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# When Your Blackjack Dealer Takes a Hit: How Nevada Assembly Bill 132 Threatens Vegas Casinos in an Age Of Legalized Marijuana\*

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## Introduction

Las Vegas is “America’s playground.”<sup>1</sup> The desert city offers a buffet of adult activities, which have traditionally included gambling, shows, escort services,<sup>2</sup> and even prostitution outside its city limits.<sup>3</sup> Despite its historic dependence on peddling vice, Las Vegas has recently sought to expand beyond its “Sin City” nickname<sup>4</sup> and become a diversified entertainment destination geared towards millennials.<sup>5</sup> With millennials now accounting for roughly forty percent of all Las Vegas tourists, casino resorts focus increasingly on “technology, contemporary art, food and the outdoors.”<sup>6</sup>

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\* This title takes inspiration from a similarly titled article: Kate Gibson, *Is Your Blackjack Dealer High?*, CBS NEWS (May 9, 2018, 10:25 AM), <https://perma.cc/4EPE-EYQF>.

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<sup>1</sup> Gregory Gunn, *Las Vegas is America’s Playground . . . And Its Security Lab: How the Technology Developed to Protect Casinos’ Earnings is Also Helping to Protect Against Terrorism and Why We Should be Concerned*, 84 UMKC L. REV. 897, 897 (2016).

<sup>2</sup> Escorts are different than prostitutes and are allowed to operate in Las Vegas. *Is Prostitution Legal in Las Vegas?*, LV CRIM. DEF., <https://perma.cc/Q25V-QQUW>.

<sup>3</sup> Prostitution, although not legal in Las Vegas, is legal in certain rural counties in Nevada. See Scott Sonner, *Federal Lawsuit Seeks to Ban Legal Prostitution in Nevada*, LAS VEGAS SUN (Feb. 26, 2019, 3:06 PM), <https://perma.cc/MM7X-KDA>; Amy Westervelt, *A Nevada County Takes Aim at Legal Prostitution: Should the Brothels Stay or Go?*, WASH. POST (May 17, 2018, 7:45 PM), <https://perma.cc/5J5P-6244>.

<sup>4</sup> David Schwartz, *Why Las Vegas Is Still America’s Most Sinful City*, FORBES (Dec. 10, 2018, 8:08 AM), <https://perma.cc/FMF8-CXVF>.

<sup>5</sup> Elaine Glusac, *See Ya, Celine. Hello, Gaga. Vegas Is Getting a Millennial Makeover as Resorts Cater to the Next Generation of Hedonists*, CHICAGO TRIBUNE (Aug. 27, 2019, 8:24 AM), <https://perma.cc/J3VE-GTAH>.

<sup>6</sup> *Id.*

As an overwhelming majority of millennials favor legalizing marijuana (above eighty percent),<sup>7</sup> it seems natural that Las Vegas casino resorts would incorporate marijuana into their recreation portfolios to further cater to this important age group. After all, recreational marijuana has been legal in Nevada since 2017.<sup>8</sup> Moreover, accommodating the gambler is central to Las Vegas casinos' business models and explains why public smoking and escort services are condoned, if not encouraged.<sup>9</sup>

If the goal is to accommodate millennial gamblers, allowing marijuana use in casinos seems like a natural progression, as over half of the United States' fifty-five million marijuana users are millennials.<sup>10</sup> Despite the cannabis industry's opportunity for growth in Las Vegas, Nevada gaming regulators have largely restricted any overlap between gaming and cannabis.<sup>11</sup> Casino resorts cannot have any connection to marijuana businesses beyond hosting industry conventions, which cannot display any physical cannabis products.<sup>12</sup>

The gaming and cannabis industries in Nevada have operated on separate trajectories for the past several years.<sup>13</sup> For the most part, casinos seem content staying away from the cannabis industry, as adherence to federal law is a requirement for maintaining a gaming license.<sup>14</sup> The recent passage of Assembly Bill 132,<sup>15</sup> which made Nevada the first state in the country to ban employers from rejecting applicants due to a positive

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<sup>7</sup> Brittany Shoot, *Make Marijuana Legal? Gen X, Millennials, and Generation Z Say Yes. Most Boomers? Nope*, FORTUNE (Mar. 7, 2019, 5:38 PM), <https://perma.cc/WMA2-DK28>.

