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Nebraska Nonsense: Trojan Horse or Cash Crop?

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Comment*

Nebraska Nonsense: Trojan Horse or Cash Crop?

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I. INTRODUCTION

When I was a young boy, my father reminisced about driving through the Nebraska countryside in the 1970s. He told me about the vast fields of green he saw, only, they were not fields of corn. Yes, Nebraska has a long history with hemp. In fact, local hemp even

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earned its own nickname: “Nebraska Non-sense.”¹ Despite this unique history, it has been illegal to grow hemp in Nebraska for almost a century—until recently.

In 2019, responding to the recent trend of hemp legalization in the U.S., Nebraska lawmakers weighed the question of whether Nebraskans should be allowed to grow hemp. LB 657, or the Nebraska Hemp Farming Act (NHFA), sought to align state and federal law on industrial hemp and open new commercial markets for farmers and businesses for the production and sale of hemp products.² Advocates of industrial hemp claimed a forthcoming “green rush” fueled by the growing market for cannabidiol (CBD), while others claimed the bill was a slippery slope for the legalization of marijuana.³ Specifically, State Senator John Lowe of Kearney argued that the NHFA was a “Trojan horse” for legal marijuana and would increase children’s access to drugs.⁴ However, the bill passed on a 43-4 vote. On May 30th, 2019, Nebraska Governor Pete Ricketts signed the bill allowing farmers to cultivate hemp.⁵

This Comment will argue that the NHFA is not a slippery slope for legal marijuana. The slippery slope argument is tenuous given Nebraska’s history as a former forerunner in hemp production and a top agricultural state with temperate, conservative values. This unique history enables citizens, judges, and legislators to draw and maintain a meaningful line between hemp and marijuana.

Part II of this Comment provides background information about industrial hemp, Nebraska’s own history with it, and the current CBD boom. Section III.A argues that the NHFA is not a slippery slope and will not increase children’s access to drugs. Rather, the NHFA better regulates both hemp and marijuana. Section III.B argues that Nebraska lawmakers correctly passed the NHFA because industrial hemp provides an economic opportunity to Nebraska farmers who should not be precluded from taking advantage of such an industry. Section III.C argues that even if the NHFA leads to future marijuana legislation, the state will benefit because Nebraska’s current marijuana laws offer poor guidance on how to prosecute today’s vast market of illegal tetrahydrocannabinol (THC) goods entering the state from neighboring states such as Colorado. This has led to inconsistent and unjust penalties. Regardless of whether marijuana is legalized, the state’s laws are outdated and in need of reform. Ultimately, this

1. MARTIN A. LEE, SMOKE SIGNALS 416 (2012).

2. Nebraska Hemp Farming Act, LB 657, § 2, 106th Leg., 1st Sess. (Neb. 2019).

3. Compare *infra* section II.C, with *infra* section II.E.

4. JoAnne Young, *Ricketts Signs Hemp Farming Act into Law*, LINCOLN J. STAR (May 30, 2019), https://journalstar.com/legislature/ricketts-signs-hemp-farming-act-into-law/article_03407d68-0545-5e0a-9f37-80a225798742.html [https://perma.unl.edu/T22L-J4KG].

5. *Id.*

Comment argues that Nebraska lawmakers were reasonable in passing the NHFA because hemp cultivation should not be illegal and the Act better regulates both hemp and marijuana.

II. BACKGROUND

A. Nebraska Was a Leading Hemp Producer Until Prohibition

Hemp is botanically known as *Cannabis sativa L.*, the same as marijuana.⁶ The ancient Chinese were the earliest reported cultivators of hemp, producing it as a textile fiber and food as early as 500 A.D.⁷ The Chinese also made the oldest surviving paper from hemp fiber over 2,000 years ago.⁸ In America, European colonists in the mid-1600s produced industrial hemp to make twine, rope, and linen.⁹ In fact, George Washington and Thomas Jefferson were “[t]wo of the strongest advocates” for industrial hemp.¹⁰ By 1914, hemp was the most “extensively” used industrial fiber in the county, with the United States using 10,000–15,000 tons a year.¹¹

In Nebraska, the earliest commercial production of hemp began in 1887 in Fremont.¹² Prior to commercial production, hemp grew abundantly as a “wild plant” throughout the Midwest.¹³ In fact, hemp grew particularly well in eastern Nebraska because of the “deep clay-loam prairie soil underlain with lime rock.”¹⁴ The “prairie soils in eastern Nebraska” gave hemp producers a natural advantage because it provided for “more uniform crops . . . after the first year” of cultivation.¹⁵

Havelock, Nebraska, was also a site for hemp cultivation before the turn of the century.¹⁶ The hemp produced there demonstrated that

6. U.S. DEP’T OF AGRIC., YEARBOOK OF THE UNITED STATES DEPARTMENT OF AGRICULTURE 288 (1913); see also 21 U.S.C. § 802(16) (2018) (“The term ‘marihuana’ means all parts of the plant *Cannabis sativa L.*”).

7. U.S. DEP’T OF AGRIC., *supra* note 6.

8. Ernest Small & David Marcus, *Hemp: A New Crop with New Uses for North America*, in TRENDS IN NEW CROPS AND NEW USES 297 (J. Janick & A. Whipkey eds., 2002), <https://www.hort.purdue.edu/newcrop/ncnu02/v5-284.html> [<https://perma.unl.edu/K3KY-YZ3B>].

9. Curt Arens, *5 Dates to Remember in Nebraska’s Hemp History*, NEB. FARMER (July 5, 2019), <https://www.farmprogress.com/crops/5-dates-remember-nebraskas-he> [<https://perma.unl.edu/RWA2-KLTA>].

10. Tara Christine Brady, *The Argument for the Legalization of Industrial Hemp*, 13 SAN JOAQUIN AGRIC. L. REV. 85, 87–88 (2003) (stating that the founders specifically advocated for a “hemp-based economy”).

11. U.S. DEP’T OF AGRIC., *supra* note 6, at 283–84.

12. *Id.* at 293.

13. *Id.* at 294.

14. *Id.* at 307.

15. *Id.* at 312.

16. *Id.* at 293. Havelock, the historic Lincoln neighborhood, was once its own municipality until it was annexed by Lincoln in 1930. Maggie Stehr, *Havelock Remains*

hemp was, and is, “remarkably” resilient to diseases caused by fungi.¹⁷ According to the 1900 U.S. Census of Agriculture, Nebraska grew 683 acres of industrial hemp,¹⁸ the third most in the nation behind Kentucky and Illinois but ahead of California.¹⁹ In the early 1900s, however, nationwide production began to decline due to the difficulty in securing a proper labor force and the lack of “labor-saving machinery” that other industries enjoyed, such as tobacco, corn, and raising livestock.²⁰

Despite its history with hemp production, Nebraska prohibited hemp, like alcohol, ahead of federal prohibition. (The state was already dry before the 18th Amendment took effect.)²¹ In 1927, amidst a wave of prohibition laws being passed in surrounding states, Nebraska prohibited all forms of hemp.²² Ten years later Congress passed the Marihuana Tax Act, the first federal law addressing cannabis.²³ The Marihuana Tax Act distinguished hemp and marijuana, and specifically regulated marijuana (effectively prohibiting it).²⁴ Therefore, hemp remained legal under federal law.²⁵ “In fact, during World War II, the federal government encouraged production of hemp for fiber and oil,”²⁶ particularly in the Midwest.²⁷ Because of ambiguities in the Act, however, most hemp producers did not want to chance

the ‘Small Town Within a City’, DAILY NEBRASKAN (Jan. 11, 2005), http://www.dailynebraskan.com/havelock-remains-the-small-town-within-a-city/_Ocba9ff1-a47e-56d3-bb5c-be4786a6829a.html [<https://perma.unl.edu/2J8>].

