

## RBG Inn of Court Pupilage Team Presentation - Medical Marijuana

- **OVERVIEW**

- Traditional views of cannabis
- Gallup polling on legalization of marijuana
- States to enact marijuana reform before Oklahoma (map breakdown of recreational v. medical states)

- **STATE LAW (S0788)**

- Now codified at 63 O.S. §§ 420A-426
- Passed by ~57%
- Created seven types of licenses: patient, caregiver, dispensary, processor, grower, transportation, and research.
- Dispensary, Processor, and Grower licenses are referred to as Commercial Licenses (and each automatically comes with a transportation license). \$2,500 application fee.

- **Patient License**

- 63 O.S. O.S. § 420A
- Application fee is \$100 (\$20 for Medicaid, Medicare, SoonerCare participants). License is good for two years. Application must be signed by an Oklahoma board certified physician who *recommends* (not *prescribes*) the use of medical marijuana.
- A license holder may consume marijuana legally and may possess:
  - up to 3 oz of marijuana on their person
  - 6 mature plants
  - 6 seedling plants
  - 1 oz of concentrated marijuana
  - 72 oz of edible marijuana
  - 8 oz of marijuana in their residence
- *Sidenote*: even for non-license holders, if they are caught in possession of up to 1.5 oz of marijuana and can “state a medical condition,” it shall only be a misdemeanor with a fine not to exceed \$400.
- Caregiver license is available for homebound patients (we can look to Medicare for interpretation of the term homebound). A caregiver license-holder has the same rights as an individual license-holder.

- **Dispensary License**

- 63 O.S. O.S. § 421A

- \$2,500 application fee. The Oklahoma Medical Marijuana Authority (OMMA) has only two weeks to approve or reject the application.
- Criteria:
  - 25 years or older
  - If applying as individual, must show Oklahoma residency
  - If applying as an entity, must show that all members, managers, and board members are Oklahoma residents
  - Entities may have non-Oklahoma residents as owners, but cannot have more than 25% out-of-state ownership.
  - Individuals or entities must be licensed to conduct business in Oklahoma
  - Must disclose ownership
  - Cannot have had any felony convictions in the previous 2 years or any violent felony convictions in past 5 years
  - Dispensary location cannot be within 1,000 feet of any public or private school entrance (measured closest property line of dispensary to any entrance to the school) (this is the only statutory limit on location and only applies to dispensaries)
- **Grower License**
  - 63 O.S. O.S. § 422A
  - Same criteria as dispensary license.
  - No limit on how much may be grown.
  - No prohibition on outdoor grow.
- **Processor License**
  - 63 O.S. O.S. § 423A
  - Same criteria as dispensary and grower license.
  - May take plants and distill or process these plants into concentrates, edibles, and other forms for consumption.
  - Must comply with Food Safety standards, which were just recently promulgated.
- **Regulatory Framework**
  - Oklahoma Medical Marijuana Authority (housed at Department of Health)
  - Oklahoma Bureau of Narcotics and Dangerous Drugs (OBND) state equivalent of the DEA, also requires registration and reporting from commercial entities
- **FEDERAL LAW**

- Marijuana remains a controlled substance (illegal) under the Controlled Substances Act (21 U.S.C. §§ 801 et seq.)
- New Farm Bill - difference between marijuana and industrial hemp (>0.3% THC on a dry-weight basis).

- **Enforcement**

- Rohrbacher-Farr appropriations rider: “SEC. 538. None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”
- Translated: DOJ cannot use appropriated funds to enforce against state-law compliant medical-marijuana participants. Note that this does not include other DOJ funds, such as seized assets
- Cole Memorandum: issued during the Obama administration--guides that DOJ should not prosecute offenses related to marijuana in states that “legalized marijuana in some form and . . . implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana.”
- Identified federal enforcement priorities as to marijuana.
- Rescinded in January 2018 by Jeff Sessions. Nonetheless, still indirectly impacts federal law enforcement and agency agendas (more below).

- **Taxation - 280E**

- Internal Revenue Code 280E: “No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I or II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.”

- *Californians Helping to Alleviate Medical Problems, Inc. (“CHAMP”) v. Comm’r*, 128 T.C. 173 (May 15, 2007), the U.S. Tax Court applied this provision to a business dispensing medical marijuana products pursuant to California's Compassionate Use Act. The court held that 280E precludes taxpayers from deducting ordinary and necessary expenses attributable to the provision of medical marijuana, regardless of whether medical marijuana is legal under applicable state law. The court explained that marijuana is a schedule I controlled substance, and that “[s]uch is so even when the marijuana is medical marijuana recommended by a physician as appropriate to benefit the health of the user.”
- Translated: MMJ entities cannot claim standard business deductions
- Example: A dispensary earns \$1 million in gross sales, pays \$800k for wholesale medical-marijuana inventory, and has \$250k in business expenses. Though a typical business could claim the \$250k in business deductions and show a loss of \$50k, marijuana businesses cannot. The dispensary may only adjust its taxable income for cost of goods sold—the \$800k it paid for its medical-marijuana inventory. As a result, the IRS would treat this dispensary as having made a profit of \$200k, instead of its actual loss of \$50k. Assuming a corporate-tax rate of 21% on that \$200k profit, the dispensary would receive a tax bill for \$42k, despite having lost money during the reporting period.
- **Mitigating 280E Exposure**
  - *Costs of Goods Sold (COGS)*: MMJ entities can still deduct costs of goods sold, i.e. costs that went into producing the good (**marijuana**). **Obviously**, growers and processors will have higher COGS because they are focused on producing goods. Dispensaries may nonetheless have COGS, but opportunities there are limited (pre-rolls, inventory management, packaging, etc.). This illustrates the need for a careful and competent CPA.
  - *Co-location*: Place other non-marijuana (plant-touching) companies in the same space as MMJ entities. For example, a t-shirt company, or even a CBD retailer. *See, e.g., CHAMPS* (co-location with counseling).
    - This can help by reducing the expenses attributable to the plant-touching entity. For example, 50% (or more) of the rent/utilities can be attributed to the non-plant-touching entity that can deduct those expenses as business deductions.
    - Oklahoma currently has no prohibition on co-location, but some states do. An early draft of the proposed OMMA regulations included such a prohibition, which was ultimately removed before the final rules were adopted.