<sup>8</sup> *Medical Cannabis*, CANNABIS COMPLIANCE BD. STATE OF NEV., <https://perma.cc/JJW3-P9LL>.

<sup>9</sup> See Adam Nagourney, *Las Vegas Casinos Are a Last Bastion for Smokers*, NY TIMES (Nov. 11, 2010), <https://perma.cc/2QQQ-DABB>.

<sup>10</sup> Christopher Ingraham, *11 Charts that Show Marijuana Has Truly Gone Mainstream*, WASH. POST (Apr. 19, 2017, 5:00 AM), <https://perma.cc/3TYZ-KHW8>.

<sup>11</sup> See, e.g., Richard N. Velotta, *Nevada Panel Keeps Barrier Between Gaming, Marijuana*, LAS VEGAS REV. J. (Mar. 5, 2018, 8:09 AM), <https://perma.cc/VU9Q-EL4L>. Although often used interchangeably, cannabis is distinct from marijuana, with the former being an umbrella term that includes both hemp (not containing the psychoactive ingredient THC) and marijuana (containing the psychoactive ingredient THC). See, e.g., Dominique Astorino, *What's the Difference Between CBD, THC, Cannabis, Marijuana, and Hemp?*, SHAPE (Nov. 29, 2018), <https://perma.cc/V3WQ-T8C8>.

<sup>12</sup> See Bryan Horwath, *Gaming and Cannabis Industries Remain Far Apart in Nevada*, VEGAS INC. (May 30, 2019, 2:00 AM), <https://perma.cc/7KYM-KYA6>; Richard N. Velotta, *Gaming Regulators Wary of Marijuana Show at Las Vegas Strip Casino*, LAS VEGAS REV. J. (Oct. 2, 2019, 6:58 PM), <https://perma.cc/CY9V-AWD9>; Velotta, *supra* note 11.

<sup>13</sup> See Velotta, *supra* note 11.

<sup>14</sup> *Id.*

<sup>15</sup> Assemb. B. 132, 2019 Assemb. & S., 80th Sess. (Nev. 2019). Assembly Bill 132 is codified as NEV. REV. STAT. § 613.132 (2019).

marijuana test,<sup>16</sup> threatens to gradually erode the separation between the gaming and cannabis industries. Assembly Bill 132, which took effect in January 2020,<sup>17</sup> likely forces casinos to knowingly hire applicants who use marijuana. Such a change runs afoul of the historic drug testing practices implemented by many of the major Las Vegas casinos,<sup>18</sup> and directly opposes the regulatory framework established by Nevada gaming regulators.<sup>19</sup> This Comment focuses on the looming legal implications that Assembly Bill 132—and by extension, a gradual acceptance of cannabis—could have on the gaming industry in Las Vegas. An MGM Resorts spokesman observed in 2018 that “Nevada law concerning marijuana has complex implications for employers in highly regulated industries like ours.”<sup>20</sup> What held true in 2018 certainly remained true in January 2020 once Assembly Bill 132 took effect, especially since Nevada state law now compels casinos to adjust their hiring practices in order to accommodate marijuana users. Assembly Bill 132 does provide several enumerated exceptions that allow employers to avoid complying with its provisions.<sup>21</sup> Casinos have so far remained silent as to whether they plan to take advantage of these exceptions.<sup>22</sup> This silence may stem from the fact that it is unclear whether casinos would be eligible to use the enumerated exceptions as they are written in the statute. Even if casinos are eligible to avail themselves of the exceptions, it remains an open question whether using them would be legally prudent.

The purpose of this Comment is two-fold. First, this Comment argues that compliance with Assembly Bill 132 creates a variety of risks for Las Vegas casinos insofar that it could invite: (1) increased federal and state regulatory scrutiny; (2) lawsuits from both casino guests and employees; and (3) a detrimental impact to Las Vegas’ economy and overall brand. Second, this Comment offers a solution in the form of a risk mitigation paradigm for Las Vegas casinos operating under Assembly Bill 132, which proffers: (1) Las Vegas casinos *can* and *should* take advantage of Assembly Bill 132’s enumerated exceptions; and (2) as a failsafe, Las Vegas casinos should in certain circumstances, test employees for marijuana after the hiring

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<sup>16</sup> Bill Hutchinson, *Nevada Becomes 1st State to Ban Most Pre-Employment Pot Tests*, ABC NEWS (June 19, 2019, 3:38 PM), <https://perma.cc/Q9UL-EN2P>.