17. U.S. DEP’T OF AGRIC., *supra* note 6, at 315. More on the agricultural benefits of hemp will be discussed *infra* section II.C.
18. Arens, *supra* note 9.
19. *Id.*
20. U.S. DEP’T OF AGRIC., *supra* note 6, at 285.
21. *Nebraska Is 36th to Ratify, Making Prohibition Law*, UNITED PRESS INT’L (Jan. 16, 1919), <https://www.upi.com/Archives/1919/01/16/Nebraska-is-36th-to-ratify-making-Prohibition-law/1089341881791/> [<https://perma.unl.edu/AE9D-7LG6>]. Rich with its own prohibition lore, Nebraska even had a “boot-legging queen.” See Louise Vinciguerra, *Nebraska’s Bootlegger Queen*, HISTORY NEB. BLOG, <https://history.nebraska.gov/blog/louise-vinciguerra-nebraska’s-bootlegger-queen> [<https://perma.unl.edu/FC2L-3YTX>] (last visited Sept. 25, 2019).
22. Arens, *supra* note 9.
23. Christina E. Coleman, Note, *The Future of the Federalism Revolution: Gonzales v. Raich and the Legacy of the Rehnquist Court*, 37 LOY. U. CHI. L.J. 803, 822 (2006) (“In 1937, the federal Treasury Department passed the Marihuana Tax Act, which imposed burdensome registration requirements for manufacturers, importers, and dealers of marijuana, as well as for practitioners prescribing the drug for medical purposes.”).
24. *Id.*
25. Marne Coit, *The Fate of Industrial Hemp in the 2018 Farm Bill - Will Our Collective Ambivalence Finally Be Resolved?*, 14 J. FOOD L. & POL’Y 12, 15 (2018).
26. *Id.*
27. Small & Marcus, *Hemp: A New Crop with New Uses for North America*, in TRENDS IN NEW CROPS AND NEW USES, *supra* note 8, at 284.

being penalized for marijuana production.²⁸ Consequently, hemp production declined despite its legality.²⁹

In 1970, Congress, under the Nixon Administration, passed the Controlled Substances Act (CSA), which is the federal regime that prohibits marijuana today.³⁰ The CSA categorizes substances in “schedules” based upon accepted medical use and potential for abuse.³¹ Marijuana is categorized as a Schedule I substance, which is considered the most dangerous schedule, and therefore, the most regulated classification.³² But the CSA did not distinguish between marijuana and hemp, so Congress gave the Drug Enforcement Agency (DEA) criminal jurisdiction over all forms of *cannabis sativa*.³³ Up until the last six years, the DEA has operated on the premise that hemp and marijuana are indeed the same, effectively banning both.³⁴

B. The Federal Government Began Hemp Reform with the 2014 and 2018 Farm Bills

Almost a century after laws began effectuating a prohibition on hemp, the U.S. was one of the only industrialized nations that prohibited industrial hemp.³⁵ Beginning in 2014, however, Republican Senate Majority Leader Mitch McConnell began advocating for hemp legalization under the purview of state research programs.³⁶ As a result, on February 7, 2014, President Barack Obama signed the Agricultural Act of 2014 (the 2014 Farm Bill).³⁷

The 2014 Farm Bill did not remove industrial hemp from the federal controlled substance schedules. Rather, it defined “industrial hemp” under the CSA as cannabis with less than 0.3% THC “on a dry

28. Brady, *supra* note 10, at 89 (explaining that although industrial hemp was still legal to produce after the Marihuana Tax Act, “the language of the Act made it very difficult for anyone to rigidly comply”).

29. See Small & Marcus, *Hemp: A New Crop with New Uses for North America*, in TRENDS IN NEW CROPS AND NEW USES, *supra* note 8, at 284 (“[T]he Marihuana Tax Act . . . essentially ended hemp production in the United States . . .”).

30. Controlled Substances Act of 1970, Pub. L. No. 99-513, §§ 101, 102, 84 Stat. 1242 (current version at 21 U.S.C. §§ 801, 802(16) (2018)); Coleman, *supra* note 23.

31. Coit, *supra* note 25, at 15–16.

32. *Id.* at 16.

33. *Id.* at 15; see also 21 U.S.C. § 802(16) (“The term ‘marihuana’ means all parts of the plant *Cannabis sativa* L.”).

34. Coit, *supra* note 25, at 15–17.

35. Elizabeth F. Ousley, *Hemp: How the Comeback Crop Is Budding in the Bluegrass*, 11 KY. J. EQUINE, AGRIC., & NAT. RESOURCES L. 103, 106 (2018).

36. Jenny Hopkinson, *McConnell High on Hemp Provision*, POLITICO (Jan. 29, 2014, 10:00 AM), <https://www.politico.com/story/2014/01/mitch-mcconnell-high-on-hemp-provision-in-farm-bill-102802> [<https://perma.unl.edu/Y6J6-H8CA>].

37. Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (2014) (codified as amended in various sections of 7 U.S.C.).

weight basis.”³⁸ Moreover, section 2606 of the bill authorized hemp research and pilot programs by state departments of agriculture and institutions of higher education, provided the research be done under “an agricultural pilot program or other agricultural or academic research” and the activities are allowed under the relevant state’s laws.³⁹ By 2017, thirty-eight states and Puerto Rico considered industrial hemp legislation; nineteen states either enacted such legislation or authorized research programs under the 2014 Farm Bill,⁴⁰ including Nebraska.⁴¹

However, still unsatisfied, Mitch McConnell pushed to have hemp removed from the Controlled Substances Act altogether. On December 20, 2018, President Donald Trump signed the Agriculture Improvement Act of 2018 (the 2018 Farm Bill).⁴² The bill removed hemp from the CSA⁴³ and expanded the definition of “industrial hemp” to include cannabis “and any part of that plant,” including “all derivatives, extracts, [and] cannabinoids,” with less than 0.3% THC.⁴⁴ Under the 2018 Farm Bill, states can submit plans and apply for primary regulatory authority over hemp production in their state,⁴⁵ meaning states can license hemp production to individual farmers compliant with the bill. The plan must include certain requirements such as land tracking, testing methods, and proper disposal of plants that exceed the allowed THC limit.⁴⁶

C. Industrial Hemp and CBD Is Now a Legal, Legitimate, and Booming Industry

Since Congress passed the Farm Bills, industrial hemp production has grown significantly. Some claim the growth has been so significant that “domestic farmers are having a tough time keeping up.”⁴⁷ Although Senator Lowe stated that markets for industrial hemp are “risky,”⁴⁸ according to Vote Hemp, a hemp advocacy group, farmers in

38. *Id.* § 7606(b)(2) (codified at 7 U.S.C. § 5940(2) (2018)). THC is the psychoactive ingredient in marijuana. *See infra* note 53 and accompanying text.

39. *Id.* § 7606(a)(1), (b)(1)(A) (codified at 7 U.S.C. § 5940(b)).

40. *State Industrial Hemp Statutes*, NCSL, <https://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx> [https://perma.unl.edu/49YR-EQB2] (last visited July 31, 2020).

41. NEB. REV. STAT. § 2-5701 (Supp. 2019).

42. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018).

43. *Id.* § 297A (codified at 7 U.S.C. § 1639o).

44. *Id.*

45. *Id.* § 297B (codified at 7 U.S.C. § 1639p).

46. *Id.*

47. Daniel Mudd, *You Down With CBD? Yea You Know Me—States Look to Incentivize and Tax Growing Hemp Industry*, 29-OCT J. MULTISTATE TAX’N 32, 32 (2019).

48. *Transcript of Floor Debate on LB 657*, 106th Leg., 1st Sess. 10 (Neb. 2019) (statement of Sen. Lowe).

the U.S. went from growing about 25,000 acres of hemp in 2017 to over 78,000 acres just a year later.⁴⁹ In 2018, the total sales for hemp-based products were estimated at \$1.1 billion, and that is “expected to more than double by 2022,” at least according to a cannabis market research firm.⁵⁰ Although these numbers are from interested groups, the USDA corroborates this significant growth, reporting that within one year hemp production quadrupled from 27,424 acres to 128,320 acres.⁵¹

The hemp boom is driven by the market demand for CBD, which is “one of 120 compounds called ‘cannabinoids’ found in cannabis.”⁵² Unlike its infamous cousin, THC, the psychoactive chemical in marijuana, CBD offers numerous purported health benefits but “does not induce a high.”⁵³ CBD, sourced from industrial hemp, can now be found in an unimaginable range of products, making investors “swoon because of the potential multibillion-dollar market.”⁵⁴ To illustrate, CBD products range from foods to toiletries⁵⁵ and can be found everywhere from bars to pet stores.⁵⁶ In the U.S., some estimate the market for CBD is expected to reach \$20 billion in the next five years.⁵⁷ That figure does not include the vast market for other industrial hemp