- *Holding Company/Operating Company structure*: creates another lease relationship which allows for the flow of money and shouldering of expenses. Of course, always observe the formalities.
- Tax Planning
  - C-Corp, LLC, or LLC taxed as C-Corp? Depends.
  - In addition to tax planning, entity formation/structure should be considered for asset-protection purposes.
  - IRS has extraordinary enforcement authority.
- **Banking**
  - As an initial matter, very few financial institutions are willing to enter a lending relationship with MMJ entities because the collateral will be subject to federal forfeiture. But some banks have been willing to enter into depository relationships with MMJ entities.
    - In Oklahoma, banks have purportedly been charging \$5,000/month as an account fee for MMJ accounts.
  - Bank Secrecy Act (12 U.S.C. §§ 1724, 1813 and 15 U.S.C. 78a): requires banks to watch for anti-money laundering law violations in customers' deposit accounts. The federal government makes banks its informants by requiring them to file a suspicious activity report ("SAR") with the Financial Crimes Enforcement Network ("FinCEN") regarding a customer's suspicious or potentially suspicious activity. Because marijuana remains illegal under federal law, proceeds from an MMRB immediately raise money laundering concerns. Last year, about 1.6 million SAR's were filed in the U.S. and 342 people were sentenced to an average of 40 months in prison as the result of the investigations coming out of SAR's. Failure to file a SAR can result in criminal and civil penalties, including incarceration for involved employees. In fact, federal law technically says a bank is itself committing money laundering by accepting proceeds from marijuana as a deposit.
  - FinCEN Guidance (due diligence required by banks):
    - (i) verifying with the appropriate state authorities whether the business is duly licensed and registered;
    - (ii) reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business;
    - (iii) requesting from state licensing and enforcement authorities available information about the business and related parties;

- (iv) developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (*e.g.*, medical versus recreational customers);
- (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties;
- (vi) ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and
- (vii) refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk.





CHANGING ATTITUDES ABOUT LEGALIZATION OF

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# MARIJUANA



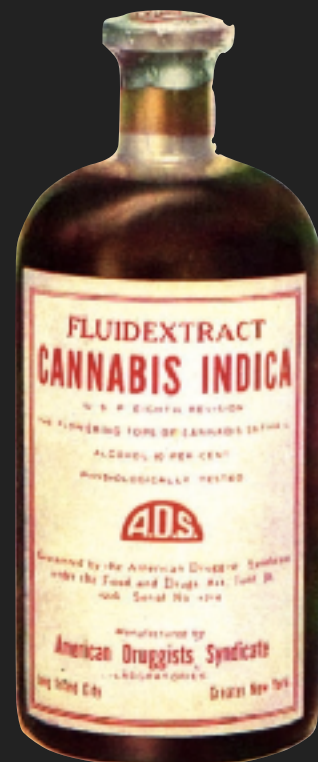
### THE PLANT

- ▶ Three species: *cannabis sativa*, *cannabis indica*, *cannabis ruderalis*
- ▶ Contains at least 66 cannabinoids, including tetrahydrocannabinol (THC) and cannabidiol (CBD)
- ▶ "Hemp" v. "Marijuana" - hemp is defined as having less than 0.3% THC on a dry-weight basis.



## HISTORY OF THE PLANT

- ▶ Hemp widely grown in the U.S. at the time of its founding
- ▶ Cannabis used in a number of medicines/treatments; legitimate restrictions began in early 20th century