<sup>17</sup> NEV. REV. STAT. § 613.132 (2019).

<sup>18</sup> See Richard N. Velotta, *Caesars May Be Alone in Ending Marijuana Screening*, LAS VEGAS REV. J. (May 8, 2018, 6:35 PM), <https://perma.cc/3KXH-PZ6E>.

<sup>19</sup> See Terry Johnson, *High Stakes: Balancing Gaming Regulation and Marijuana*, NEV. GAMING LAW., Sept. 2018, at 18.

<sup>20</sup> Velotta, *supra* note 18.

<sup>21</sup> NEV. REV. STAT. § 613.132 (2019).

<sup>22</sup> See Howard Stutz, *Casinos and Marijuana Continues To Be an Evolving Issue in Nevada*, CDC GAMING REP. (May 14, 2019, 7:54 PM), <https://perma.cc/U3LG-ZXAF>.

process. While this Comment focuses primarily on Assembly Bill 132, it also seeks to offer long-term considerations for Las Vegas casinos as they grapple with cannabis legalization.

Part I of this Comment chronicles the history of marijuana in Nevada, as well as how gaming regulators and casinos have responded to legalization. Part II gives a comprehensive overview of Nevada Assembly Bill 132, as well as a broader legal survey of employer testing for marijuana. Part III examines the legal, regulatory, and economic challenges that Las Vegas casinos face as a result of compliance with Assembly Bill 132. Part IV provides a solution in the form of a risk mitigation paradigm. Finally, Part V offers considerations for the future as well as for other jurisdictions, including Native American reservations.

## I. History of Marijuana and Casinos in Nevada

Legalized marijuana in Nevada dates back to 2000, when Nevada voters approved the legalization of medical marijuana.<sup>23</sup> Since then, marijuana has developed and grown into a multi-million dollar industry that also caters to recreational users.<sup>24</sup> Despite the cannabis industry's growth in Nevada over the past couple decades, Las Vegas casinos—at the bequest of state gaming regulators—refrain from doing business with the industry.<sup>25</sup>

### A. Chronology of Marijuana Legalization in Nevada

The legalization of marijuana in Nevada, as well as the overall growth of the cannabis industry in the state, has followed a conventional path and can be encapsulated in three phases: (1) the legalization of medical marijuana in 2001 and the subsequent gap of roughly fifteen years until the opening of the first marijuana dispensary;<sup>26</sup> (2) the legalization of recreational marijuana in 2017;<sup>27</sup> and (3) the further maturation of the cannabis

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<sup>23</sup> *Nevada Medical Marijuana Law & Regulations*, AMS. FOR SAFE ACCESS, <https://perma.cc/4ARS-GYB9>; see also DEAN HELLER, STATE OF NEVADA BALLOT QUESTIONS 2000, <https://perma.cc/RK3A-GEVA>.

<sup>24</sup> See Todd Prince, *Nevada Awards 61 More Recreational Marijuana Dispensary Licenses*, LAS VEGAS REV. J. (Dec. 10, 2018, 5:51 PM), <https://perma.cc/4PRT-AW75>.

<sup>25</sup> See Velotta, *supra* note 11.

<sup>26</sup> See *Colorado and Nevada Become Seventh and Eighth States to Legalize Medical Marijuana*, BRITANNICA (Nov. 7, 2000), <https://perma.cc/3994-HQ29>; see also Graham Abbott, *First Medical Marijuana Dispensary Opens in Las Vegas*, GANJAPRENUER (Aug. 28, 2015), <https://perma.cc/E9ZC-BU6B>.

