnership Act because they conflict.

## 2. Technical Argument Under the Partnership Act

The second potential argument why a court should find that the Partnership Act does not mandate dissolution of Retail Marijuana Partnerships comes from the language of section 7-64-801(1)(d) of the Partnership Act. The Partnership Act specifically contemplates dissolution upon "occurrence" of an "event that makes it" unlawful for the partnership's business "to be continued."<sup>162</sup> In other words, the statute contemplates that a partnership's business would be lawful upon formation but would thereafter become unlawful, presumably because of a change in the law. It does not contemplate the situation in which a partnership is formed to engage in business that is already unlawful—which makes sense, given that partnerships may not be formed for an illegal purpose.<sup>163</sup> A technical argument could be made that dissolution would not be triggered under section 7-64-801(1)(d) if a partnership

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<sup>162</sup> Colorado Uniform Partnership Act, COLO. REV. STAT. ANN. § 7-64-801(1)(d) (West 2006).

<sup>163</sup> See *supra* notes 97–98 and accompanying text.

were formed to engage in the Retail Marijuana Business because no “event” would “occur” that would “make” it unlawful for the partnership’s business to continue—that is, since the Retail Marijuana Business is already unlawful under federal law, there is no triggering event after the partnership’s formation that causes the business to be unlawful, and, thus, section 7-64-801(1)(d) would not be implicated, and the partnership would not dissolve.<sup>164</sup>

A court seeking to avoid the Marijuana Laws’ unintended consequences could be sympathetic to this type of technical argument, within limits. On the one hand, it is hard to believe that the Colorado General Assembly intended for Retail Marijuana Partnerships to dissolve immediately after their formation, given that the Marijuana Laws do authorize partnerships to participate in the Retail Marijuana Business.<sup>165</sup> This leaves room for a narrow ruling that engagement in the Retail Marijuana Business does not trigger dissolution under section 7-64-801(1)(d). On the other hand, it is also hard to believe that the Colorado General Assembly would intend section 7-64-801(1)(d) to capture activity that becomes unlawful after the partnership is formed, but not activity that is illegal prior to formation. Under that line of reasoning, a partnership formed tomorrow for the purpose of carrying out contract killings would not trigger the statute’s dissolution provisions, since murder is already illegal under both Colorado and federal law.<sup>166</sup> Any ruling other than a very narrow one in favor of this technical argument risks compounding unintended consequences upon unintended consequences.

### 3. “Unlawful” as Limited by the Retail Marijuana Amendment

The third potential argument why a Retail Marijuana Partnership would not automatically dissolve is that the Retail Marijuana Amendment’s express language attempts to harmonize the amendment with other bodies of Colorado law in a way that avoids unintended consequences such as this one. Subsection (4) of the Retail Marijuana Amendment provides “[n]otwithstanding any other provision of law, the following acts are *not unlawful* and shall not be an offense under Colorado law . . . .” Subsection (4) goes on to list a number of activities

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<sup>164</sup> This technical argument would not address the illegal formation issue, given that the argument relies upon a specific construction of statutory language and the illegal purpose doctrine arises from case law, not a similar statutory provision.

<sup>165</sup> See *supra* Section I.C.

<sup>166</sup> See 18 U.S.C. § 1111 (2012) (murder); COLO. REV. STAT. ANN. § 18-3-102 (West 2013) (murder in the first degree).

involved in the Retail Marijuana Business (e.g., cultivating, harvesting, selling, or transporting marijuana).<sup>167</sup> Someone trying to avoid automatic dissolution of a Retail Marijuana Partnership might argue for an interpretation of subsection (4) roughly along these lines: “No matter whether the Retail Marijuana Business is illegal under federal or any other state’s law, it will be not considered ‘unlawful’ whenever that term is used in Colorado state laws.” Adopting that interpretation would seem to save partnerships from automatic dissolution<sup>168</sup> under section 7-64-801(1)(d) of the Partnership Act: if the Retail Marijuana Amendment’s language means that the word “unlawful” as used in Colorado statutes does not apply to the Retail Marijuana Business, then the business of Retail Marijuana Partnerships would not be “unlawful” for purposes of the Partnership Act.

This argument is the most compelling of the three, though it is still unclear whether this interpretation would succeed after the Colorado Supreme Court’s ruling in *Coats II*. Section 14 of article XVIII of the Colorado constitution, the section of the constitution authorizing medical marijuana use (Medical Marijuana Amendment),<sup>169</sup> was the section at issue in *Coats*.<sup>170</sup> Subsection 4(a) of the Medical Marijuana Amendment provides, in relevant part, “[a] patient’s medical use of marijuana, within the following limits, is lawful.”<sup>171</sup> And yet the court still held that medical marijuana use was not a “lawful” activity under the Lawful Activities Statute because such use remained illegal under federal law and “lawful,” as used in the Lawful Activities Statute, was not limited to state law.<sup>172</sup>

However, *Coats* leaves room for doubt about how the Colorado Supreme Court would rule in a similar case involving subsection (4) of the Retail Marijuana Amendment. The courts in *Coats* were able to decide on the basis of the federal prohibition on marijuana use.

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<sup>167</sup> COLO. CONST. art. XVIII, § 16, cl. 4 (emphasis added).

<sup>168</sup> This interpretation of subsection (4) would not necessarily avoid the illegal purpose doctrine issue, however. It is one thing to say that the definition of “unlawful” in Colorado statutes will be shaped by the Colorado constitution, and that if the constitution says something is not unlawful, that holds true for all instances of the term “unlawful” in Colorado statutes. It is another thing to say that a provision in the Colorado constitution could make an act not unlawful *generally speaking*; as discussed throughout this Article, marijuana sales remain illegal under federal law, and so the illegal purpose doctrine might still come into play. An amendment of the Partnership Act providing that formation of a partnership is permissible for a purpose that is lawful under state law, even if that purpose is unlawful under federal law, could eliminate the problem—though it might also open the door to formation of partnerships for purposes that are not forbidden under Colorado law but that Colorado would not want to permit. See *infra* note 212 and accompanying text.

<sup>169</sup> COLO. CONST. art. XVIII, § 14.

<sup>170</sup> See *Coats II*, 2015 CO 44, ¶ 1.

<sup>171</sup> COLO. CONST. art. XVIII, § 14, cl. 4(a).

<sup>172</sup> See *Coats II*, 2015 CO 44, ¶¶ 4, 13; see also *supra* notes 154, 156.