## HISTORY OF THE PLANT

- ▶ *Reefer Madness* (1936)
- ▶ Increased legal regulation and prohibition





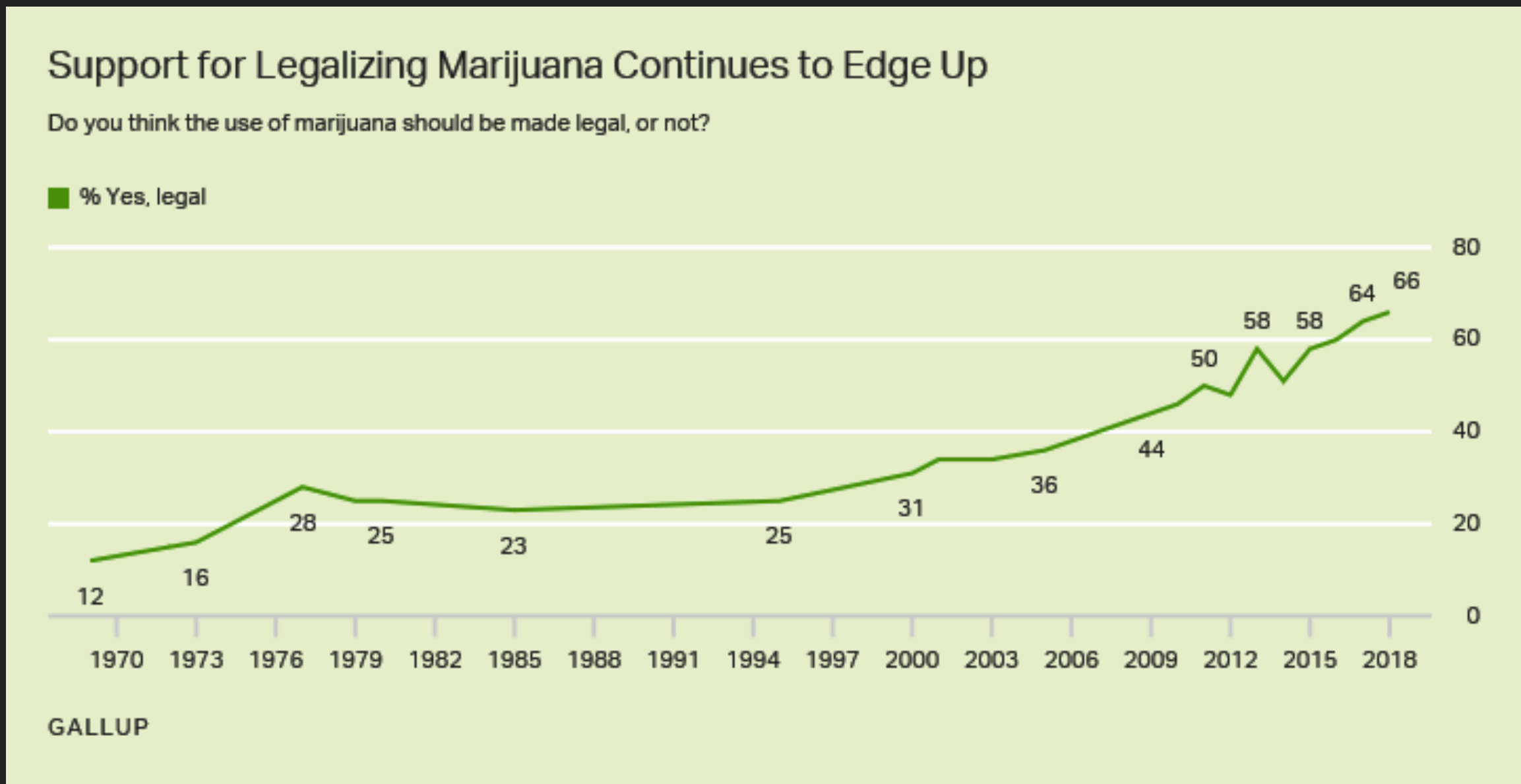
## HISTORY OF THE PLANT

- ▶ Cannabis culture and experimentation (1960-70s)
- ▶ "We don't smoke marijuana in Muskogee." *Okie from Muskogee* (1969)
- ▶ Controlled Substances Act (1970)
- ▶ War on Drugs (1971-?)
- ▶ DEA formed in 1973 under Nixon



## MODERN MARIJUANA TRENDS

- ▶ Gallup: 2 in 3 Americans Support Legalization (Oct. 2018)