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49. *U.S. Hemp Crop Report*, VOTE HEMP, <https://www.votehemp.com/u-s-hemp-crop-report/> [https://perma.unl.edu/66NV-JNBD] (last visited Sept. 13, 2020).
 50. Parija Kavilanz, *These Hemp Farmers Are Making a Killing on the CBD Industry*, CNN Bus. (Apr. 10, 2019, 11:41 AM), <https://www.cnn.com/2019/04/09/success/hemp-farmer/index.html> [https://perma.unl.edu/P4B9-ELY6].
 51. Jenni Avins & Dan Kopf, *As Demand for CBD Explodes, US Farmers Are Seeing Dollar Signs*, QUARTZ (Aug. 12, 2019), <https://qz.com/1686276/how-much-hemp-is-grown-in-the-us/> [https://perma.unl.edu/8DKX-PZGH].
 52. Joresa Blount, *What Is CBD? Here's the Complete Guide*, FLIPBOARD (Sept. 11, 2019), <https://flipboard.com/@forbes/what-is-cbd-here-s-the-complete-guide/%3Aa%3A89958095-a7f608d189%2Fforbes.com> [https://perma.unl.edu/4DH4-YMXY].
 53. *Id.*
 54. Max A. Cherney, *Hemp Is Now Legal in the U.S., so What Does That Mean for Pot Companies?*, MARKET WATCH (Dec. 23, 2018, 10:07 PM), <https://www.marketwatch.com/story/cbd-and-hemp-are-now-legal-in-the-us-so-what-does-that-mean-for-pot-companies-2018-12-20> [https://perma.unl.edu/44L4-S9M2].
 55. Alex Malyshev & Ted McDonough, *The Marketing and Sale of Products Containing Hemp and CBD Over the Internet*, 23 J. INTERNET L. 1, 21 (2019) (explaining that CBD products include “beverages and foods, chewables, tinctures, moisturizers and creams, shampoos, supplements and protein powders, ointments, and even dog treats”); Kavilanz, *supra* note 50.
 56. Avins & Kopf, *supra* note 51 (noting that CBD products are sold in “drugstores, cafés, pet stores, bars, spas, and all over the internet”).
 57. Malyshev & McDonough, *supra* note 55. The estimates range widely, however. See Mudd, *supra* note 47 (“Recent reports estimate that the hemp industry, which accounted for approximately \$1.1 billion in revenue in 2018, will more than double to approximately \$2 billion to \$2.6 billion by 2022, while another report makes a bold prediction that the CBD market alone may reach \$22 billion by 2022.” (footnote omitted)).

products.⁵⁸ Although the projections range from \$2 to \$22 billion in the next few years, one thing is clear: “These are startling numbers from an industry that essentially didn’t exist some five years ago.”⁵⁹

Aside from hemp’s economic potential and numerous applications, from an agricultural perspective, hemp is beneficial to farmland. Academia, government, and professional research firms have confirmed that hemp is a good crop because of its forest cover potential and ability to preserve biodiversity by reducing dependence on “old growth forests.”⁶⁰ It requires no pesticides or herbicides and is a very sustainable crop.⁶¹ Additionally, hemp “tends to improve rather than injure the soil”; in fact, it “improves its physical condition, destroys weeds, and does not exhaust its fertility.”⁶² Even those critical of hemp legalization acknowledge its small “environmental footprint.”⁶³ It even protects the soil by warding off nematodes (root-damaging

58. Malyshev & McDonough, *supra* note 55. Before CBD, manufacturers had traditionally used hemp as an industrial fiber, but today they have found many more applications for the plant. This knowledge is not new. “Popular Mechanics magazine (1938) touted hemp as ‘the new billion dollar crop,’ stating that it ‘can be used to produce more than 25,000 products, ranging from dynamite to Cellophane.’” Small & Marcus, *Hemp: A New Crop with New Uses for North America*, in *TRENDS IN NEW CROPS AND NEW USES*, *supra* note 8, at 285; *see also* Malyshev & McDonough, *supra* note 55 (“Hemp fibers are used in fabrics, textiles, yarns and spun fibers, paper, carpeting, home furnishings, construction and insulation materials, auto parts, and composites. Hurds (the short woody fibers found in the stalk of the plant) are used in animal bedding, papermaking, and oil absorbents. Hemp seed and oilcake are used in a range of foods and beverages (e.g., salad and cooking oil and hemp dairy alternatives) and can be an alternative food and feed protein source. Oil from the crushed hemp seed is used in soap, shampoo, lotions, bath gels, and cosmetics. Hemp is also being used in nutritional supplements and in medicinal and therapeutic products, including pharmaceutical, as well as a range of composite products. Hempcrete (a mixture of hemp hurds and lime products) is being used as a building material. Hemp is used as a lightweight insulating material and in hemp plastics and related composites for use as a fiberglass alternative by the automotive and aviation sectors.”). Hemp’s long fibers also make hemp paper twice as recyclable as wood paper. Small & Marcus, *Hemp: A New Crop with New Uses for North America*, in *TRENDS IN NEW CROPS AND NEW USES*, *supra* note 8, at 298; *4 Best Reasons to Legalize Hemp*, *ECOWATCH* (Apr. 20, 2015, 8:32 AM), <https://www.ecowatch.com/4-best-reasons-to-legalize-hemp-1882033886.ht> [<https://perma.unl.edu/58FV-JGDS>]. It can produce three to four times as much fiber per hectare as typical forests and twice as much as a pine plantation. Small & Marcus, *Hemp: A New Crop with New Uses for North America*, in *TRENDS IN NEW CROPS AND NEW USES*, *supra* note 8, at 298. Furthermore, hemp also has promise as a potential biodiesel, feedstock, and cover crop. *4 Best Reasons to Legalize Hemp*, *supra*.

59. Mudd, *supra* note 47.

60. *See 4 Best Reasons to Legalize Hemp*, *supra* note 58.

61. *Id.*

62. U.S. DEP’T OF AGRIC., *supra* note 6, at 308.

63. *See* Dan Mitchell, *Why Legalized Hemp Will Not Be a Miracle Crop*, *MOD. FARMER* (Oct. 17, 2013), <https://modernfarmer.com/2013/10/legal-industrial-hemp-wont-matter/> [<https://perma.unl.edu/W3A4-JW6U>].

worms) and fungi.⁶⁴ Hemp is also reputed to be a great rotation option because it is a “heavy nitrogen user and is best suited following a legume, such as soybeans.”⁶⁵ What is more, “[l]and is more easily plowed after hemp than after corn or small grain.”⁶⁶

D. Nebraska Passed a 2014 Hemp Bill and the Nebraska Hemp Farming Act in 2018

After Congress passed each farm bill, Nebraska followed suit. First, in April 2014, then-Governor Dave Heineman passed LB 1001, the state version of the 2014 Farm Bill and Nebraska’s “pilot program.”⁶⁷ The bill, which defined hemp as containing 1% or less of THC, allowed “industrial hemp to be planted, grown, harvested, possessed, processed, sold and purchased” on a very limited basis.⁶⁸ The bill had three goals: (1) allow universities and the Nebraska Department of Agriculture (NDA) to grow hemp, (2) exempt hemp from criminal statutes, and (3) task the NDA with regulatory authority over hemp production.⁶⁹ Such regulatory authority included promulgating “rules and regulations relating to the license, testing for THC levels,” and the required documentation to ensure compliance with the NHFA.⁷⁰ To grow hemp, the licensee had to provide “a legal description of the land to be used for production . . . pay a minimum fee of \$150 . . . and submit fingerprints and other necessary information to complete a check for criminal history.”⁷¹

64. *4 Best Reasons to Legalize Hemp*, *supra* note 58. For an idea of what a nematode is, see generally Damian C. Adams, Regina M. Keenan, Michael T. Olexa, Robert J. McGovern & Joshau A. Cossey, *The Legal Basis for Regulatory Control of Invasive Citrus Pests in Florida: A Review of the Citrus Canker and Spreading Decline Cases*, 12 *DRAKE J. AGRIC. L.* 409, 415 (2007) (“Spreading decline is caused by the burrowing nematode, *Radopholus similis*, a microscopic worm that damages the feeder roots of citrus trees.”).

65. Debby, *Hemp Acres on the Rise in Canada*, *NEB. HEMP ASS’N* (Aug. 21, 2014), <https://nebraskahempassociation.org/hemp-acres-on-the-rise-in-canada/> [<https://perma.unl.edu/54GC-T4CC>]; see also Tyler Williams, *State Bill Legalizes Industrial Hemp Growth for NU*, *State Department of Agriculture*, *DAILY NEBRASKAN* (Apr. 4, 2014), http://www.dailynebraskan.com/news/state-bill-legalizes-industrial-hemp-growth-for-nu-state-department/article_75a9c6f2-bba-11e3-b839-001a4bcf6878.html [<https://perma.unl.edu/UT9Y-VH9J>] (“A key benefit of industrial hemp legalization would be its uses in crop rotation, said Timothy Kettler, a soil scientist in the Department of Agronomy and Horticulture at the University of Nebraska–Lincoln. Crop rotation helps to break disease cycles that can be debilitating to farmer yields, Kettler said.”).

66. U.S. DEP’T OF AGRIC., *supra* note 6, at 309.

67. LB 1001, 103rd Leg., 2d Sess. (Neb. 2014); Williams, *supra* note 65.

68. *Introducer’s Statement of Intent LB 1001*, 103rd Leg., 2d Sess. (Neb. 2014) (statement of Sen. Brad Ashford, Chairperson, Judiciary Comm.).