Accordingly, the courts did not address the state law issue of whether the Medical Marijuana Amendment created a state constitutional right to state-licensed medical marijuana use, or what the consequences of such a constitutional right would be for Coats's case.<sup>173</sup>

Moreover, the Medical Marijuana Amendment's language is somewhat less explicit than that of the Retail Marijuana Amendment. The Medical Marijuana Amendment provides that compliance with its terms is an "affirmative defense" to the state criminal laws related to medical marijuana use and that it is an "exception from the state's criminal laws" to engage in or assist in medical marijuana use in compliance with the constitutional provisions.<sup>174</sup> It does not have language parallel to that in subsection (4) of the Retail Marijuana Amendment, which purports to make the Retail Marijuana Business "not unlawful" "[n]otwithstanding any other provision of law."<sup>175</sup> Accordingly, the Retail Marijuana Amendment's language may present a more compelling case for the Colorado Supreme Court to find that the ballot initiative writers and the legislature intended the Retail Marijuana Business to be considered not "unlawful" for purposes of all of Colorado's laws, both statutory and common<sup>176</sup>—even though, of course, no amount of legislative intent in Colorado could prevent the Retail Marijuana Business from being unlawful under federal law.<sup>177</sup>

### III. THE HARM AND POTENTIAL SOLUTIONS

The preceding Parts laid out the relevant laws and the potential legal consequences of those laws for Retail Marijuana Partnerships. This Part first examines the practical consequences of the legal issues created

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<sup>173</sup> See *Coats I*, 2013 COA 62, ¶ 23; *Coats II*, 2015 CO 44, ¶ 21.

<sup>174</sup> See COLO. CONST. art. XVIII, § 14, cl. 2(a)–(c).

<sup>175</sup> *Id.* § 16, cl. 4; see *id.* § 14.

<sup>176</sup> However, such broad legalization may not actually have been the intent of the ballot initiative's drafters. The Retail Marijuana Amendment is entitled "Personal use and regulation of marijuana." *Id.* § 16. The reference to "regulation," rather than "legalization," was intentional. At the initial hearing on June 15, 2011, of the Colorado Title Board to set the ballot title for the Retail Marijuana Amendment, the authors of the initiative asked the Title Board to remove the word "legalization" from the ballot title. See *Title Board Hearing 06-15-2011*, COLO. TITLE BD. (June 15, 2011), [http://www.sos.state.co.us/pubs/info\\_center/audioArchives.html](http://www.sos.state.co.us/pubs/info_center/audioArchives.html). As co-author Steve Fox, a Washington, D.C. lobbyist for the Marijuana Policy Project, said at that hearing, "legalization is not what this is . . . . What we are doing is regulating marijuana. And it's a significant legal difference. It would be inaccurate to call this legalization." *Id.*

<sup>177</sup> See *In re Rent-Rite Super Kegs W. Ltd.*, 484 B.R. 799, 805 (Bankr. D. Colo. 2012) ("That marijuana cultivation may not be criminally prosecuted under the laws of the state of Colorado is simply of no consequence and has no bearing on the Court's finding that Debtor's business operation constitutes a continuing criminal violation of the federal Controlled Substances Act.").

by the interplay between the Marijuana Laws and the partnership laws. It then critiques four potential solutions to these legal issues and advocates adoption of the most viable one.

#### A. *What Is the Harm?*

If the formation and dissolution issues caused by the interaction between the Marijuana Laws and the partnership laws have no significant real-world consequences for those who plan to engage in the Retail Marijuana Business, then this discussion is merely a tempest in a teapot. This Section examines the likely practical effect of, first, an inability to form general and limited liability partnerships to engage in the Retail Marijuana Business because of the illegal purpose doctrine, and, second, the automatic triggering of such partnerships' dissolution under section 7-64-801(1)(d) of the Partnership Act.

##### 1. Formation Consequences

Would it really be so terrible if there were no Retail Marijuana Partnerships? Would Colorado be worse off if all businesses engaged in the Retail Marijuana Business were organized as some entity other than a general or limited liability partnership? Is there actually some need to address the Marijuana Laws' unintended consequences for formation of partnerships, more so than for some other form of entity?<sup>178</sup> In answer to all of these questions, yes and no.

First, the scale of the problem may not be all that large because the popularity of partnerships is waning. Limited liability companies (LLCs) are becoming the most popular form of business entity.<sup>179</sup> For comparison, in 2012 and 2013, a total of 123,992 new LLCs were formed in Colorado, compared to 20,331 new for-profit corporations, 679 LLPs, and 483 new LPs.<sup>180</sup> The rise in the LLC's popularity is presumably due

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<sup>178</sup> See *supra* note 120.

<sup>179</sup> See Rodney D. Chrisman, *LLCs Are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations, and LPs Formed in the United States Between 2004–2007 and How LLCs Were Taxed for Tax Years 2002–2006*, 15 *FORDHAM J. CORP. & FIN. L.* 459, 459–60 (2010) (“The limited liability company (LLC) is now undeniably the most popular form of new business entity in the United States.”). Chrisman remarks that this fact “is amazing, especially because for most of America’s history the general partnership and the corporation dominated the business organizations’ landscape.” *Id.* at 460.

<sup>180</sup> INT’L ASS’N OF COMMERCIAL ADMIN’RS, ANNUAL REPORT OF JURISDICTIONS 2012 AND 2013, at 1–2, 4 (2014), <https://www.iaca.org/wp-content/uploads/Colorado.pdf>. The corporations figure includes both business and professional corporations. *Id.* at 1. Unfortunately, there are no figures available for general partnerships, as their formation does

to the form's many benefits.<sup>181</sup> Perhaps chief among these is that LLCs provide their equity owners with limited liability for the entity's obligations, which general partnerships do not.<sup>182</sup> Accordingly, it has been suggested that most businesses engaged in the Retail Marijuana Business will be formed as LLCs.<sup>183</sup> If this proves true and few businesses engaging in the Retail Marijuana Business are formed as partnerships, then the real-world consequences of the problems discussed in this Article may be limited in scope.

Yet limited in scope is not the same as nonexistent. The general partnership is the default form of business entity for businesses owned by two or more persons who do not choose another form.<sup>184</sup> Operating as a partnership with an enforceable partnership agreement (or at least a set of statutory default rules) not only provides some degree of protection for the rights of the partners, but it also provides protection for the partnership's third-party creditors. As noted earlier,<sup>185</sup> partners retain personal liability for the partnership's debts and obligations. If the law does not recognize that a partnership has been created, the law also may not impose vicarious liability upon the business's owners for the protection of innocent third parties harmed by the acts of the business or one of its owners.