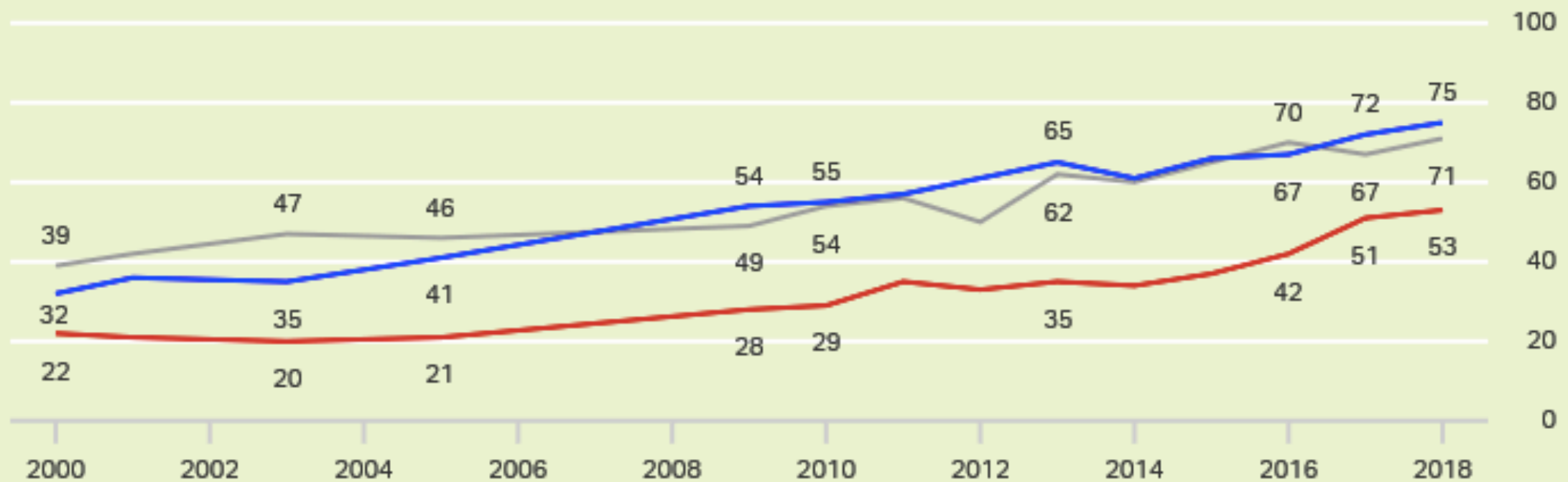


## MODERN MARIJUANA TRENDS

### Majorities of All Political Identification Groups Continue to Support Legalization of Marijuana in 2018

% Yes, marijuana should be made legal

■ Republicans ■ Independents ■ Democrats



GALLUP

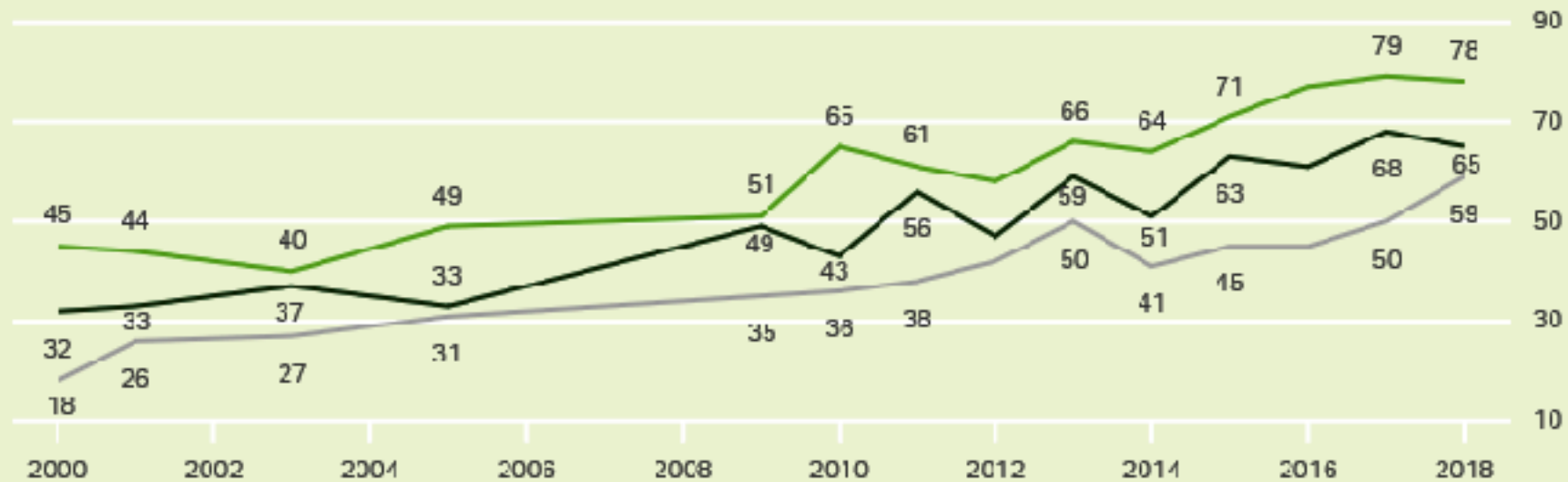


## MODERN MARIJUANA TRENDS

### Majority Support for Legalization of Marijuana Across All Age Groups in 2018

% Yes, marijuana should be made legal

■ 18-34 ■ 35-54 ■ 55 and older

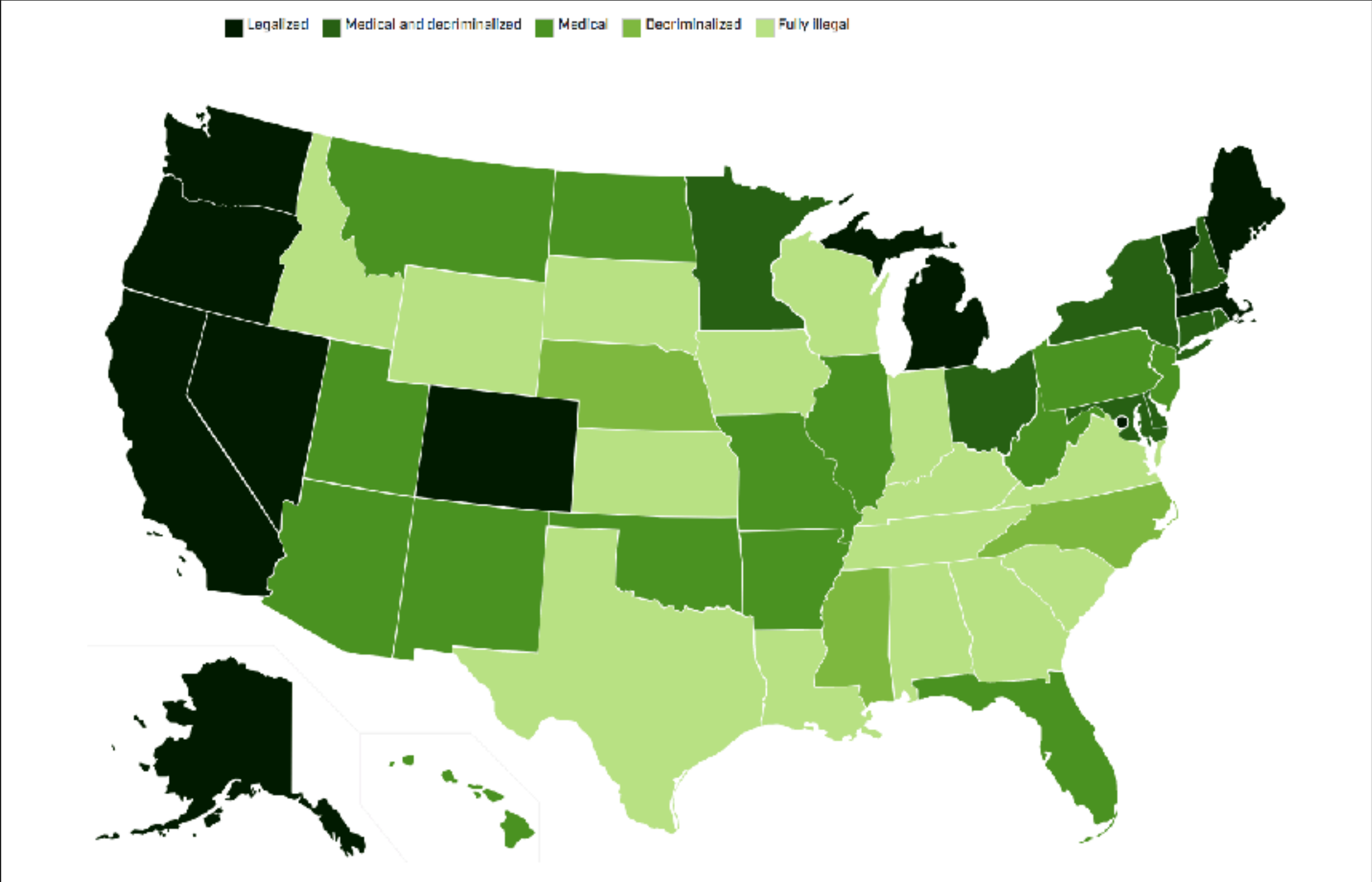


### Support for Legal Marijuana by Region, 2009-2010 vs. 2017-2018

Do you think the use of marijuana should be made legal, or not?