<sup>27</sup> *Medical Cannabis*, *supra* note 8.

industry, as evidenced by the introduction of the Cannabis Compliance Board.<sup>28</sup>

### 1. Medical Marijuana

Medical marijuana has been legal in Nevada since 2001.<sup>29</sup> Nevada residents wishing to use marijuana for medicinal purposes can apply for a medical marijuana card, which can be used to purchase marijuana at any state-certified dispensary.<sup>30</sup> A major benefit of having a medical marijuana card is the ability to receive a discounted rate at dispensaries, as medicinal users in Nevada pay less in taxes than recreational users.<sup>31</sup>

The benefits of having a Nevada medical marijuana card extend beyond just a lower tax rate and continue to the workplace. Nevada Revised Statute 453A (“NRS 453A”) governs the administration of Nevada’s medical marijuana program.<sup>32</sup> NRS 453A requires employers to make reasonable accommodations, when feasible, for employees that use medical marijuana.<sup>33</sup> Specifically, the statute states that “the employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card.”<sup>34</sup> NRS 453A thus affords employers significant flexibility and deference in the form of various enumerated exceptions for when accommodations are not required for employees that use medical marijuana.<sup>35</sup> For example, employers do not have to make accommodations if that employer has “reasonable business purposes” for not doing so.<sup>36</sup> Additionally, Nevada employers do not have to accommodate medical marijuana users if such an accommodation would: (1) endanger individuals or property; (2) impose an undue hardship; or (3) prevent the employee from fulfilling job responsibilities.<sup>37</sup>

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<sup>28</sup> Press Release, Governor of Nev., *Governor Sisolak Signs Bill Creating Cannabis Compliance Board* (June 12, 2019), <https://perma.cc/K58E-KVHV>.

<sup>29</sup> See BRITANNICA, *supra* note 26 (Nevada voters approved the legalization of medical marijuana via ballot initiative in 2000 and the law took effect on October 1, 2001).

<sup>30</sup> See *Medical Marijuana Cardholder Registry*, DEP’T OF HEALTH & HUM. SERVS. NEV. DIV. OF PUB. & BEHAV. HEALTH (DPBH), <https://perma.cc/54Q4-6CG6>.

<sup>31</sup> Eli McVey, *Chart: How Medical Cannabis Programs Fare in States with Recreational Markets*, MARIJUANA BUS. DAILY (Oct. 15, 2019), <https://perma.cc/S5AD-WTB8>.

<sup>32</sup> See NEV. REV. STAT. § 453A (2020).

<sup>33</sup> NEV. REV. STAT. § 453A.800(3) (2017); see also Haley N. Lewis, *Unlikely Consequences: How Medical Marijuana is Affecting Nevada’s Gaming Industry*, 6 UNLV GAMING L.J. 299, 314 (2016).

<sup>34</sup> NEV. REV. STAT. § 453A.800(3) (2019).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

It should be noted that NRS 453A has been repealed as of July 1, 2020,<sup>38</sup> when it was superseded by Assembly Bill 533, which retains NRS 453A's basic structure and key provisions.<sup>39</sup> Assembly Bill 533 constituted an organizational facelift for cannabis regulation in Nevada, since it created the Cannabis Compliance Board and Cannabis Advisory Commission.<sup>40</sup>

## 2. Recreational Marijuana

Recreational marijuana has been legal in Nevada since 2017.<sup>41</sup> Nevada voters legalized recreational marijuana via a ballot initiative (Regulation and Taxation of Marijuana Act).<sup>42</sup> Prior to the passage of Assembly Bill 132, recreational marijuana users in Nevada enjoyed significantly less workplace protections than medicinal users.<sup>43</sup> Indeed, Nevada Revised Statute 453D.100 notes that the legalization of marijuana does not prohibit a "public or private employer from maintaining, enacting, and enforcing a workplace policy prohibiting or restricting actions or conduct otherwise permitted."<sup>44</sup>

The legalization of recreational marijuana via ballot initiative did not alter the regulatory regime for medical marijuana under NRS 453A.<sup>45</sup> As such, medical marijuana users in Nevada retained their more favorable workplace protections under NRS 453A than recreational users receive under NRS 453D. Assembly Bill 132 addresses this discrepancy by standardizing workplace protections for recreational and medicinal users.<sup>46</sup>

## 3. Marijuana Dispensaries & Licensing Disputes

Despite the legalization of medical marijuana in 2001, the first marijuana dispensaries (retail marijuana stores) in Nevada did not open until 2015.<sup>47</sup> Prior to the opening of dispensaries, authorized medicinal users "had to grow their own [marijuana]—up to 12 plants per person—or find

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<sup>38</sup> See NEV. REV. STAT. ANN. § 453A.800(3) (LexisNexis 2019).