For instance, consider the scenario in which two people, Jordan and Stan, are working together in a Retail Marijuana Business that in all respects meets the definition of a "partnership," other than the fact that it is formed for purposes of engaging in the Retail Marijuana Business. There is no written agreement between Jordan and Stan, and no established course of conduct for their dealings together, as their

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not require state filing and thus cannot be tracked. *See* Chrisman, *supra* note 179, at 461 ("The number of general partnerships formed each year cannot be tracked since no filing is required."); *supra* text accompanying note 94.

<sup>181</sup> *See* J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, LIMITED LIABILITY COMPANIES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 2:5 Westlaw (database updated Sept. 2016) (discussing benefits of forming an LLC).

<sup>182</sup> *See* Colorado Limited Liability Company Act, COLO. REV. STAT. ANN. § 7-80-705 (West 2006) (LLC members are not liable for the LLC's obligations); Colorado Uniform Partnership Act (1997), COLO. REV. STAT. ANN. § 7-64-306(1) (all partners are jointly and severally liable for partnership obligations). *But see* Scheuer, *supra* note 10, at 532-37 (discussing how investors in various business entities, including LLCs, engaged in marijuana-related businesses may lose limited liability protection because of the illegal nature of the marijuana business). LLPs provide partners with limited liability, *see* § 7-64-306(3), but they lack some of the other features that make LLCs desirable, such as the ability to have a single owner. *See* CALLISON & SULLIVAN, *supra* note 181, § 3:1 (LLC member requirements).

<sup>183</sup> *See* Scheuer, *supra* note 10, at 532 (asserting that "most" marijuana businesses in states in which marijuana businesses are legal will elect to form as LLCs).

<sup>184</sup> *See* J. William Callison, *New Entity Classification Regulations*, 26 COLO. LAW., Apr. 1997, at 3, 6 ("[N]oncorporate organizations with at least two members are partnerships.").

<sup>185</sup> *See supra* note 125.



business is brand new. Without consulting Stan, Jordan asks an acquaintance of hers, André, for a loan for “her” business. Jordan never mentions to André the fact that she is working with someone else, and André believes that Jordan is operating a business by herself. André gives Jordan \$2000 for operating expenses in exchange for Jordan’s promise to repay the sum with interest. Instead, Jordan disappears with the money, leaving André unpaid.

If Jordan and Stan have a “partnership,” André may have recourse against both the partnership and Stan for the \$2000. Section 301(1)(a) of the Partnership Act provides that each partner is the partnership’s “agent,” and any act of a partner “for apparently carrying on in the ordinary course the partnership business . . . binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing had notice that the partner lacked authority.”<sup>186</sup> In this example Jordan has no authority to enter into a loan agreement with André because she has not consulted Stan, and a business decision generally requires either a majority or unanimous vote of the partners, depending upon whether the matter is in or outside the ordinary course of the partnership’s business.<sup>187</sup> Yet her act—obtaining a loan for purposes of operating expenses—is at least apparently for carrying on the business in the ordinary course, and André has no knowledge or notification of the fact that Jordan has no authority, since he thinks she is the sole owner of her business. Thus, under section 7-64-301(1)(a) of the Partnership Act, the partnership would probably be bound by Jordan’s loan agreement with André and André could look to the assets of the partnership, and potentially to Stan’s personal assets,<sup>188</sup> to recover the loan.

If the law does not recognize the business as a partnership and the default partnership rules do not apply, then André may be left without a satisfactory remedy if he cannot collect from Jordan. In this case, Jordan’s act likely would not implicate Stan in any way that would impose personal liability upon him: he did not have knowledge of her actions, did not authorize them, and did not receive any benefits from them (since she absconded with the money) or otherwise ratify her taking the loan from André.<sup>189</sup> Even the purported partner doctrine<sup>190</sup>

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<sup>186</sup> § 7-64-301(1)(a).

<sup>187</sup> See *id.* § 7-64-401(10) (ordinary course decision requires a majority vote while extraordinary decision requires a unanimous vote). Accordingly, regardless of whether the decision to take out a small loan is considered ordinary course or an extraordinary decision, Jordan could not make that decision unilaterally on behalf of the partnership unless some agreement between her and Stan permitted her to do so.

<sup>188</sup> See *supra* note 125.

<sup>189</sup> Two lines of analysis are relevant here. First, it should be determined whether Jordan is acting as Stan’s agent. An “agent” is a person who, by mutual agreement, acts on behalf of

likely will not come to André's aid, as Jordan indicated to André that she needed funds for "her" business, and there is no indication that André knew of Stan's involvement in the business at all. If there is no partnership and the purported partner doctrine does not apply, then the Partnership Act provides that Stan would not be liable to André for Jordan's bad act.<sup>191</sup>

Faced with a scenario such as this one, a court could decide to overlook the illegal purpose doctrine and recognize the formation of a partnership between Stan and Jordan so that André is not without a remedy (if he cannot collect from either Jordan's or the business's assets). Assuming a court would be likely to do so, then the consequences of the conflict between the Marijuana Laws and the illegal purpose doctrine are probably not so significant in practice. But it should also be noted that Stan is equally innocent—or guilty—in this scenario as André is. Stan had no involvement in the fraudulent loan, so he is just as blameless as André is in that respect. And both are "guilty" insofar as both are involved in the Retail Marijuana Business—Stan as an owner and André as a knowing lender.<sup>192</sup> Because of this, a court

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another (principal) and is subject to the principal's control. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006). A principal is generally bound by the acts of his agent when the agent acts with authority. *See id.* §§ 6.01–6.02 (providing that disclosed and unidentified principals are parties to contracts made by agents acting with actual or apparent authority); § 7.03 (describing principals' liability for agents' torts). Here, it is hard to see how Jordan could be Stan's agent for purposes of obtaining a loan from André. There is no indication of any agreement that Jordan would act on Stan's behalf or that Stan exerts any legally cognizable form of "control" over Jordan. *See id.* § 1.01 cmt. f(1) (describing the principal's right to control). Nor is there any indication that Jordan had authority from Stan to enter into the loan agreement on his behalf, since he did not know about it and there was no course of dealing or other manifestation from Stan that would seem to lend authority to Jordan. *See id.* §§ 2.01–2.02 (definition and scope of actual authority); §§ 3.01–.02 (creation of actual authority). Thus, it would appear that Stan would not be liable for the loan agreement as a matter of a principal's vicarious liability for the acts of an agent. Stan would also seemingly not be liable for the loan agreement on account of having ratified it. Ratification involves "the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority." *Id.* § 4.01(1). Ratification requires that the ratifier either manifest assent to the act or act in a way that justifies a reasonable assumption that the person assents to the act. *Id.* § 4.01(2). Here, Stan has not assented to the loan agreement because he does not know about it. Nor has he had an opportunity to act in a way consistent with having assented to it, since Jordan never remitted the funds to the business or told Stan about it after the fact.