	2009-2010	2017-2018	Change
	% Yes, legal	% Yes, legal	(pct. pts.)
East	46	67	+21
Midwest	40	65	+25
South	41	65	+24
West	56	65	+9

# MODERN MARIJUANA TRENDS



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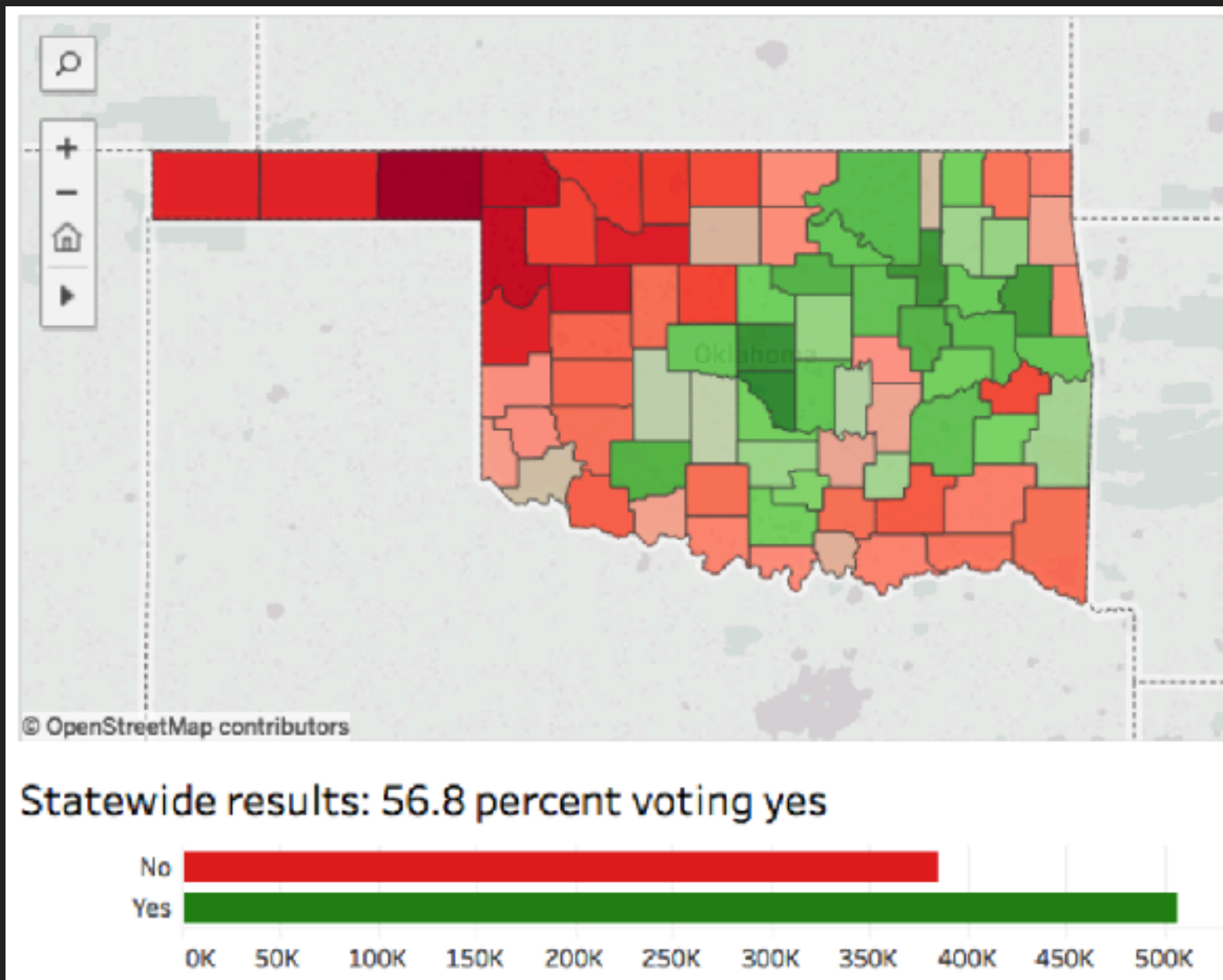
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# OKLAHOMA LAW

# CHANGING ATTITUDES ABOUT LEGALIZATION OF MARIJUANA

## SQ788

- ▶ Passed on June 25, 2018 by ~57%



### SQ788

- ▶ Now codified at 63 O.S. §§ 420A-426.
- ▶ 7 types of licenses: patient, caregiver, dispensary, processor, grower, transportation, and research
- ▶ Created the Oklahoma Medical Marijuana Authority (OMMA) to be housed under the Dep't of Health

## PATIENT LICENSE

- ▶ 63 O.S. § 420A
- ▶ Application fee is \$100 (\$20 for Medicaid, Medicare, Soonercare)
- ▶ Good for two years, cannot be revoked by physician after recommendation
- ▶ Application must be signed by Oklahoma board certified physician
- ▶ By statute, OMMA must approve or deny within 14 days
- ▶ *Recommendation, not prescription*

## PATIENT LICENSE

- ▶ A license holder may consume marijuana legally and possess:
  - ▶ Up to 3 oz of marijuana on their person
  - ▶ 6 mature plants
  - ▶ 6 seedling plants
  - ▶ 1 oz of concentrated marijuana
  - ▶ 72 oz of edible marijuana
  - ▶ 8 oz of marijuana in their residence



## CAREGIVER LICENSE

- ▶ Available for “homebound” patients
  - ▶ Look to Medicare/Medicaid for homebound definition
- ▶ A caregiver license holder has the same rights as an individual holder
- ▶ Currently no limit on how many “caregiver” licenses an individual may acquire