69. *Id.*

70. *Id.*

71. *Id.* The licensure revenue was used to carryout and enforce LB 1001. *Id.* A person was not eligible to grow hemp if they had a prior criminal conviction. *Id.*

Then, after the 2018 Farm Bill, Nebraska Governor Pete Ricketts signed LB 657, or the Nebraska Hemp Farming Act, on May 30th, 2019.⁷² The NHFA aligns Nebraska “with federal law regarding the cultivation, handling, marketing, and processing of hemp and hemp products.”⁷³ The bill seeks to open new commercial markets for Nebraska farmers and businessmen by expanding “Nebraska’s hemp industry to the maximum extent” of the law.⁷⁴ The bill sets up licensing and fee requirements and outlines reporting and enforcement requirements by the NDA.⁷⁵ Additionally, the NHFA not only grants universities, such as the University of Nebraska-Lincoln, the ability to research hemp production and processing, it actually encourages it.⁷⁶ Ultimately, the bill aspires to “[r]eturn Nebraska to the forefront of the hemp industry.”⁷⁷

The NHFA accomplishes its goals by tasking the NDA with the authority to regulate the growing, harvesting, and processing of hemp for research.⁷⁸ To legally grow hemp, a farmer must obtain a signed license agreement from the NDA.⁷⁹ Further, the bill creates the Nebraska Hemp Commission, which includes the Dean of the University of Nebraska College of Agricultural Sciences and Natural Resources as well as two Nebraska hemp farmers.⁸⁰ The Commission’s duties include promoting the Nebraska hemp industry and setting its budget.⁸¹ The key change made by LB 657 was to section 2-5701 of the Nebraska Revised Statutes, the codification of LB 1001 that allowed universities in the state to cultivate industrial hemp for the purposes of research. LB 657 expanded this section to allow qualified farmers to also cultivate hemp in accordance with the NHFA.⁸²

E. State Senator Lowe Argued the NHFA Will Lead to Legal Marijuana and More Drugs for Children

State Senator John Lowe of Kearney vehemently argued against the NHFA. His two main points were that the NHFA is a slippery slope to legal marijuana and that passing the NHFA will increase children’s access to drugs. First, he explained his Trojan horse argument,

72. Nebraska Hemp Farming Act, LB 657, 106th Leg., 1st Sess. (Neb. 2019) (codified at NEB. REV. STAT. §§ 2-501 to -519 (Supp. 2019)).

73. *Id.* § 2(1).

74. *Id.* § 2(2), (4).

75. *Id.* §§ 4, 7 (licenses); *id.* § 8 (fees).

76. *Id.* § 1(5).

77. *Id.* § 1(7).

78. *Id.* § 4(2)–(3); NEB. DEP’T OF AGRIC., HEMP PROGRAM (2019), <https://nda.nebraska.gov/hemp/> [<https://perma.unl.edu/64XR-TA44>].

79. LB 657, § 6.

80. *Id.* § 17(1)(a), (c).

81. *Id.* § 17(3).

82. *Id.* § 5.

a form of a slippery slope, by stating: “The hemp bill is a Trojan horse bill for marijuana, for medical marijuana because once we get it, then we’re going to go straight to marijuana.”⁸³ He continued, stating that it is the strategy of NORML—the National Organization for the Reform of Marijuana Laws—to normalize industrial hemp and marijuana.⁸⁴ Second, he argued that because the NHFA is “a Trojan horse bill for marijuana,” it will increase children’s access to drugs.⁸⁵

According to Lowe, the NHFA will increase children’s access to drugs because hemp and marijuana are the same plant.⁸⁶ He continued, stating that hemp is the marijuana of the ’70s, or “ditch weed,” and he cited a concern about a growing trend in smoking hemp.⁸⁷ He said, “You get the same taste, the same psychological feeling of smoking a joint, but without the high by smoking a hemp cigarette.”⁸⁸ According to Lowe, smoking hemp is so dangerous because it is unregulated.⁸⁹ Additionally, he argued against the bill because of the market risk of producing hemp⁹⁰ and the potential impact the NHFA will have on federal contracting jobs because Nebraskans will increasingly test positive for THC.⁹¹

III. ANALYSIS

A. The NHFA Is Not a Trojan Horse for Legal Marijuana

Nebraska lawmakers correctly passed the NHFA contrary to Senator Lowe’s slippery slope arguments for three reasons. First, the NHFA is not a slippery slope for marijuana legalization because citizens, judges, and legislators can likely draw and maintain a meaningful line between hemp and marijuana. Next, the NHFA will not increase children’s access to drugs because hemp is not a drug. Lastly, several provisions in the NHFA better regulate both hemp and marijuana in several ways.

83. *Transcript of Floor Debate on LB 657*, 106th Leg., 1st. Sess. 18 (Neb. 2019) (statement of Sen. Lowe).

84. *Id.* at 10 (“Industrial is usually first, then medical, then recreational. That is how things have gone in other states.”).

85. Young, *supra* note 4 (“If you don’t want your children or grandchildren getting easy access to drugs, because that’s what this is, don’t vote for this bill.”).

86. *Transcript of Floor Debate on LB 657*, at 10 (statement of Sen. Lowe) (“Marijuana and hemp are the same plant. . . . So let’s not talk about two different plants.”).

87. *Id.* at 10, 18.

88. *Id.* at 18.

89. *Id.*

90. *Id.* at 10 (stating the hemp market is “rocky, risky, and untraveled” and it also “requires more paperwork, and regulatory infractions could result in crop seizures and destruction”).

91. *Id.* at 19 (“And once we pass [the NHFA], is the testing for federal jobs going to know the difference between the CBD and the THC because, yes, there is THC in hemp.”).

First, the argument that legal hemp is a slippery slope for marijuana in Nebraska is tenuous because of Nebraska's unique history with both hemp cultivation and temperate social policies. Granted, Senator Lowe's concern that legal marijuana advocates push for legalized hemp as a stepping-stone to medical then recreational marijuana is legitimate.⁹² However, in his law review article, *The Mechanisms of the Slippery Slope*, Eugene Volokh says, "The question [regarding the validity of a slippery slope argument] shouldn't be 'Can we draw the line between A and B?,' but rather 'Is it likely that other citizens, judges, and legislators will draw the line there?'"⁹³ Therefore, the question is can Nebraska draw a line between hemp and marijuana, and will that line remain despite the trend of legalization?

The reasonable answer is: Yes. Nebraska lawmakers, including citizens and judges, are more than capable of drawing a distinct and enduring line between hemp and marijuana. This is so for several reasons. First, the definition of "industrial hemp" is clear: Hemp is any cannabis plant with less than 0.3% THC, is not marijuana, and is legal to produce. Therefore, unlike the prohibition-era confusion between hemp and marijuana, there is more clarity between the two under the NHFA. As such, cultivating hemp will not offend Nebraska's temperate, social policies because it is not the psychoactive version of the plant.

Second, hemp is an agricultural product. Nebraska is the third most agricultural producing state.⁹⁴ As a result, it is reasonable to conclude that legalizing hemp, an agricultural product, is materially different from legalizing marijuana, which is more widely known as a drug, and that Nebraska lawmakers are particularly qualified to draw this agricultural distinction. Because hemp is a non-psychoactive, agricultural product, the NHFA conforms to both Nebraska's agrarian and social values.⁹⁵ Thus, Nebraska's history and current values abate the slippery slope argument.

Next, the NHFA will not increase children's access to drugs because hemp is not a drug.⁹⁶ "Ron Wyden [the United States Senator]

92. See *supra* section II.E.

93. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1034-35 (2003).

94. FAQs, U.S. DEP'T OF AGRIC., ECON. RES. SERV., <https://www.ers.usda.gov/faqs/#Q1> [<https://perma.unl.edu/57RW-2NT6>] (last visited Sept. 11, 2020) ("In 2019, the top 10 agricultural producing States in terms of cash receipts were (in descending order): California, Iowa, Nebraska . . .").