<sup>190</sup> *See supra* note 125.

<sup>191</sup> *See* Colorado Uniform Partnership Act (1997), COLO. REV. STAT. § 7-64-308(5) ("persons who are not partners as to each other are not liable as partners to other persons[,] except for liability established by means of the purported partner doctrine under subsections (1) and (2)); *see also supra* note 125 (describing the purported partner doctrine).

<sup>192</sup> *See In re Medpoint Mgmt., L.L.C.*, 528 B.R. 178, 186–87 (Bankr. D. Ariz. 2015), *rev'd on other grounds*, 2016 WL 3251581 (B.A.P. 9th Cir. June 3, 2016) (barring creditors' claims in bankruptcy where creditors knowingly lent money to a licensed medical marijuana business); *see also* Scheuer, *supra* note 10, at 535 (suggesting that marijuana business owners may not face unlimited liability to creditors who knowingly invested in the marijuana business).

might not use its equitable powers to give André a remedy against Stan, which means that the question of whether a partnership was formed would have real-life consequences.

## 2. Dissolution Consequences

If the consequences of the Marijuana Laws for partnership formation are hazy, the consequences of automatic dissolution are concrete. As explained earlier,<sup>193</sup> dissolution means the partnership's legal existence has come to an end and the partnership continues only for purposes of winding up its business. Let us return to Stan and Jordan (though this time assume Jordan is not trying to defraud André) and imagine that their partnership is specifically for purposes of operating a "Retail Marijuana Cultivation Facility."<sup>194</sup> In setting up their business, the partners may have acquired certain tangible assets, such as seeds, grow lights, exhaust fans, and drying equipment, and contributed those assets to the partnership. They probably have expended money to apply for a "Retail Marijuana Cultivation Facility License"<sup>195</sup> and for legal counsel<sup>196</sup> to help them navigate the various rules and applications. They

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<sup>193</sup> See *supra* notes 99–103 and accompanying text.

<sup>194</sup> See Retail Marijuana Code, 1 COLO. CODE REGS. § 212-2.103 (2013) (amended 2017). A "Retail Marijuana Cultivation Facility" is "an entity licensed to cultivate, prepare, and package Retail Marijuana and sell Retail Marijuana to Retail Marijuana Establishments, but not to consumers." *Id.*

<sup>195</sup> New applicants (i.e., those without existing medical marijuana licenses in good standing) must pay a \$5000 application fee for a license application to be considered. See *id.* § 212-2.207(A)(2). A "Tier 1" Retail Marijuana Cultivation Facility License permitting cultivation of 1800 plants costs \$1500. See *id.* § 212-2.208(D)(2).

<sup>196</sup> This assumes that they are able to find a lawyer to advise them, which may be difficult because of ethical rules in some states that limit attorneys' ability to advise clients regarding marijuana businesses. See Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 899–905 (2013) (describing the ethical limitations on attorneys' ability to counsel clients regarding marijuana law); see also, e.g., Maine Prof'l Ethics Comm'n, Op. 199 (2010), [http://www.maine.gov/tools/whatsnew/index.php?topic=mebar\\_overseers\\_ethics\\_opinions&id=110134&v=article](http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&id=110134&v=article) ("While attorneys may counsel or assist a client in making good faith efforts to determine the validity, scope, meaning or application of the law, the [Maine Rules of Professional Conduct] forbid[] attorneys from counseling a client to engage in the business or to assist a client in doing so."). However, the Colorado Supreme Court recently adopted an amendment to the Colorado Rules of Professional Conduct that permits Colorado lawyers to "counsel a client regarding the validity, scope, and meaning" of the Medical Marijuana Amendment and the Retail Marijuana Amendment, and to "assist a client in conduct that the lawyer reasonably believes is permitted by" Colorado's marijuana laws, provided that the lawyers must also "advise the client regarding related federal law and policy." COLO. RULES OF PROF'L CONDUCT r. 1.2 cmt. 14 (COLO. BAR ASS'N 2016), [http://www.cobar.org/Portals/COBAR/repository/rules\\_of\\_prof\\_conduct.pdf](http://www.cobar.org/Portals/COBAR/repository/rules_of_prof_conduct.pdf). Similarly, the Washington State Bar ethics committee has issued an opinion that permits Washington lawyers to assist clients with conduct that complies with Washington's marijuana laws, though the committee cautioned that its opinion "may have to be reconsidered" if "the federal government changes its position and

may have purchased or leased property to serve as premises for their facility. Perhaps they have paid someone to create a website or other online presence for their business. Maybe they have contracts to supply stores with their products. Certainly, there are numerous other steps they may have taken, moneys they may have expended, and assets they may have obtained in the course of starting up their business.

What does automatic dissolution mean for Stan and Jordan? In large part, it means selling off the partnership's assets. In a different type of partnership this might not be so hard; either Stan or Jordan or both could purchase the assets. But the Rules prescribe specific standards and regulations that Retail Marijuana Cultivation Facilities must comply with, including that they may only sell marijuana to certain "Persons," such as "Retail Marijuana Stores" and other Retail Marijuana Cultivation Facilities.<sup>197</sup> Similarly, the Rules require a separate license for each specific business entity operating a Retail Marijuana Business,<sup>198</sup> and limit the transfer of ownership interests in "Retail Marijuana Establishments" and their businesses.<sup>199</sup> Even converting to a different form of entity requires informing the Marijuana Enforcement Division and paying the related fee.<sup>200</sup> In sum, the process of winding up a Retail Marijuana Partnership—even if the business will be carried on by a new entity—is not only cumbersome but is also expensive.<sup>201</sup> And so, if section 7-64-801(1)(d) of the Partnership Act triggers automatic dissolution of Retail Marijuana Partnerships and those partnerships do wind up, the practical consequences for those partnerships are significant.

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again seeks to enforce the CSA against the kinds of activities made lawful under" Washington's state marijuana laws. Washington State Bar Ass'n, Advisory Op. 201501 (2015), <http://mcle.mywsba.org/IO/print.aspx?ID=1682>.

<sup>197</sup> See Retail Marijuana Code, 1 COLO. CODE REGS. § 212-2.501(D) (2013) (amended 2017) (authorizing sales only to specific persons).