<sup>39</sup> Assemb. B. 533, 2019 Assemb. & S., 80th Sess. (Nev. 2019).

<sup>40</sup> See *id.*

<sup>41</sup> *Medical Cannabis*, *supra* note 8.

<sup>42</sup> *Id.*

<sup>43</sup> See NEV. REV. STAT. § 453D.100(2)(a) (2017).

<sup>44</sup> *Id.*

<sup>45</sup> *Medical Cannabis*, *supra* note 8.

<sup>46</sup> Assembly Bill 132 prohibits all employers from denying an applicant based on the use of marijuana, regardless of whether such use is for medicinal or recreational purposes. See NEV. REV. STAT. § 613.132 (2019).

<sup>47</sup> See Abbott, *supra* note 26.

it some other way.”<sup>48</sup> Marijuana dispensaries in Nevada initially only sold to medicinal users and did not begin selling to recreational users until 2017.<sup>49</sup> As of October of 2020, there were seventy-four marijuana dispensaries operating in Nevada, with most selling to both medicinal and recreational users.<sup>50</sup> A large majority of these dispensaries are based in Clark County, specifically Las Vegas.<sup>51</sup>

State licenses to operate marijuana dispensaries are awarded through a competitive application process.<sup>52</sup> For instance, in December of 2018, Nevada awarded sixty-one new dispensary licenses<sup>53</sup> out of a pool of 461 applications.<sup>54</sup> Unlike other states that have legalized marijuana, such as Oregon, Nevada caps the total number of dispensaries,<sup>55</sup> with the allowed number of licenses depending on a county’s population.<sup>56</sup> Clark County, which encompasses Las Vegas and is the largest county in Nevada,<sup>57</sup> caps the number of medicinal licenses at forty and the number of recreational licenses at eighty.<sup>58</sup>

Given that marijuana dispensaries have thus far proven to be a lucrative enterprise in Nevada and gross millions of dollars a year in revenue,<sup>59</sup> it is not surprising that the application process for dispensary licenses has ignited legal controversy.<sup>60</sup> A number of prospective dispensary operators have filed lawsuits challenging the process by which the state awards dispensary licenses.<sup>61</sup> In response to this uptick in litigation, Nevada’s

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<sup>48</sup> Scott Sonner & Michelle Rindels, *First Legal Medical Pot Sold in Nevada 15 Years After Approval*, LAS VEGAS SUN (July 31, 2015, 5:25 PM), <https://perma.cc/K5T4-L3LZ>.

<sup>49</sup> See Jenny Kane & Sarah Litz, *Midnight Marijuana: Nevada Celebrates First Legal Sales*, USA TODAY (July 1, 2017, 11:20 AM), <https://perma.cc/ZY9F-AM7X>.

<sup>50</sup> See *Nevada Marijuana Dispensaries*, POTGUIDE.COM, <https://perma.cc/N8N8-4X4X>.

<sup>51</sup> *Id.*

<sup>52</sup> See Michaela Chesin, *In Marijuana Case, Companies That Didn’t Get Dispensary Licenses Say They Will Go Out of Business if State’s Decision Stands*, NEV. INDEP. (July 19, 2019, 2:00 AM), <https://perma.cc/KBX5-TMP3>; see also MELANIE YOUNG, JORGE PUPO, & STEVE GILBERT, *NEVADA MARIJUANA PROGRAM 53* (2019), <https://perma.cc/C2D9-LHS8>.

<sup>53</sup> Prince, *supra* note 24.

<sup>54</sup> Chesin, *supra* note 52.

<sup>55</sup> Jeffrey Meehan, *Recreational Marijuana Industry Expected to Grow in Nevada*, LAS VEGAS REV. J. (July 27, 2018, 3:42 PM), <https://perma.cc/83ET-WHCV>.

<sup>56</sup> YOUNG ET AL., *supra* note 52.

<sup>57</sup> See Michael Scott Davidson, *Clark County Saw Second-Largest Population Increase in Nation*, LAS VEGAS REV. J. (Apr. 19, 2019, 2:53 PM), <https://perma.cc/67FK-BPN2>.