95. See *supra* section II.A.

96. The Federal District Court of the District of Idaho recently stated that hemp does not have any psychotropic effects. *Big Sky Sci. LLC v. Idaho State Police*, No. 1:19-CV-00040-REB, 2019 WL 438336, at *1 (D. Idaho Feb. 2, 2019) ("Because industrial hemp has a Δ -9 THC percentage of 0.3 percent or less on a dry weight basis, it has virtually no psychotropic effects and is not used recreationally."); see

of Oregon put it bluntly: ‘Federal law treat[ed] hemp like it’s a dangerous drug, but the only thing you’re going to accomplish by smoking hemp is wasting breath, time and lighter fluid,’”⁹⁷ hence the name: Nebraska Nonsense.⁹⁸

Hemp—a substance removed from the CSA by a conservative—is not a drug because it does not have the same psychological effect as marijuana.⁹⁹ Senator Lowe stated that smoking hemp has the same psychological effect as smoking marijuana but without the high. However, the high is exactly the psychological effect that concerns lawmakers and parents alike. Without the high, hemp is not a drug; if hemp is not a drug, the NHFA does not increase access to drugs for anyone, much less for children. Moreover, according to Senator Lowe, smoking hemp is dangerous because it is unregulated, yet he opposed the NHFA, which better regulates hemp overall. And although he claimed that hemp and marijuana are the same plant, Senator Lowe himself distinguished the two: “[T]rue industrial hemp grows to 18 feet tall.”¹⁰⁰

Lastly, contrary to Senator Lowe’s position, the NHFA better regulates both hemp and marijuana, and therefore, decreases children’s access to drugs by allowing police officers to better enforce marijuana laws. Senator Justin Wayne of Omaha, who introduced the bill,¹⁰¹ explained that the language of LB 657 would not only create the NHFA but would also close a critical gap in the state’s existing law in two ways:¹⁰² (1) by providing that any plant material without proper documentation is subject to seizure by state patrol or other officers, and (2) by creating a \$1,000 fine for possession of undocumented plant material.¹⁰³

This was a critical change in the law. Before, it was cost-prohibitive for small counties to test plant material because it cost \$25–\$50 per test, and if illegal plant materials (e.g., marijuana) were identified, the maximum punishment was a fine up to \$300.¹⁰⁴ So essentially, a person with an ounce or less of marijuana could have claimed

also Brady, *supra* note 10, at 86–87 (noting chemical differences between marijuana and industrial hemp).

97. Harmeet Kaur, *Hemp Won’t Get You High (and Other Things to Know Now That It’s Legal)*, CNN (Dec. 20, 2018, 5:10 PM), <https://www.cnn.com/2018/12/15/us/congress-hemp-legalization/index.html> [https://perma.unl.edu/G8BS-YBES].

98. LEE, *supra* note 1.

99. *See Big Sky*, 2019 WL 438336, at *1.

100. *Transcript of Floor Debate on LB 657*, 106th Leg., 1st Sess. 13 (Neb. 2019) (statement of Sen. Lowe) (emphasis added). The NHFA, according to Lowe, allows for hemp that grows from two to eighteen feet tall. *Id.*

101. *Legislative Journal*, 106th Leg., 1st Sess. 297 (Neb. 2019).

102. *Transcript of Floor Debate on LB 657*, at 9 (statement of Sen. Wayne).

103. *Id.* at 1–2 (statement of Sen. Wayne); *accord* Nebraska Hemp Farming Act, LB 657, § 15(5)–(6), 106th Leg., 1st Sess. (Neb. 2019).

104. *Transcript of Floor Debate on LB 657*, at 1–2 (statement of Sen. Wayne).

it was hemp from Kentucky and would receive only a \$300 fine *if* the police officer decided to test it.¹⁰⁵ In contrast, the NHFA created a new misdemeanor class for carrying undocumented hemp plant material, which is punishable with a fine up to \$1,000. This change closed the loophole, as it is no longer cost-prohibitive for Nebraska counties to enforce the criminal code.¹⁰⁶ Additionally, the NHFA helps law enforcement and protects farmers in another important way. Prior to the bill, anyone growing hemp—even unknowingly—was subject to criminal prosecution. This was problematic because hemp indeed grows wildly across the state. The NHFA now gives law enforcement the discretion to issue a cease and desist order in such situations.¹⁰⁷

B. Hemp Is a Commercially Viable Crop that Nebraska Farmers Should Be Able to Grow

Nebraska lawmakers correctly passed the NHFA because industrial hemp can provide Nebraska's farmers with a legitimate economic opportunity. If there is a legal and viable agricultural market, especially one as promising as hemp, Nebraska farmers should be able to participate in it. First, farmers across the country are cashing in on hemp because the CBD boom has made hemp more profitable than traditional crops. Second, although the hemp market may be risky, all agricultural markets have risk. Therefore, to preclude farmers from the hemp market because of the reasons addressed in section III.A—that hemp is a drug, a Trojan horse for future marijuana legalization, or both—is unreasonable. Furthermore, for the state to determine what risks farmers should or should not take is paternalistic.¹⁰⁸ Advocating for the NHFA, Nebraska State Senator Steve Erdman echoed the frustration of many Nebraska farmers by stating, “[W]e’re waiting out there in rural Nebraska to raise hemp to save the farm.”¹⁰⁹

Across the country, hemp is providing farmers with economic opportunity. For example, a farmer in Kentucky, a state with similar history as Nebraska with hemp,¹¹⁰ expressed, “There are a lot of

105. *Id.*

106. *Id.*

107. LB 657, § 11.

108. The state regulating a person for “his own good” is the very essence of paternalism. Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 579–80 (2004) (“In the words of John Stuart Mill: ‘[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.’ This famous passage, often taken principally to state Mill’s harm principle, also states an antipaternalist corollary to that principle. The state cannot regulate a person for his own good.” (alteration in original) (footnote omitted)).

109. *Transcript of Floor Debate on LB 657*, at 12 (statement of Sen. Erdman).

110. U.S. DEP’T OF AGRIC., *supra* note 6, at 293, 303; *see also* Ousley, *supra* note 35, at 103 (“Industrial hemp could be a successful mechanism for Kentucky to serve as

things you can do on a farm, but there aren't a lot of things you can do to make money."¹¹¹ He continued stating that an acre of soybeans (one of Nebraska's leading crops)¹¹² could earn him \$500, whereas that same acre of hemp could yield as much as \$30,000.¹¹³ Hemp advocates state that farmers can expect a return of "between \$2,500 and \$75,000 per acre."¹¹⁴ Moreover, some concur that hemp is easier to cultivate—"[t]he plant is a weed . . . [a]nd it likes to grow."¹¹⁵ Hemp is also providing some farmers opportunity for rapid expansion. For instance, Hemp Depot in Colorado, which operates its own farms and distributes its own CBD and hemp products, reported that in 2018 it planted 5.2 million plants, sold 25,000 pounds of hemp, and earned \$10 million in sales.¹¹⁶ For 2019, the group expected to sell 350,000 pounds with total sales reaching \$50 million.¹¹⁷

Since the CBD boom, hemp is now more profitable than many traditional crops. One Colorado farm used to grow hundreds of acres of kale, squash, and pumpkins but now dedicates 150 acres to hemp with plans to expand to 1,000 acres.¹¹⁸ The farm charges \$35–\$40 per pound of hemp it sells for CBD extraction, compared to around \$1 for a pound of kale.¹¹⁹ In Kentucky, some farmers are switching from tobacco to hemp.¹²⁰ One Kentucky farmer stated, "There's been plenty

an agricultural innovator. . . . Kentucky's legislature recently declared a desire to promote the expansion of the Commonwealth's industrial hemp industry to the 'maximum extent permitted by federal law' and to 'move the Commonwealth and its citizens to the forefront of the industrial hemp industry.'" "From the end of the civil war until 1912, virtually all the hemp in the U.S. was produced in Kentucky." Small & Marcus, *Hemp: A New Crop with New Uses for North America*, in TRENDS IN NEW CROPS AND NEW USES, *supra* note 8, at 284. Appropriately, a U.S. senator from Kentucky would eventually lead the charge for legalizing hemp today. See Tom Angell, *McConnell Leads USDA Secretary on Tour of Kentucky Hemp Farm*, FORBES (July 2, 2019, 11:16 AM), <https://www.forbes.com/sites/tomangell/07/02/mcconnell-leads-usda-secretary-on-tour-of-kentucky-hemp-farm/#7e4> [<https://perma.unl.edu/QQ82-4NYR>].

111. Avins & Kopf, *supra* note 51.

112. NEB. DEP'T OF AGRIC., NEBRASKA AGRICULTURAL FACT CARD (2020), <https://nda.nebraska.gov/facts.pdf> [<https://perma.unl.edu/5DWF-QYA6>] [hereinafter FACT CARD].

113. Avins & Kopf, *supra* note 51.

114. Joe Burlison, *Nebraska Farmers Investigate Hemp Possibilities*, MIDWEST MESSENGER (Sept. 5, 2020), https://www.agupdate.com/midwestmessenger/news/crop/nebraska-farmers-investigate-hemp-possibilities/article_73dc6258-d00c-11e9-ac03-6b0fbc579792.html#:~:text=depending%20on%20the%20state%2C%20circumstances,%242%2C500%20and%20%2475%2C000%20per%20acre [<https://perma.unl.edu/7KPT-F2CD>].