<sup>198</sup> *Id.* § 212-2.501(B) (providing that "a separate license is required for each specific business or business entity, regardless of geographical location"). Changing the premises at which a "Retail Marijuana Establishment" operates requires permission of the Marijuana Enforcement Division following an application. *Id.* § 212-2.206(A)(1). "Retail Marijuana Establishments" is the term used to refer to Retail Marijuana Stores, Retail Marijuana Cultivation Facilities, Retail Marijuana Products Manufacturing Facilities, Retail Marijuana Testing Facilities, Retail Marijuana Establishment Operators, and Retail Marijuana Transporters (each as defined in the Rules). *Id.* § 212-2.103.

<sup>199</sup> See *id.* § 212-2.205 (providing rules for transfer of ownership and changes in business entity form).

<sup>200</sup> See *id.* § 212-2.205(D) (conversion of an entity of one form into another pursuant to COLO. REV. STAT. § 7-90-201 to -206 requires "a report containing suitable evidence of [the entity's] intent to convert"); *id.* § 212-2.210(A)(3) (\$800 fee per "Person" for a change of corporation or LLC structure).

<sup>201</sup> For example, the fee for transferring ownership to new owners is \$1600. § 212-2.210(A)(1). Even reallocating ownership among owners costs \$1000. *Id.* § 212-2.210(A)(2).

Of course, the key word is “if.” Along with the question of whether a court or regulatory body would actually carry out the law as it is written there is the question of how likely partners in Retail Marijuana Partnerships are to, first, know the law, and second, do what it requires. People who engage in the Retail Marijuana Business—particularly those who do so by means of a partnership, as opposed to an entity that typically carries with it limited liability, such as an LLC—may not be people who have a sophisticated understanding of the business and legal landscape in which they are operating.<sup>202</sup> It is highly unlikely that a layperson would be familiar with the partnership dissolution rules and would think that those rules might apply to a business ostensibly sanctioned by the Marijuana Laws. If access to legal counsel for Retail Marijuana Businesses is limited,<sup>203</sup> it becomes even less likely that those businesses—or the regulators enforcing the Marijuana Laws, for that matter—will become aware of and will follow the statutory provisions. In all likelihood, the automatic dissolution provisions will not pose a concrete problem unless they are raised in court by plaintiffs or defendants for other purposes—e.g., by a plaintiff partner who wishes to dissolve the partnership but is unable to do so under the terms of the partnership agreement, or by a partner defending against vicarious liability to a third party on the grounds that the partnership had already dissolved and no longer existed.

#### B. *What Are Some Possible Solutions?*

In light of the practical consequences for partnerships that result from the inconsistencies between the Marijuana Laws and Colorado’s partnership laws, this Section critiques four potential solutions, one judicial and three legislative.<sup>204</sup> It then advocates adoption of the final solution as the one that is most likely to be effective.<sup>205</sup>

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<sup>202</sup> See Scheuer, *supra* note 10, at 547–48 (“Instead of professionals who are primarily motivated by profit, as we see in other industries, we are likely to see fewer professional stakeholders who do not understand the risk of investing in illegal businesses, those with no assets outside the business that are at risk, or those who are drawn to work in this industry for other reasons such as their personal experience with marijuana. . . . The industry will likely suffer because it will attract people who are less experienced with business. In fact, it will primarily attract individuals who had experience dealing with marijuana before it was legalized.” (footnotes omitted)); see also *id.* at 532 (“[M]any people forming marijuana businesses . . . may not be aware of the potential problems they might have with business entity laws.”).

<sup>203</sup> See *supra* note 196.

<sup>204</sup> There are likely other solutions that would address the consequences of the Marijuana Laws for partnerships, perhaps including some that aim to sweep more broadly than do the solutions discussed herein. The trick, of course, to any solution is to ensure that it does not

## 1. Judicial Fix

The first possible solution to the partnership formation and dissolution problem is a judicial one. Following formation of a Retail Marijuana Partnership, a partner in that partnership (or the partnership itself) could file an action in state court<sup>206</sup> seeking two declaratory judgments<sup>207</sup>: (1) first, that the partnership was lawfully formed because

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create even more unintended consequences than the ones it aims to address. Accordingly, the potential solutions described in this Article are purposefully narrow.

<sup>205</sup> Of course, none of these solutions will resolve the fundamental problem that marijuana sales remain illegal under federal law. Until that changes, or the U.S. Supreme Court blesses state marijuana legalization in spite of the CSA, there will remain significant risks and uncertainties for those who sell marijuana, even in accordance with state laws—not the least of which is federal prosecution.

<sup>206</sup> One interesting question that arises is whether a court would be willing to participate in such a case at all, in light of the unclean hands doctrine. Unclean hands is an equitable doctrine providing that a person will not get relief from a court of equity if his or her conduct has not been fair, equitable, and honest in relation to the subject of the requested relief. *See Salzman v. Bachrach*, 996 P.2d 1263, 1269 (Colo. 2000) (en banc); 27A AM. JUR. 2D *Equity* § 98 (2016). There is some question whether equitable principles such as unclean hands apply in a declaratory judgment action. *See Gen. Motors Corp. v. Blevins*, 144 F. Supp. 381, 387 (D. Colo. 1956) (“There is uncertainty in the decision as to whether or not equitable maxims and equitable defenses apply in a declaratory judgment action.”). This is because a declaratory judgment suit is not necessarily a suit in equity. *See Chevron Corp. v. Salazar*, No. 11 Civ. 3718(LAK), 2011 WL 3628843, at \*6 (S.D.N.Y. Aug. 17, 2011) (stating “a declaratory judgment action is neither inherently equitable nor inherently legal” and noting “[t]he nature of the declaratory judgment action depends on the character of the underlying claim”); *Buromin Co. v. Nat’l Aluminate Corp.*, 70 F. Supp. 214, 216 (D. Del. 1947) (“[A] declaratory judgment suit is not a suit in equity.”). There is authority on both sides of the issue. *See United States v. Fall River Navigation Co.*, 285 F. Supp. 354, 358 (S.D.N.Y. 1968) (commenting that “unclean hands . . . is a recognized ground to refuse to grant declaratory relief”); *Buromin*, 70 F. Supp. at 216 (observing that equitable principles still apply in declaratory judgment suits); *Purcell v. Cape Girardeau Cty. Comm’n*, 322 S.W.3d 522, 524 (Mo. 2010) (en banc) (“A litigant with unclean hands generally is not entitled to equitable relief such as an injunction or declaratory judgment.”). *But see Gov’t Emps. Ins. Co. v. Saco*, No. 12–CV–5633 (NGG)(MDG), 2015 WL 1527611, at \*8 (E.D.N.Y. Apr. 2, 2015) (“The doctrine of unclean hands does not necessarily bar a declaratory judgment action, and its validity as a defense depends on the character of the underlying claim.”); *Beldt v. Leise*, 60 P.3d 1119, 1121 (Or. Ct. App. 2003) (“The doctrine of unclean hands . . . does not affect the court’s authority to issue a declaratory judgment.”); *Hogue v. Kroger Co.*, 373 S.W.2d 714, 716 (Tenn. 1963) (unclean hands doctrine does not apply in a declaratory judgment suit). The Colorado Supreme Court has previously invoked the unclean hands doctrine to refuse to grant a declaratory judgment, *see Rhine v. Terry*, 143 P.2d 684, 684–85 (Colo. 1943) (en banc), and it is possible that the court might do the same here.