<sup>58</sup> YOUNG ET AL., *supra* note 52.

<sup>59</sup> Prince, *supra* note 24.

<sup>60</sup> See *Nevada Discloses Recreational Cannabis License Winners*, MARIJUANA BUS. DAILY (May 10, 2019), <https://perma.cc/46Q6-XTL4>.

<sup>61</sup> See *Nevada Marijuana Companies Push for State to Redo License Selection Process*, MARIJUANA BUS. DAILY (May 8, 2019), <https://perma.cc/7XTM-HQH8>.

governor has recently sought to enact transparency measures that disclose information about successful dispensary applicants.<sup>62</sup>

Notably, Clark County District Court Judge Elizabeth Gonzalez issued an injunction in August of 2019 that halted some of the dispensaries awarded licenses in December of 2018 from opening.<sup>63</sup> The injunction noted that in reviewing dispensary applications, state regulators failed to exercise basic due diligence, such as verifying the accuracy of submitted information.<sup>64</sup> Although the injunction did not impact dispensaries that were operating at the time,<sup>65</sup> it introduced the possibility of increased scrutiny of the licensing process going forward.<sup>66</sup>

#### 4. Cannabis Compliance Board

Another response to the controversy surrounding the licensing process for Nevada dispensaries was the introduction of the Cannabis Compliance Board.<sup>67</sup> The Cannabis Compliance Board will be composed of five members, all of whom will be appointed by the Nevada Governor.<sup>68</sup> The Cannabis Compliance Board is “modeled after the Nevada Gaming Control Board.”<sup>69</sup>

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<sup>62</sup> See Press Release, Steve Sisolak, Governor of Nev., *Governor Sisolak, Director Young Move for Greater Transparency in Marijuana Licensing Program with Senate Bill Amendment* (Mar. 26, 2019), <https://perma.cc/97JX-GT6Y>; see also *Nevada Discloses Recreational Cannabis License Winners*, *supra* note 60.

<sup>63</sup> See *Serenity Wellness Ctr., LLC v. Nevada*, No. A-19-786962-B, 2019 Nev. Dist. LEXIS 828, at \*8–41 (Dist. Ct. Clark Cty. Aug. 23, 2019); see also John Sadler, *Nevada Judge’s Ruling Could Freeze Licensing Process for Some New Cannabis Shops*, VEGAS INC. (Aug. 23, 2019, 5:50 PM), <https://perma.cc/V8QU-TW4P>; Jim Hartman, *Feds Could End Dispute over Marijuana Licensing*, REC. COURIER (Sept. 19, 2019), <https://perma.cc/NLJ3-4J6P>.

<sup>64</sup> See Hartman, *supra* note 63.

<sup>65</sup> See *Nevada Judge Freezes Permits for New Recreational Marijuana Shops*, MARIJUANA BUS. DAILY (Aug. 26, 2019), <https://perma.cc/FQ4N-ENQP>.

<sup>66</sup> Many of the major plaintiffs in this litigation eventually reached a settlement that was approved by the Cannabis Compliance Board. See Michelle Rindels, *Cannabis Board OKs Partial Settlement of Large, Longstanding Legal Dispute Over Dispensary Licenses*, NEV. INDEP. (Aug. 7, 2020, 1:13 PM), <https://perma.cc/3GWQ-2C2A>. In September 2020, Judge Gonzalez issued a ruling allowing Nevada’s marijuana licensing process to resume “with some new retail marijuana stores allowed to open, some applications for licenses reviewed again by state officials and some companies still denied the licenses they didn’t get in December 2018.” Ken Ritter, *Nevada Judge Rules State Marijuana Licensing Process Can Go Ahead*, LAS VEGAS SUN (Sept. 3, 2020, 11:00 PM), <https://perma.cc/2GCF-Z2HC>.

<sup>67</sup> See *Nevada Governor Names Head of New Cannabis Regulatory Panel*, MARIJUANA BUS. DAILY (Oct. 1, 2019), <https://perma.cc/3P4B-MRUQ>.

<sup>68</sup> Press Release, *supra* note 28.