115. Avins & Kopf, *supra* note 51.

116. Kavilanz, *supra* note 50.

117. *Id.*

118. *Id.*

119. *Id.*

120. David E. Carpenter, *Legal Hemp in 2019 May Be a Boon for Stressed Out American Farmers*, FORBES (Dec. 20, 2018, 2:13 PM), <https://www.forbes.com/sites/>

of challenges with a new crop, but as of today, a mediocre hemp crop is yielding a better return than an excellent tobacco crop.”¹²¹ Mitch McConnell, commenting on Kentucky’s declining tobacco workforce, said that “there are a lot of young farmers and processors here who are excited about [hemp], and we’re glad to be in the lead.”¹²² A California farmer who raises cattle and grows alfalfa lamented about traditional crops and their waning potential but praised hemp’s attractive qualities such as using less water and being more frost resistant, qualities that make farmers working on tight margins appreciate hemp’s effect on their bottom line.¹²³ In addition to the demand fueled by CBD, hemp is now a potential animal feed with trials underway in Canada.¹²⁴ This could provide an additional market for Nebraska hemp farmers.

Indeed, the hemp market is risky. One article decrying the claims that hemp is a miracle crop argues that demand is not as high as hemp advocates purport, citing the decline of demand in the European hemp market due to cheaper and better alternatives such as artificial fibers.¹²⁵ Accordingly, hemp prices will likely drop once it is more readily available through legalization due to market saturation and falling prices once demand becomes satisfied.¹²⁶ However, Mitchell’s critical article ignores the market for CBD. In fact, the price of hemp increased after the 2018 Farm Bill was signed, and industry watchers say that the price could remain or go even higher if demand for CBD is not met.¹²⁷

Granted, while hemp may be profitable for some farmers, they do face certain challenges in producing hemp.¹²⁸ For example, the seeds for good quality hemp that are high in CBD and low in THC are expensive, ranging from \$1–\$2 each.¹²⁹ Hemp is also a very labor intensive product, requiring special machinery for planting and harvesting that is not yet available for hemp like it is for traditional large-scale crops like corn and wheat.¹³⁰ Senator Lowe correctly pointed out: “It’s

daidcarpenter/2018/12/20/legal-hemp-in-2019-may-be-a-boon-for-stressed-out-american-farmers/#c75491d8f3be [https://perma.unl.edu/HD9L-SMX5].

121. *Id.*

122. Angell, *supra* note 110 (alteration in original).

123. Carpenter, *supra* note 120.

124. Debby, *supra* note 65.

125. Mitchell, *supra* note 63 (“Demand for hemp isn’t as high as hemp’s loudest proponents would have it—all you have to do is look at countries where it’s legal.”).

126. See Esther Honig, *Legalizing Hemp Will Likely Shake Up the Market*, NPR (Dec. 25, 2018, 4:13 PM), <https://www.npr.org/2018/12/25/680079481/legalizing-hemp-will-likely-shake-up-the-market> [https://perma.unl.edu/7LUG-UTHE]; Kavilanz, *supra* note 50.

127. Kavilanz, *supra* note 50.

128. *Id.*

129. *Id.*

130. *Id.*

going to require new combines, new tractors, new ways to plant it, new cost to these farmers.”¹³¹ As a result, farmers attempting to grow the crop have to resort to “manual labor for planting, harvesting, and removing weeds.”¹³² These challenges have resulted in “total failure” for some farmers, although they seem willing to persist.¹³³

Lowe is correct that the hemp market has risks, but all agricultural markets have risk. To preclude Nebraskan farmers from entering the hemp market is paternalistic. Farmers face a variety of challenges with any crop, including traditional crops such as dairy and tobacco.¹³⁴ For example, farmers today face challenges ranging from climate change to the Chinese tariff situation that has affected soybean sales¹³⁵ (again, one of Nebraska’s top agricultural exports).¹³⁶ Although the above examples of farmers who are flourishing in the hemp market may be anecdotal, the point is that Nebraska farmers themselves are best situated to determine the risks of the crops they grow and should not be precluded from cashing in on the hemp boom just because the state is reluctant to accept that hemp is not a drug. While there are doubts about hemp’s prospect, there is also legitimate opportunity, and Nebraska certainly has distinct advantages that could enable it to become the “great hemp state” once again and return “to the forefront of the hemp industry.”¹³⁷ Like Senator Erdman stated, “I’m not sure that this bill is going to be the salvation for anybody’s farm, but we are going to give [farmers] some hope that it is.”¹³⁸

Despite these risks, there is nevertheless a tremendous interest in CBD and industrial hemp, not only in the U.S. generally but here in Nebraska. There has been “a vast amount of interest in cultivating

131. *Transcript of Floor Debate on LB 657*, 106th Leg., 1st Sess. 13 (Neb. 2019) (statement of Sen. Lowe).

132. Kavilanz, *supra* note 50.

133. *Id.*

134. Carpenter, *supra* note 120.

135. *Id.*

136. *See supra* note 112 and accompanying text.

137. Nebraska Hemp Farming Act, LB 657, § 2(7), 106th Leg., 1st Sess. (Neb. 2019); *see also* Shawn Hauser, Courtney Barnes & Caitlin Wightman, *Five Reasons Why Texas Could Be “The Great Hemp State,”* VICENTE SEDERBERG.COM (Jul. 30, 2019), <https://vicentesederberg.com/insights/five-reasons-why-texas-could-be-the-great-hemp-state/> [<https://perma.unl.edu/6TQP-3SRX>] (noting that Texas passed a law in 2019 establishing a hemp farming program and noting five reasons why Texas is positioned to become one of the top hemp producers and researchers in the U.S.). Nebraska, like Texas, is similarly situated to be a “great hemp state” because of the benefits from being a late comer to industrialized hemp; Nebraska’s size, climate, and geographical advantages; Nebraska’s agricultural research institutions; and the already-present infrastructure. *Id.*

138. *Transcript of Floor Debate on LB 657*, 106th Leg., 1st Sess. 12 (Neb. 2019) (statement of Sen. Erdman).

industrial hemp in Nebraska.”¹³⁹ For the June 28, 2019 deadline, the NDA received 176 applications from Nebraska farmers.¹⁴⁰ According to one hemp company’s CEO, the combined CBD and hemp industries are touted to grow “exponentially” and present “a real opportunity for rural economic development, with a tremendous enthusiasm from customers.”¹⁴¹ His company’s intention is “to attract the best and brightest, innovative farmers and offer them a long-term relationship rather than a spot-market.”¹⁴² It is difficult to imagine that Nebraskans would be unwelcoming to companies and opportunities such as this.¹⁴³

C. Nebraska’s Marijuana Laws Need Reform

Regardless of whether Nebraska were to pass marijuana legalization laws as Senator Lowe warned, Nebraska’s existing marijuana laws need reform. First, Nebraska’s marijuana laws are inconsistent and outdated. Second, the federal government’s policy of nonenforcement of its own marijuana prohibition because it is no longer “a priority” begs the question: Should marijuana enforcement be a priority for Nebraska? “In order to take a slippery slope argument seriously, support for position A needs to lead to the realistic possibility that people will support position B. Absurd scenarios can be dismissed if they are truly absurd.”¹⁴⁴ Indeed, Nebraska may pass a new marijuana law soon considering that Midwestern states are not immune from the recent trend to legalize. Notably, Illinois and Michigan have legalized recreational marijuana while Ohio, Minnesota, and Missouri have legalized medical marijuana.¹⁴⁵ Even one of the most conservative

139. Jon Burleson, *Industrial Hemp Faces Growing Unknowns*, MIDWEST MESSENGER: KANSAS (Nov. 20, 2019), https://www.agupdate.com/todaysproducer/news/crop/industrial-hemp-faces-growing-unknowns/article_6df2ba74-0bd8-11ea-881a-17ca900c4a37.html [https://perma.unl.edu/VZ9M-RKLS].

140. David Earl, *Nebraska Ag Officials Get 176 Applications to Grow Hemp in 2019*, KETV OMAHA (July 2, 2019, 8:08 PM), <https://www.ketv.com/article/nebraska-ag-officials-get-176-applications-to-grow-hemp-in-2019/28285952#:~:text=officials%20at%20the%20Nebraska%20Department,during%20the%202019%20growing%20season> [https://perma.unl.edu/7BBD-FR3U].

141. Carpenter, *supra* note 120.

142. *Id.*

143. One in four jobs in Nebraska are related to agriculture. FACT CARD, *supra* note 112.

144. Joe Carter, *How Not to Argue: The Problem with Slippery Slopes*, GOSPEL COALITION, <https://www.thegospelcoalition.org/article/how-not-to-argue-the-problem-with-slippery-slopes/> [https://perma.unl.edu/RD2U-6LRE] (last visited Jan. 9, 2020).