## COMMERCIAL LICENSE

- ▶ Dispensary, Processor, and Grower licenses referred to as "Commercial Licenses"
- ▶ \$2,500 application fee
- ▶ Each commercial license automatically comes with a transportation license
- ▶ OMMA must approve or deny within 14 days of application

# COMMERCIAL LICENSE

- ▶ Criteria:
  - ▶ 25 years or older
  - ▶ If applying as individual, must establish OK residency
  - ▶ If applying as entity, must show that all members, managers, and board members are OK residents
  - ▶ Entities cannot have more than 25% of out-of-state ownership
  - ▶ Must be licensed to conduct business in Oklahoma
  - ▶ Must disclose ownership
  - ▶ Cannot have had any felony convictions in the previous 2 years or any violent felony convictions in past 5 years

## DISPENSARY LICENSE

- ▶ 63 O.S. § 421A
- ▶ Cannot be located within 1,000 feet of a public or private school entrance
  - ▶ measured closest property line of dispensary to *any* entrance of the school
- ▶ OMMA recommends using the NCES MapEd Tool to measure distance to school

## GROWER LICENSE

- ▶ 63 O.S. § 422A
- ▶ No limit on how much can be grown
- ▶ No prohibition on outdoor grow
- ▶ May only sell to dispensaries or processors



## PROCESSOR LICENSE

- ▶ 63 O.S. § 423A
- ▶ May take plants and distill or process plants into concentrates, edibles, and other forms for consumption
- ▶ Must comply with newly promulgated Food Safety Standards



**CONTAINS THC**  
**NOT SAFE FOR KIDS OR PETS**

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### **THC UNIVERSAL SYMBOL**

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**COLOR:**

The universal symbol must be red in color, text must be black in color. **DO NOT** change the color, font or language of the symbol.

**HEX** #df1831

**CMYK** 0 / 100 / 85 / 6

**RGB** 223 / 24 / 49

**PREFERRED SIZE:**

No smaller than  
.6"x.85" in size.

0.6"



**CONTAINS THC**  
**NOT SAFE FOR KIDS OR PETS**

0.85"

## STATUTORY PROTECTIONS

- ▶ 63 O.S. § 425A(A)
- ▶ “No school or landlord may refuse to enroll or lease to and may not otherwise penalize a person solely for his status as a medical marijuana license holder, unless failing to do so would *imminently* cause the school or landlord to lose a monetary or licensing related benefit under federal law or regulations.” (emphasis added).

## STATUTORY PROTECTIONS

- ▶ 63 O.S. § 425A(B)
- ▶ “Unless a failure to do so would cause an employer to *imminently* lose a monetary or licensing related benefit under Federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person . . . .” (emphasis added).

## STATUTORY PROTECTIONS

- ▶ 63 O.S. § 425A(B)(2)
- ▶ “Employers may take action against a [license holder] if the holder uses or possesses marijuana while in the holder's place of employment or during the hours of employment. Employers **may not** take action against the holder of a medical marijuana license **solely** based upon the status of an employee as a medical marijuana license holder or the results of a drug test showing positive for marijuana or its components.” (emphasis added)

## STATUTORY PROTECTIONS

- ▶ 63 O.S. § 425A(F)
- ▶ “No city or local municipality may ***unduly change or restrict*** zoning laws to prevent the opening of a retail marijuana establishment.” (emphasis added).

CHANGING ATTITUDES ABOUT LEGALIZATION OF MARIJUANA

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## PHYSICIAN-PATIENT SKIT

## HEALTHCARE CONSIDERATIONS

- ▶ “Physician” defined:
  - ▶ MD or DO with:
    - ▶ valid, unrestricted, and existing Oklahoma license
    - ▶ Board certified as defined by the respective board
    - ▶ Excludes resident physicians

# HEALTHCARE CONSIDERATIONS

- ▶ Physicians may, but are not required to, register with OMMA before recommending MMJ
  - ▶ OMMA keeps list online, which includes contact information, name of medical practice, area of certification, and licensing entity
- ▶ Requirements to recommend:
  - ▶ Good standing with licensure board
  - ▶ Establish a bona-fide physician-patient relationship
  - ▶ Must recommend MMJ usage according to the “accepted standards a reasonable and prudent physician would follow when recommending any medication to a patient.”
  - ▶ No qualifying conditions



## REGULATORY FRAMEWORK

- ▶ Apply with OMMA and report to OMMA monthly
- ▶ Must also register with Oklahoma Bureau of Narcotics and Dangerous Drugs (OBNDD)
  - ▶ report to OBNDD quarterly
- ▶ OMMA adopted minimal regulations despite more thorough proposed regulations