<sup>69</sup> *Id.*

The Cannabis Compliance Board will be supplemented by a Cannabis Advisory Commission, which will issue non-binding recommendations similar to the Nevada Gaming Policy Committee.<sup>70</sup> The Board was not set to become fully operational until July 2020, when it assumed regulatory control over marijuana from the Nevada Department of Taxation.<sup>71</sup> As of July 2020, the Cannabis Compliance Board still had only three members, yet had already issued various guidance documents and regulations for the state's marijuana industry.<sup>72</sup>

## 5. Cannabis Tourism

Regulatory challenges aside, cannabis is on its way to becoming a billion-dollar industry in Nevada, as well as an important sector of the state's economy.<sup>73</sup> Overall, the state's total cannabis sales currently exceed \$500 million a year, with Clark County accounting for nearly eighty percent of sales.<sup>74</sup> For fiscal year 2019, legalized marijuana yielded over \$100 million in tax revenue for Nevada.<sup>75</sup>

Given its status as an international gambling and entertainment destination, Las Vegas provides unique opportunities as a hub for the cannabis industry—opportunities not as readily available in other cities that are not as hospitality oriented.<sup>76</sup> For example, Acres Cannabis (a dispensary based in Las Vegas) plans to launch a cannabis lounge in coordination with the Morton Family of Morton's Steakhouse.<sup>77</sup> Likewise, in 2018, Planet 13 opened the world's largest cannabis dispensary in Las Vegas.<sup>78</sup>

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<sup>70</sup> See *id.*

<sup>71</sup> See Press Release, Steve Sisolak, Governor of Nev., *Governor Sisolak Appoints Tyler Klimas as Executive Director of the Cannabis Compliance Board* (Sept. 30, 2019), <https://perma.cc/V2QG-LN9Q>; Michelle Rindels, *Sisolak's Third Appointee to Five-Member Cannabis Compliance Board Is Nevada Banker*, THE NEV. INDEP. (Feb. 24, 2020, 3:25 PM), <https://perma.cc/VST3-5NJJ>; see also Michelle Rindels, *At Inaugural Meeting, Cannabis Compliance Board Lifts Restriction on License Transfers, Approves New Regulations*, NEV. INDEP. (July 21, 2020, 12:10 PM), <https://perma.cc/7MP4-TJGR>.

<sup>72</sup> See *Nevada Cannabis Compliance Board Members*, CANNABIS COMPLIANCE BD. STATE OF NEV., <https://perma.cc/ZU6L-6QYU>; *Written Guidance*, CANNABIS COMPLIANCE BD. STATE OF NEV., <https://perma.cc/G25J-PYQ6>; see also Rindels, *Inaugural Meeting*, *supra* note 71.

<sup>73</sup> See Jeff Smith, *Nevada Marijuana Sales Rise to \$639 Million in Fiscal 2019*, MARIJUANA BUS. DAILY (Sept. 4, 2019), <https://perma.cc/2YUC-FT27>.

<sup>74</sup> See, e.g., *id.*; STATE OF NEV., MARIJUANA TAX REVENUE (2019), <https://perma.cc/7M8D-XY5Y>.

<sup>75</sup> STATE OF NEV., *supra* note 74.

<sup>76</sup> See, e.g., Ed Komenda, *Cannabis Lounges are Coming to Las Vegas. Is Sin City the Next Amsterdam of Weed Tourism?*, RENO GAZETTE J. (May 21, 2019, 12:42 PM), <https://perma.cc/5R23-K5GV>.

<sup>77</sup> *Id.*

<sup>78</sup> Jimmy Im, *The World's Largest Cannabis Dispensary Just Opened in Vegas—And It Has an Entertainment Complex Attached*, CNBC (Nov. 8, 2018, 10:33 AM), <https://perma.cc/R6GQ-YKZ6>.