145. *Marijuana Overview*, NCSL (Oct. 17, 2019), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [https://perma.unl.edu/W2E7-3T56]; *State Medical Marijuana Laws*, NCSL (Mar. 10, 2020), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [https://perma.unl.edu/9AP6-72YE].

states in the union, Utah, has legalized medical marijuana.¹⁴⁶ As a result, legal marijuana in Nebraska is no longer an absurd idea, regardless of hemp cultivation.

First, Nebraska's laws are inconsistent because of their disparate treatment of marijuana and THC. Furthermore, they are outdated because their lack of clarity offers prosecutors poor guidance on how to pursue THC possession charges. Both of these problems result in vastly different outcomes.¹⁴⁷ The penalty for first-time offenders of marijuana possession caught with one ounce or less is an infraction—not a misdemeanor—resulting in a \$300 penalty.¹⁴⁸ In contrast, possession of “hash or concentrates,” meaning any form of THC other than the plant itself, is a felony punishable by up to two years in prison and or \$10,000.¹⁴⁹ A felony conviction jeopardizes a person's chance of getting into college, obtaining a job, receiving certain government benefits, and getting certain licenses.¹⁵⁰ This issue will only

146. Utah Medical Cannabis Act, UTAH CODE ANN. § 26-61a-101 (West 2018).

147. Nebraska is not the only state with issues of outdated marijuana statutes. *See, e.g.,* Eric Schlimgen, Comment, “*What’s in a Name Anyway?*”: *Reevaluating South Dakota’s Cannabis Statutory Scheme*, 63 S.D. L. REV. 44, 44 (2018) (“The marijuana and edibles consumed now are not the same products of the 1970s and neither are the gummy bears. South Dakota’s legislature has not attempted to remain contemporary with the developments of the cannabis industry; the current statutory language makes interpretation, prosecution, and defense of cannabis cases arduous.” (footnote omitted)).

148. NEB. REV. STAT. § 28-416(11)–(13) (Supp. 2017); *accord Nebraska Laws and Penalties*, NORML, <https://norml.org/laws/item/nebraska-penalties-2> [<https://perma.unl.edu/7TY7-4Y6U>] (last visited Oct. 4, 2019).

149. NEB. REV. STAT. § 28-405(c)(16) (Cum. Supp. 2018); NEB. REV. STAT. § 28-416(3) (Supp. 2017). In other words, while one person caught with “flower” would receive a punishment akin to a traffic ticket, the other who possessed, for example, an edible with equal amount of THC, could receive a felony conviction. *See* NEB. REV. STAT. § 28-416(2); *accord* *State v. Hendrickson*, No. A-19-1175, 2020 WL 5189175, at *1 (Neb. Ct. App. Sept. 1, 2020) (“[P]ossession of tetrahydrocannabinol (THC) [is] a Class IV Felony.”).

150. *See* Lorelei Laird, *Green and Clean Oregonians Get a Chance to Erase Marijuana-Growing Convictions*, 102 A.B.A. J. 9, 9–10 (2016); Stateside Staff, *What Michigan Can Learn from California’s Effort to Expunge Marijuana Convictions*, MICH. RADIO (May 14, 2019), <https://www.michiganradio.org/post/what-michigan-can-learn-california-s-effort-expunge-marijuana-convictions> [<https://perma.unl.edu/3TRV-DZNR>]; *see also* Zach Pluhacek, *Pot Brownie Will Put You Behind Bars in Some Nebraska Counties*, LINCOLN J. STAR (Dec. 25, 2014), https://journalstar.com/news/state-and-regional/nebraska/pot-brownie-will-put-you-behind-bars-in-some-nebraska/article_b0dfa39a-ddd9-57d6-a2e5-ce0d781935a3.html [<https://perma.unl.edu/4RNV-NWC5>] (quoting Sheriff Adam Hayward of Chappell, Nebraska who stated that, when it comes to arresting people for pot brownies, “[w]e’re not the federal government and can pick and choose what we want to enforce” and Nebraska State Senator Davis who stated that the laws “need[] to be straightened out”). As San Francisco District Attorney George Gascón said while discussing the city’s move to expunge over 9,000 marijuana convictions, “It was the morally right thing to do If you have a felony conviction, you are automatically excluded in so many ways from participating in your community.”

become more problematic with the advent of many new THC products.¹⁵¹ Of course, some THC products can be very powerful while others have no intoxicating effect whatsoever.¹⁵²

The vagueness of Nebraska's criminal code offers state prosecutors poor guidance on how to pursue charges for possessors of THC, making this an issue that concerns more than those who wish to legalize marijuana. In fact, some county attorneys "believe Nebraska's 40-year-old marijuana law has [sic] does not provide sufficient clarity in how to deal with products laced with the drug," resulting in "dramatic[]" differences in how these crimes are prosecuted.¹⁵³ The main issue is what exactly is the amount of THC that forms the basis of the charge. "The law does not specify whether the weight of the illegal product should include the ingredients to make the baked goods being regularly seized by police officers."¹⁵⁴ In 2014, county attorneys testified before the Legislature's Judiciary Committee. There, Jonathon Steller, then-acting county attorney in Deuel County said:

[P]olice are authorized by Nebraska statute to base charges on 'the weight at the time the officers weighs [sic] it' at the time of arrest. It doesn't say anything about mixture. It doesn't say anything about separating it. So essentially if you bring edible products that exceed 7 grams into Cheyenne or Deuel County, you leave a felon.¹⁵⁵

"The weight alone is meaningless without that mixture language telling us how much of that is actual marijuana," stated Sarah Carstensen, a deputy county attorney in Hall County at the time.¹⁵⁶ In other words, someone caught with an edible is charged with possession of THC in the overall amount of the edible and not in the amount

Matthew S. Schwartz, *San Francisco to Expunge Thousands of Marijuana Convictions*, NPR (Feb. 26, 2019, 7:27 AM), <https://www.npr.org/2019/02/26/698045482/san-francisco-to-expunge-thousands-of-marijuana-convictions> [<https://perma.unl.edu/F3E7-ECLC>].

151. THC products falling under the penumbra of "hash or concentrates" are just as diverse as CBD products and are becoming just as popular as the flower. There are now edibles, concentrates, and even topicals. Abby Hutmacher, *Beyond Flower-The Many Types of Marijuana*, POTGUIDE.COM (Apr. 28, 2015), <https://www.coloradopotguide.com/colorado-marijuana-blog/2015/april/29/beyond-flower-the-many-types-of-marijuana/> [<https://perma.unl.edu/D6W2-9WA5>].

152. Topicals, for example, are used "to administer cannabinoids [that provide pain] relief without causing the characteristic 'high' of other cannabis. [THC] can be found in lotions and patches to help relieve muscle pain and skin irritation." *Id.*

153. Billy Kelly, *How Tough Is Nebraska on Pot Possession? Depends on the County*, NET NEBRASKA (Sept. 18, 2014, 6:30 AM), <http://netnebraska.org/article/news/938774/how-tough-nebraska-pot-possession-depends-county> [<https://perma.unl.edu/3C4M-RM84>] ("County attorneys in Nebraska respond to small quantity pot cases in dramatically different ways. The range of charges, fines, and opinions came to light in [the] hearing before the Nebraska State Legislature's Judiciary Committee.").

154. *Id.*

155. *Id.*

156. *Id.*

of the THC itself. The non-THC ingredients in such goods typically constitute a much greater portion than the THC. Imagine a law that penalized a minor's possession of a twelve ounce beer with an infraction but penalized the possession of five ounces of wine or one and a half ounces of liquor—liquids containing equal amounts of alcohol as the beer—with a felony.¹⁵⁷ Or, under that same law, imagine a minor getting caught with a rum cake and getting felony possession charges for the net weight of the rum cake and not for the actual amount of rum therein. Such a law would not only be clearly unreasonable, it would be patently unjust. As written, Nebraska's marijuana laws are ill-equipped to deal with the nuances of the modern-day cannabinoid landscape and require reform.¹⁵⁸

Second, although marijuana is federally prohibited, the federal government is not enforcing marijuana laws.¹⁵⁹ Under the Obama administration, the federal government began the practice of "prosecutorial discretion," unofficially known as "nonenforcement," an amorphous standard detailed in the 2013 Memorandum from James M. Cole, the Deputy Attorney General at the time.¹⁶⁰ In the Memo,

157. *See What Is a Standard Drink?*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, <https://www.niaaa.nih.gov/what-standard-drink> [<https://perma.unl.edu/5VEJ-97QH>] (last visited Oct. 13, 2020).