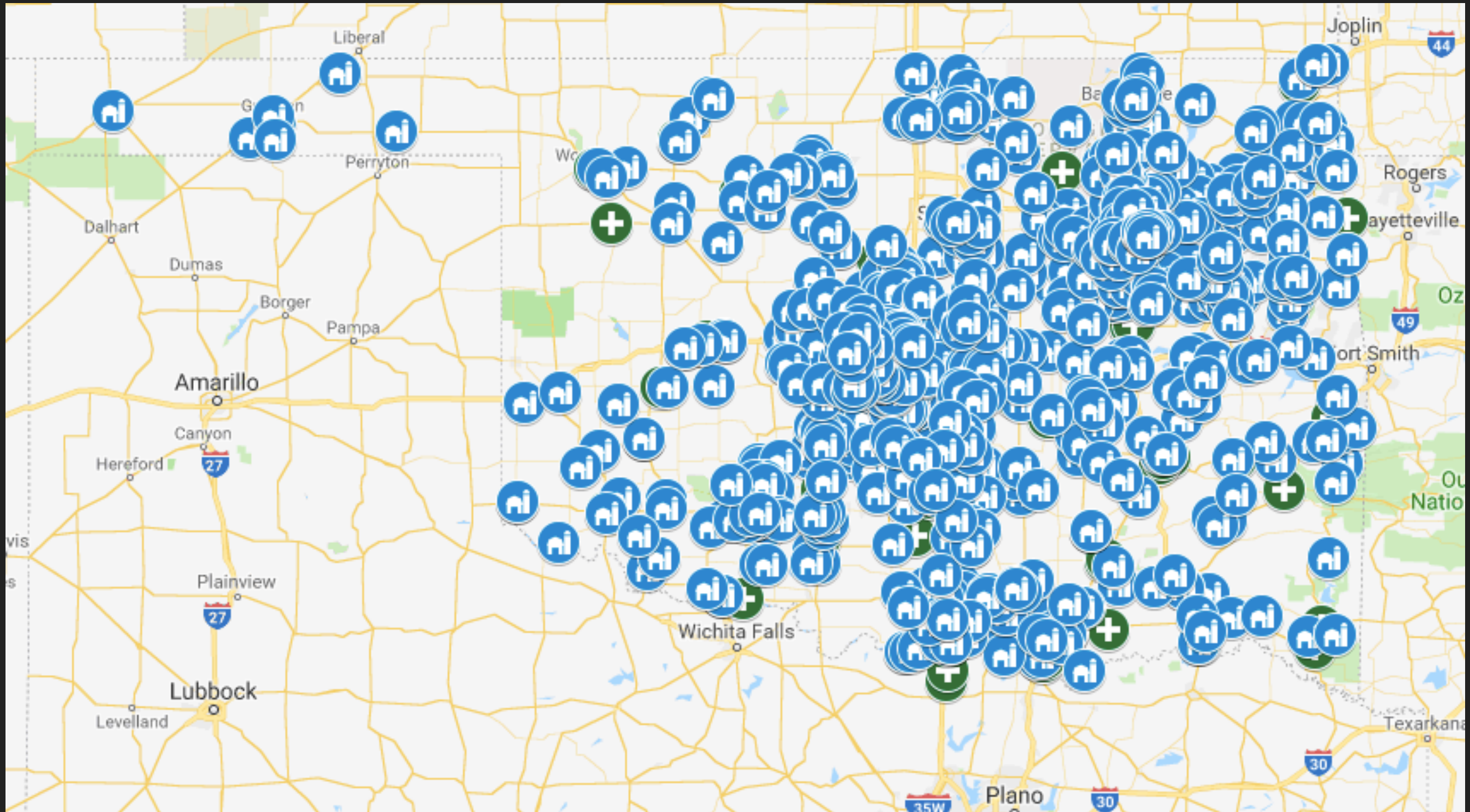


## INVOLVEMENT IN MEDICAL MARIJUANA

- ▶ As of February 4, 2019:
  - ▶ 38,592 patients approved (~1% of population)
  - ▶ 232 caregivers approved
  - ▶ 2,892 commercial entities approved (\$7.23 million in app. fees)
    - ▶ 928 dispensaries approved
    - ▶ 1,548 growers approved
    - ▶ 416 processors approved
  - ▶ 41.6 patients/dispensary, 24.9 patients/grower