<sup>207</sup> The Colorado Rules of Civil Procedure permit the bringing of declaratory judgment actions to determine rights under a written contract or for purposes of construing a statute:

Any person interested under a . . . written contract, or . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

engaging in the Retail Marijuana Business is not an “illegal purpose” within the meaning of the illegal purpose doctrine; and (2) second, that the partnership did not automatically dissolve as a result of its engagement in the Retail Marijuana Business because such business was not “unlawful” for purposes of section 7-64-801(1)(d) of the Partnership Act.<sup>208</sup> A court’s declaratory judgments for the plaintiff presumably would be based on one or both of the following premises: The first is that both the concept of illegality in the illegal purpose doctrine and the term “unlawful” in section 7-64-801(1)(d) are qualified by state law—i.e., federal law does not determine whether a partnership’s business is “illegal” or “unlawful” for purposes of state partnership law. The second possible premise is that the Retail Marijuana Amendment makes the Retail Marijuana Business not “illegal” or “unlawful” for purposes of all Colorado statutes and common law doctrines applied to entities created under those statutes. If a court accepted one of these alternative arguments and interpreted partnership common law and the Partnership Act accordingly, Retail Marijuana Partnerships would have some assurance that they are permitted to engage in the Retail Marijuana Business (at least as far as Colorado law is concerned) and are not required to wind up immediately after their formation.<sup>209</sup>

Arguing in favor of this type of judicial solution is the fact that it would be difficult for a Colorado court to interpret the Marijuana Laws in such a way that general partnerships and LLPs are, for all intents and purposes, prohibited from engaging in the Retail Marijuana Business. As a matter of statutory construction, judges seek to give meaning to each term in a statute and try to avoid interpretations that would render

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COLO. R. CIV. P. 57(b). Moreover, the Colorado Supreme Court has stated that a declaratory judgment action is appropriate when there is “a justiciable issue or a legal controversy extant” and that a declaratory judgment “is appropriate when it will terminate the controversy.” *Heron v. City & County of Denver*, 411 P.2d 314, 316 (Colo. 1966) (en banc). Accordingly, a declaratory judgment action would seem to be appropriate for determining rights under a partnership agreement and construing the Marijuana Laws and the Partnership Act to determine whether Retail Marijuana Partnerships are permissible.

<sup>208</sup> For a similar, though broader, suggestion, see Scheuer, *supra* note 10, at 551–52 (advocating a court ruling that a CSA violation by a Retail Marijuana Business does not violate the law for purposes of the state business entity laws). Scheuer’s suggestion (including in its legislative form, *see id.*) essentially attempts to carve out the CSA from the meaning of “law” in the business entity statutes so as to resolve multiple issues sparked by the inconsistencies between state business entity laws and state laws legalizing marijuana businesses. This type of broad, all-encompassing solution has the benefit of resolving multiple business entity law-related issues generated by state marijuana laws all in one fell swoop. However, it creates a greater potential for unintended consequences than does a more targeted solution such as the one this Article proposes. It may also be difficult to implement, given the Colorado Supreme Court’s interpretations of the Colorado statutes in *Coats II* and *Crouse*. *See supra* text accompanying notes 152–56.

<sup>209</sup> *See supra* note 205.

a provision a nullity.<sup>210</sup> A judge could conceivably construe the illegal purpose doctrine and “unlawful” in the Partnership Act as being limited to state law so as to give effect to the General Assembly’s intent that partnerships be “persons” that are permitted to engage in the Retail Marijuana Business.<sup>211</sup>

However, it is not certain that a Colorado court would embrace this judicial solution. First, interpreting the illegal purpose doctrine and the term “unlawful” in section 7-64-801(1)(d) of the Partnership Act as limited to state law is undesirable. This would permit partnerships to engage in activities prohibited under federal law, though not expressly prohibited under Colorado law, that Colorado would want to disallow, such as infringing upon copyrights.<sup>212</sup> A judicial decision that limits the illegal purpose doctrine or the term “unlawful” in this way would likely have unintended consequences of its own.

Second, it is unclear in light of *Coats II* whether a Colorado court would choose to hold that the Retail Marijuana Amendment makes the Retail Marijuana Business “lawful” (or not “unlawful”). As discussed *supra*,<sup>213</sup> the Colorado Supreme Court held in *Coats II* that medical marijuana use was not a “lawful” activity for purposes of the Lawful Activities Statute because such use remains unlawful under federal law. On the one hand, the court’s declining to rule on the state law issue of whether the Medical Marijuana Amendment creates a constitutional right to medical marijuana use makes it possible for a Colorado court to

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<sup>210</sup> See *People v. Null*, 233 P.3d 670, 679 (Colo. 2010) (en banc) (noting that, in interpreting statutes, courts “avoid interpretations that would render any words or phrases superfluous” (citing *People v. Cross*, 127 P.3d 71, 73 (Colo. 2006))).

<sup>211</sup> The need to construe “unlawful” in this way is reduced just slightly by the fact that “partnership,” as used in the Code and the Rules, almost certainly includes LPs. See *supra* note 88. LPs are not subject to the same automatic dissolution provisions as are general and limited liability partnerships, which means their pursuit of the Retail Marijuana Business would not come with the same dissolution concerns as exist for general and limited liability partnerships (though they would have similar formation concerns). See *supra* note 131. If the term “partnership” does include LPs, and LPs can engage in the Retail Marijuana Business without automatically dissolving, then a court could avoid implying a state law qualification to the term “unlawful” in section 7-64-801(1)(d) without rendering the word “partnership” in the Code’s and Rules’ definition of “person” a nullity. See Colorado Retail Marijuana Code, COLO. REV. STAT. ANN. § 12-43.4-103(13) (West 2010); Retail Marijuana Code, 1 COLO. CODE REGS. § 212-2.103 (2013) (amended 2017) (definitions of “person” in the Code and the Rules). It seems unrealistic that a court would interpret the word “partnership” as referring only to LPs, however, especially since the court would need to reconcile its ruling with the fact that the Rules specifically mention general partnerships and LLPs. See *supra* text accompanying note 87.