158. For a great discussion of the disparity and some justification of the current laws, see JoAnne Young, *It's Time to Modernize Nebraska's Marijuana Laws*, *Senator Says*, LINCOLN J. STAR (Mar. 20, 2019), https://journalstar.com/legislature/it-s-time-to-modernize-nebraska-s-marijuana-laws-senator/article_2d12b86e-dbad-5800-b540-42d4e3a96f7c.html [<https://perma.unl.edu/B9SD-J56R>] [hereinafter *Modernize*].

159. Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice to All United States Attorneys 4 (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.unl.edu/2AFH-E3CM>] [hereinafter 2013 Memorandum from James M. Cole] (providing that where state regulatory and enforcement systems address federal priorities, "enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity"); see also Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783 (2013) ("The Obama Administration's preferred tool for domestic policy, however, is new: using 'prosecutorial discretion' not to enforce statutes with which the President disagrees. In 2009, the Department of Justice stopped enforcing federal drug laws against individuals whose actions comply with 'existing state laws providing for the medical use of marijuana.'"); Rosalie Winn, *Hazy Future: The Impact of Federal and State Legal Dissonance on Marijuana Businesses*, 53 AM. CRIM. L. REV. 215, 222 (2016) ("Since 2009, the Department of Justice under President Obama has issued a series of four memoranda providing guidance to United States Attorneys on federal prosecutorial discretion in enforcing the CSA against marijuana cultivation, distribution, and possession, as well as against financial institutions that provide services to marijuana businesses.").

160. 2013 Memorandum from James M. Cole, *supra* note 159. The Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals. *Id.* at 3. The memo then stated that,

the Department of Justice stated that “it likely was not an efficient use of federal resources to focus enforcement efforts” on those compliant with robust state regulatory schemes.¹⁶¹ Another example of federal nonenforcement is section 538 of the Consolidated and Further Continuing Appropriations Act, known as the Rohrabacher–Farr amendment. The law states, “None of the funds made available in this Act to the Department of Justice may be used . . . to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana,” and this law now extends to any state programs including recreational.¹⁶² Under President Trump, Attorney General Jeff Sessions rescinded the Cole Memo, at least to some degree.¹⁶³ However, current Attorney General William Barr stated, “I am accepting the Cole Memorandum for now, but I have generally left it up to the U.S. Attorneys in each state to determine what the best approach is”¹⁶⁴ If the federal government no longer considers marijuana to be a priority, that begs the question: Should marijuana enforcement be a priority for Ne-

contrary to a previous memo that distinguished medical users and large-scale, for profit enterprises, as long as a business is compliant with a State’s robust regulatory system, prosecutors should exercise discretion on a case-by-case basis. *Id.* The “2014 Cole Memo” further clarified guidance on “prosecutorial discretion.” Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep’t of Justice to All United States Attorneys (Feb. 14, 2014), <https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20%282%29.pdf> [<https://perma.unl.edu/R399-SFBV>].

161. 2013 Memorandum from James M. Cole, *supra* note 159.

162. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130; see also FIN. CRIMES ENFORCEMENT NETWORK, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (2014), <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses> [<https://perma.unl.edu/J6T3-FPF2>] (“[T]he Cole Memo provides guidance to DOJ attorneys and law enforcement to focus their enforcement resources on persons or organizations whose conduct interferes with any one or more of the following important priorities (the ‘Cole Memo priorities’).”).

163. *Jeff Sessions Says Prosecutors Won’t Pursue “Small Marijuana Cases”*, CBS NEWS (Mar. 10, 2018, 12:34 PM), <https://www.cbsnews.com/news/jeff-sessions-doj-prosecutors-will-not-pursue-small-marijuana-cases/> [<https://perma.unl.edu/2SJG-RE2A>].

164. Sara Brittany Somerset, *Attorney General Barr Favors a More Lenient Approach to Cannabis Prohibition*, FORBES (Apr. 15, 2019, 5:00 AM), <https://www.forbes.com/sites/sarabrittany Somerset/2019/04/15/attorney-general-barr-favors-a-more-lenient-approach-to-cannabis-legalization/#112c46f9c4c8> [<https://perma.unl.edu/Q4H3-5VV5>].

braska?¹⁶⁵ For example, in 2014, Nebraska spent an estimated \$10.2 million in tax payer dollars for marijuana enforcement.¹⁶⁶

Forthcoming marijuana legislation would provide the state the ability to assess whether the status quo of marijuana enforcement is a priority for Nebraskans rather than deferring to a mercurial federal government.¹⁶⁷ Whether one believes that marijuana should be legal, it is clear that Nebraska's marijuana laws are insufficient in addressing the wide variety of cannabis products that state law enforcement will inevitably encounter. The federal government is no longer enforcing its marijuana prohibition because it believes it is no longer a priority. If further cannabis legislation follows the NHFA, it will provide Nebraskans an opportunity to assess whether citizens' tax dollars should continue to be expended in prosecuting and jailing individuals that possess trivial amounts of residue or THC products, even those products without intoxicating effects.¹⁶⁸ The "charade of federal illegality," inconsistent treatment of marijuana and THC, and poor guidance offered by the code undermine law enforcement and public perceptions of the law itself: "When laws are irrational we lose faith in civil institutions."¹⁶⁹

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165. "Arbitrary amounts of the drug included in marijuana laws have helped create overpopulation of Nebraska prisons and county jails, [Omaha Senator Justin] Wayne told the Legislature's Judiciary Committee . . ." *Modernize, supra* note 158.
166. Riley Johnson, *Marijuana Arrests up in Nebraska After Colorado Made Pot Legal, but Experts Can't Pinpoint Why*, LINCOLN J. STAR (Sept. 20, 2016), https://journalstar.com/news/local/crime-and-courts/marijuana-arrests-up-in-nebraska-after-colorado-made-pot-legal/article_6b4490bf-7d6f-57da-a445-f88e3e804eb0.html [<https://perma.unl.edu/W3UV-249F>].
167. Similar federalist arguments were made with the NHFA. "In debate on the bill, Omaha Sen. Justin Wayne, who introduced it, said hemp production was coming, one way or another, and rather than being out of the business for two to three years, it was important that Nebraska get in now." Young, *supra* note 4. Arguing for state-determined programs, Senator Hilgers pointed out that with the passing of the 2018 Farm Bill, if Nebraska did not implement its own regulations then Nebraska would be subject to federal regulation. *See Transcript of Floor Debate on LB 657*, 106th Leg., 1st Sess. 5–6 (Neb. 2019) (statement of Sen. Hilgers).
168. *See Modernize, supra* note 158 ("Right now there's no basic distinction and no protection from prosecutors for someone simply caught with a pipe that has residue, versus someone caught with actual measurable amounts (of a drug).").
169. Benton B. Bodamer, *Column: Hemp Legalization Is a Slippery Slope . . . and That's OK*, COLUMBUS DISPATCH (Sept. 6, 2019, 4:10 AM), <https://www.dispatch.com/opinion/20190906/column-hemp-legalization-is-slippery-slope—and-thats-ok> [<https://perma.unl.edu/FDK7-NVP5>] ("In the face of federal illegality, draconian tax burdens, Wild West banking and competition from black market illegal operations, the state-compliant cannabis industry in America has managed to build a base of sophisticated investors, informed customers, medical professionals and even Republican supporters . . . cultivating a promising industry that has generated millions of tax dollars and thousands of jobs.").

IV. CONCLUSION

The Nebraska Legislature and Governor Pete Ricketts correctly passed the NHFA because industrial hemp is not a slippery slope for legal marijuana. Given Nebraska's history as both one of the largest hemp producing states and a temperate, conservative state, Nebraskans are capable and likely to draw and maintain a meaningful line between industrial hemp and marijuana. Senator Lowe's argument that the NHFA will increase access to drugs for children is without merit because hemp is not a drug. Furthermore, Nebraska lawmakers correctly passed the NHFA because industrial hemp, fueled by the demand for CBD, is an economically booming industry that can provide a promising opportunity for farmers across the state. To preclude Nebraska farmers, the driving force behind the third largest agricultural state, from participation in a legal and viable market would be unreasonable. Furthermore, for the state to determine what risks farmers should and should not take with their own crops is paternalistic.

Moreover, even if the NHFA leads to further cannabis legislation, Nebraska could benefit from marijuana reform. First, Nebraska's laws unfairly punish those possessing one form of THC over another and offer prosecutors little guidance on enforcing possession of THC goods, leading to disparate and unjust treatment of all cannabis products. Next, the federal government no longer believes that marijuana prohibition is a priority. This begs the question of whether Nebraska should continue to prioritize marijuana enforcement and use tax dollars to do so. In all, Nebraska lawmakers were reasonable in passing the NHFA, having properly discerned that legal hemp is neither a slippery slope for marijuana nor will it increase children's access to drugs. On the contrary, the NHFA will likely restore Nebraska to the forefront of hemp production and may very well save the farm.