# INVOLVEMENT IN MEDICAL MARIJUANA

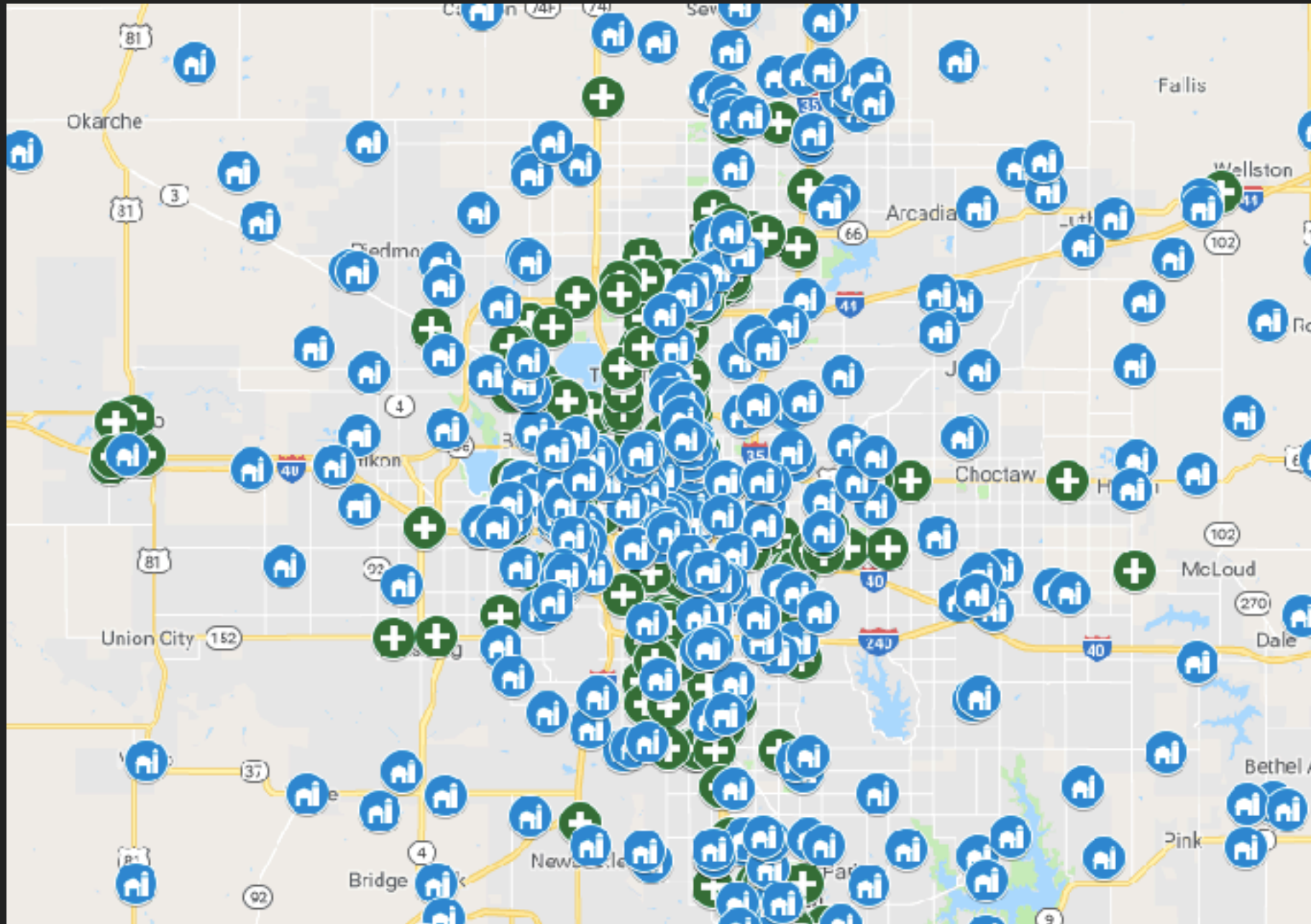
▶ As of October 2018





## INVOLVEMENT IN MEDICAL MARIJUANA

▶ As of October 2018



CHANGING ATTITUDES ABOUT LEGALIZATION OF MARIJUANA

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## ATTORNEY-CLIENT SKIT



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# FEDERAL LAW

## CONTROLLED SUBSTANCES ACT (CSA)

- ▶ 21 U.S.C. § 801 *et seq.*
- ▶ Recently enacted farm bill distinguishes “industrial hemp” from “marijuana”
  - ▶ Industrial hemp must be no greater than 0.3% THC on a dry-weight basis

## FEDERAL ENFORCEMENT

- ▶ Rohrbacher-Farr appropriations rider:
- ▶ “None of the funds made available under this Act to the [DOJ] may be used, with respect to the [states] to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of *medical* marijuana.” (emphasis added).
- ▶ Does *not* apply to non-appropriated DOJ funds (e.g., seized assets)



## COLE MEMO

- ▶ Issued during Obama administration
- ▶ DOJ should not prosecute in states that “legalized marijuana in some form and . . . implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana.”
- ▶ Set forth federal enforcement priorities



## COLE MEMO

- ▶ Rescinded in January 2018 by Attorney General Jeff Sessions
- ▶ The Cole Memo continues to impact federal law enforcement and agency agendas

**Going Undercover: Jeff Sessions Has Disguised Himself As A Cartel Member And Strapped Himself With A Surveillance Wire In Order To Read The Wikipedia Entry For Marijuana**

7/18/17 12:42pm • SEE MORE: CRIME ▾



# TAXATION

- ▶ Internal Revenue Code § 280E:  
“No deduction or credit shall be allowed . . . on any trade or business if such trade or business . . . consists of trafficking in controlled substances.”
- ▶ MMJ entities cannot claim standard business deductions





## TAXATION

- ▶ Example of 280E's effect:
  - ▶ Dispensary earns \$1 million in gross sales
  - ▶ Pays \$800k for inventory and has \$250k in business expenses
  - ▶ Would typically be \$50k loss
  - ▶ But 280E disallows business deductions, so the IRS would see this business as making \$200k profit
  - ▶ Despite the actual loss, the business would owe ~\$42k in taxes



## MITIGATION 280E EXPOSURE

- ▶ Costs of Goods Sold (COGS) - MMJ entities can still account for these expenses
  - ▶ Growers and processors have more opportunity here because more \$ goes into creating the good
  - ▶ Vertical integration
- ▶ Co-location
  - ▶ *Californians Helping to Alleviate Medical Problems, Inc. v. Comm’r*, 128 T.C. 173 (May 15, 2007) (“CHAMPS”)
  - ▶ Place a non-MMJ entity in the same space to defray costs. The MMJ entity seeks to minimize square footage so the other entity can shoulder expenses and claim them as business deductions
  - ▶ OBSERVE THE FORMALITIES!!!

## MITIGATION 280E EXPOSURE

- ▶ Holding Company Structure - similar structure you would expect for asset-protection
- ▶ Tax planning - C-Corp? LLC with C-Corp tax election? Depends.
- ▶ Remember the IRS has extraordinary enforcement authority



## **BANKING SKIT**

### BANKING

- ▶ Virtually no lending relationships because the collateral is subject to federal seizure
- ▶ Depository relationships require substantial, ongoing due diligence and thus come at a premium
  - ▶ Some Oklahoma banks are charging ~\$5,000/month as an account fee



# BANKING

- ▶ Bank Secrecy Act, 12 U.S.C. §§ 1724, 1813, and 15 U.S.C. §78A
- ▶ Anti-money laundering
- ▶ Suspicious Activity Reports (SARs)
- ▶ Last year, 1.6 million SARs were filed, resulting in 342 convictions based on SAR investigations



## BANKING

- ▶ FinCEN Guidance (based on Cole Memo):
  - ▶ (i) verify licensing with state
  - ▶ (ii) review license application
  - ▶ (iii) request available information about the business
  - ▶ (iv) develop understanding of the normal and expected activity of the business
  - ▶ (v) ongoing monitoring or publicly available info on business
  - ▶ (vi) ongoing monitoring for suspicious activity
  - ▶ (vii) refreshing information as part of due diligence commensurate with risk





### OTHER FEDERAL CONCERNS

- ▶ Intellectual Property - cannot trademark controlled substances
- ▶ Food and Drug Administration - some movement on CBD products
- ▶ National Institute of Health - need for for more research
- ▶ The *other* border - widespread legalization in Canada
- ▶ First Amendment implications of physician speech (as to recommending MMJ)







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# MARIJUANA