<sup>212</sup> See Copyright Act of 1976, 17 U.S.C. § 506 (2012) (prohibiting the infringement on copyright of certain works). Colorado lacks a comparable statutory provision. See *Coats I*, 2013 COA 62, ¶ 18 (listing other examples of activities prohibited under federal law but not specifically banned by Colorado statute). Notwithstanding the lack of a Colorado statute on this point, the Colorado General Assembly would surely not want to sanction the formation of partnerships for purposes of infringing upon others’ copyrights.

<sup>213</sup> See *supra* text accompanying note 152; see also *supra* text accompanying notes 167–76.



find the Retail Marijuana Business not “unlawful” under the Partnership Act on the theory that the Retail Marijuana Amendment creates a constitutional right to sell retail marijuana in accordance with the Marijuana Laws. Also, *Coats II* construed the term “lawful” in the employment discrimination context, not in a business entity law context, so a sympathetic court might be able to distinguish *Coats II* based on the factual circumstances.

On the other hand, the fact that “unlawful” under the Partnership Act is not limited by reference to state law remains significant. Following *Coats II*, a Colorado court would likely find that the term “unlawful” in section 7-64-801(1)(d) refers to both state and federal law, and thus would be unable to declare that the Retail Marijuana Business is not “unlawful.” Moreover, nothing in *Coats II* suggests that the Colorado Supreme Court’s decision was strongly motivated by the fact that it was an employment case, or that the court would be more inclined to find marijuana-related activity “lawful” for purposes of partnership law.<sup>214</sup> If anything, a Colorado court may be *less* sympathetic to this argument in the context of business entity law.<sup>215</sup> Thus, the effect of *Coats II* on a future ruling on the Retail Marijuana Amendment is not entirely predictable, and so a judicial solution cannot be wholly recommended.

## 2. Legislative Fix #1

Given the problems inherent in a judicial solution after *Coats*, a legislative fix is preferable. One such fix would be to change the language of section 7-64-801(1)(d) of the Partnership Act so as to limit the word “unlawful” to state law. For example, the section could be changed to read “(d) An event that makes it unlawful *under state law* for all or substantially all of the business of the partnership to be continued.” This suggestion poses the same problem that a judicial interpretation does: there are likely activities that are unlawful under federal law that Colorado’s legislature would not want its partnerships to engage in, and would not want to sanction their doing so by means of this language.<sup>216</sup> Further, it does not address the issue of the illegal purpose doctrine. This solution is thus an inadequate one.

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<sup>214</sup> The fact that the court applied the same interpretation of “lawful” in *Crouse*, a criminal case, bolsters this argument. *See supra* notes 154, 156.

<sup>215</sup> Surely the employee in *Coats*, a quadriplegic man who was terminated for “his state-licensed use of medical marijuana at home during nonworking hours,” is a more sympathetic plaintiff than a partnership. *Coats II*, 2015 CO 44, ¶ 2.

<sup>216</sup> *See supra* note 212 and accompanying text.

### 3. Legislative Fix #2

A second potential legislative solution is to carve out from the term “unlawful” in section 7-64-801(1)(d) of the Partnership Act activities that comply with the Marijuana Laws. For example, the section could be amended to read:

(d) An event that makes it unlawful for all or substantially all of the business of the partnership to be continued . . . . For purposes of this section, business conducted in compliance with article 43.4 of title 12 and section 16 of article XVIII of the state constitution<sup>217</sup> shall not be considered “unlawful.”

This solution has the virtue of greater certainty than relying upon a court’s interpretation of the Partnership Act, and it avoids the problematic restriction of “unlawful” in the Partnership Act to state law.

But it is still not an ideal solution. First, it does not eliminate the illegal purpose doctrine problem. Second, to put it bluntly, it looks bad to have to say that statutorily authorized conduct is not unlawful. The obvious implication (and the reality) is that the conduct is unlawful, even if only as a matter of federal law. The amended language does what it is intended to do, but does so in an inelegant manner. It also decreases the uniformity of the Partnership Act with the partnership laws of other states that have adopted the Uniform Partnership Act (1997).<sup>218</sup> In light of this, changing the Partnership Act’s dissolution language in this way is undesirable, as well as awkward.

### 4. Legislative Fix #3

The third potential legislative solution is the simplest and the most viable: an amendment of the Code to provide that partnerships that conduct business in compliance with the Marijuana Laws have not formed for an “illegal purpose” within the meaning of the illegal purpose doctrine and are not engaging in “unlawful” business for purposes of section 7-64-801(1)(d) of the Partnership Act—i.e.:

Notwithstanding any other provision of Colorado state or local law, the cultivation, manufacture, distribution, and sale of retail marijuana and retail marijuana products in compliance with the terms, conditions, limitations, and restrictions of section 16 of article

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<sup>217</sup> For completeness, this amendment should also carve out business conducted in accordance with the Medical Marijuana Code and the Medical Marijuana Amendment.

<sup>218</sup> See *supra* note 138.

XVIII of the state constitution, this article, and the rules authorized and adopted pursuant to this article shall be deemed:

(a) A lawful purpose for which to form a partnership under the Colorado Uniform Partnership Act (1997), section 7-64-101 et seq., C.R.S.; and

(b) Not to be unlawful for purposes of section 7-64-801(1)(d), C.R.S.<sup>219</sup>

This amendment would fit naturally as new subsection (7) in section 12-43.4-901 of the Code, entitled “Unlawful acts—exceptions.” As written, section 12-43.4-901 enumerates a number of acts and activities that remain unlawful despite the Code—e.g., consuming retail marijuana in a licensed retail marijuana establishment, buying or selling retail marijuana products except pursuant to the Code and the Retail Marijuana Amendment, etc.<sup>220</sup>—and establishing misdemeanor penalties for violating the Code or the Rules.<sup>221</sup> New subsection (7) could easily be added to this section to rectify the complications with partnership formation jurisprudence and the Partnership Act without the problems associated with the other potential solutions.

Adopting a clear legislative solution such as this one would avoid the vagaries of depending upon judicial decisions to bless Retail Marijuana Partnerships. It would also eliminate one source of uncertainty for those eager to engage in the Retail Marijuana Business by means of a partnership, since it would make clear that—at least as far as Colorado law is concerned—their investment is not at risk of forfeiture because drafters of the Marijuana Laws were unable to anticipate and avoid all potential consequences of inconsistencies with other state laws. The Colorado General Assembly should adopt this amendment to the Code to eliminate, as much as is possible so long as marijuana sales remain illegal under federal law, the unintended consequences for partnerships of legalizing retail marijuana sales.

#### CONCLUSION

Governor Hickenlooper opposed the legalization of retail marijuana sales in Colorado from the outset. With the benefit of a few

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<sup>219</sup> There are certainly other statutory sections pertaining to other business entities and other topics that would benefit from inclusion in this amendment, and a similar amendment should likely be made to the Medical Marijuana Code. In line with this Article’s focus, I refer only to general and limited liability partnerships, the relevant provision of the Partnership Act, and the Code.

<sup>220</sup> See Colorado Retail Marijuana Code, COLO. REV. STAT. § 12-43.4-901.

<sup>221</sup> See *id.* § 12-43.4-901(6).

years' hindsight, he still believed Colorado's legalization of recreational marijuana was "reckless," notwithstanding his efforts to "regulate the living daylights out of it."<sup>222</sup> Whether Governor Hickenlooper's negativity was warranted largely remains to be seen. What is clear, though, from Colorado's retail marijuana legalization is that the consequences of marijuana legalization are far-reaching and hard to predict. It may be relatively simple to draft a ballot measure that legalizes marijuana sales statewide; it is far harder to implement a comprehensive marijuana regulatory scheme in a way that avoids conflicts and inconsistencies with other state statutes—particularly when those conflicts and inconsistencies are not readily apparent, such as those arising from business entity statutes.

Two maxims ring especially true here and provide good counsel for other states that may choose to legalize marijuana sales in the future. The first is that haste makes waste. The Retail Marijuana Amendment mandated that implementing regulations be adopted within roughly six months after the amendment was signed into law by the governor on December 10, 2012.<sup>223</sup> Even the most careful legislators with the best intentions struggle to draft comprehensive legislation on such a tight timeframe. Marijuana legislation, which has so many implications for so many diverse fields—public health, zoning, taxation, business entity law, etc.—is especially unsuited to rapid drafting. Emergency legislation adopted solely to meet deadlines may be the result, as it has been in Alaska, Colorado, Oregon, and Washington,<sup>224</sup> and likely will be in the states that have most recently legalized retail marijuana sales. While the ballot initiative may be advantageous because it can produce legislative

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<sup>222</sup> See Dan Kedmy, *Colorado Governor: Legalizing Marijuana Was 'Reckless' Decision*, TIME (Oct. 7, 2014), <http://time.com/3478057/colorado-john-hickenlooper-reckless>.

<sup>223</sup> See COLO. CONST. art. XVIII, § 16, cl. 5(a) (mandating that regulations be adopted no later than July 1, 2013).

<sup>224</sup> See Letter from Micaela Fowler, Dep't of Commerce, Cmty. & Econ. Dev., to Scott Meriwether, Office of the Lieutenant Governor of Alaska (Feb. 24, 2015), [https://www.commerce.alaska.gov/web/portals/9/pub/mcb/statutesandregulations/abc\\_board\\_emergency\\_regulations\\_2015-02-24.pdf](https://www.commerce.alaska.gov/web/portals/9/pub/mcb/statutesandregulations/abc_board_emergency_regulations_2015-02-24.pdf) (Alaska emergency regulations regarding the meaning of "in public"); COLO. DEP'T OF REVENUE, MARIJUANA ENF'T DIV., STATEMENT OF BASIS AND PURPOSE—COLORADO RULES GOVERNING RETAIL MARIJUANA (2013), [https://www.colorado.gov/pacific/sites/default/files/Retail%20Marijuana%20Rules,%20Adopted%20090913,%20Effective%20101513%5B1%5D\\_0.pdf](https://www.colorado.gov/pacific/sites/default/files/Retail%20Marijuana%20Rules,%20Adopted%20090913,%20Effective%20101513%5B1%5D_0.pdf) (describing the necessity of adopting emergency rules governing Colorado's retail marijuana sales to comply with the short time period for rule adoption prescribed by the implementing legislation); S. 542, 78th Legis. Assemb., Reg. Sess. (Or. 2015), <https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB542/Introduced> (Oregon emergency marijuana regulations); 16-03 Wash. Reg. 17-21 (Jan. 6, 2016), <http://lawfilesexternal.wa.gov/law/wsr/2016/03/16-03EMER.pdf> (Washington emergency rules to implement 2015 marijuana legislation).

results faster than the ordinary legislative process can,<sup>225</sup> it may also speed the process to a greater than optimal extent, thereby creating the potential for confusion and uncertainty about the laws. Perhaps this result is unavoidable, given the nature of the ballot initiative process. Then again, perhaps some of this dilemma can be avoided if advocates of marijuana legalization push to include in legalizing ballot amendments longer lead times for drafting implementing legislation.

The second maxim is the advice to learn from others' mistakes, as one will never make enough of one's own. Governor Hickenlooper seemed mindful of this when he expressed displeasure at having Colorado be the "experiment" in recreational marijuana legalization<sup>226</sup>—to be first is to have no opportunity to learn from others' experiences. Some issues with state marijuana legalization are well highlighted, if still unresolved, such as problems with banking, taxation, and the like. Others, like conflicts with the doctrines governing formation and dissolution of partnerships and other business entities, as discussed in this Article, are just now coming to light. As more states legalize marijuana sales and join the "experiment," (as they surely will, unless the Supreme Court speaks conclusively against it), more mistakes will be made that can be avoided by those that come after. Particularly in fields that have uniform statutes available and widely adopted, such as business entity law, the opportunities to learn from others—and to borrow their solutions—are widespread and relatively painless. Mostly, it takes a willingness to learn and the patience to put that learning to good use.

This Article has proposed a narrow state solution to a problem arising in a narrow slice of a much broader field. As it is subject to more scrutiny with respect to marijuana legalization, business entity law is sure to be the source of more conflicts and inconsistencies with laws legalizing marijuana sales. Broader solutions pertaining more globally to business entity law may be preferable to targeted strikes against particular issues. But, in the same vein as legislation legalizing marijuana sales generally, solutions must be carefully examined before they are implemented, lest they, too, have unintended consequences.

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<sup>225</sup> See DuVivier, *supra* note 35, at 234–48 (describing the relative benefits and drawbacks of the ballot initiative process).

<sup>226</sup> See Slothower, *supra* note 4.