In what is a glimpse into the future of the cannabis industry in Las Vegas, the Planet 13 dispensary offers visitors a variety of entertainment options beyond just cannabis.<sup>79</sup> For example, the dispensary “offers interactive and visual experiences for visitors, like synchronized 3D projections on the lobby walls and walkways lit with sensory activated LED lights.”<sup>80</sup> Moreover, the dispensary has future plans for an attached coffee shop and tasting room featuring cannabis-infused alcohol.<sup>81</sup> Visitors can even participate in “laser graffiti,” where they shoot colored laser beams onto a wall.<sup>82</sup> While such innovations and the overall integration of cannabis into Las Vegas’ recreation portfolio may benefit tourists, it could still run into major regulatory roadblocks.<sup>83</sup>

### B. *Gaming Regulators’ Position on Marijuana*

The Nevada Gaming Control Board and the Nevada Gaming Commission are the primary entities that comprise the regulatory regime governing gaming in Nevada.<sup>84</sup> The Nevada Gaming Control Board, established in 1955, slightly predates the Nevada Gaming Commission, which was established in 1959.<sup>85</sup> Both entities fulfil similar duties and have overlapping regulatory responsibilities.<sup>86</sup> Although the Gaming Commission acts “on the recommendations of the Board,” it does not always defer to the Board’s judgment.<sup>87</sup> For example, the Commission has the final say regarding all matters relating to gaming licensing.<sup>88</sup>

The Gaming Policy Committee is separate from the Gaming Control Board and Gaming Commission and is a purely advisory entity that issues recommendations at the request of the Governor of Nevada.<sup>89</sup> Its recommendations do not have binding effect on the Gaming Control Board or the Gaming Commission.<sup>90</sup> Nevertheless, in practice, the Gaming Policy

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See Velotta, *supra* note 11.

<sup>84</sup> See, e.g., *Gaming Regulation History*, NEV. RESORT ASS’N, <https://perma.cc/7J36-YTB>.

<sup>85</sup> Lewis, *supra* note 33, at 306.

<sup>86</sup> See NEV. REV. STAT. § 463.140(2) (2017).

<sup>87</sup> See *Gaming Commission*, NEV. GAMING CONTROL BD., <https://perma.cc/4GZH-ZUNE>.

<sup>88</sup> *Id.*

<sup>89</sup> See *About the Gaming Policy Committee*, NEV. GAMING CONTROL BD., <https://perma.cc/W47B-PMBP>.

<sup>90</sup> NEV. REV. STAT. § 463.021(5) (2017).

Committee's recommendations do carry weight and act as important guidance for the gaming industry.<sup>91</sup>

### 1. Nevada Gaming Control Board

The Nevada Gaming Control Board has historically taken a strong stance with respect to preventing the intersection of the gaming and marijuana industries.<sup>92</sup> In 2014, the Gaming Control Board indicated that it “does not believe investment or any other involvement in a medical marijuana facility or establishment by a person who has received a gaming approval or has applied for a gaming approval is consistent with the effective regulation of gaming.”<sup>93</sup> In a demonstration of how seriously it takes its commitment to prevent any overlap between the marijuana and gaming industries, the Gaming Control Board ruled in 2014 that a gaming company could not provide slot machines to a restaurant because the spouse of the gaming company's owner—not the owner himself—had a minority stake in a marijuana company.<sup>94</sup>

### 2. Nevada Gaming Commission

The Nevada Gaming Commission has adopted a similar position with respect to marijuana and gaming as the Nevada Gaming Control Board, which should not come as a surprise considering how the two regulatory bodies work in tandem.<sup>95</sup> In asserting that casinos should not maintain business relationships with marijuana dispensaries, the Gaming Commission has adopted the position that “licensees should not receive financing from or provide financing to an individual, entity or establishment that sells, cultivates or distributes marijuana.”<sup>96</sup>

The Gaming Commission even forbids landlord-tenant relationships between gaming and marijuana companies<sup>97</sup>—although more recently the Commission has noted that “a gaming license holder can lease a building from a businessman who also rents to someone in the marijuana

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<sup>91</sup> See, e.g., Horwath, *supra* note 12.

<sup>92</sup> See Lewis, *supra* note 33, at 307–10.

<sup>93</sup> *Id.* at 307.

<sup>94</sup> *Id.* at 310–11.

<sup>95</sup> See *id.* at 308–09.

<sup>96</sup> Richard N. Velotta, *Marijuana Has No place in Nevada Casinos, Gaming Officials Say*, LAS VEGAS REV. J. (Aug. 24, 2017, 4:32 PM), <https://perma.cc/F3QU-WH6Q/>.

<sup>97</sup> *Id.*

industry.”<sup>98</sup> Ironically, even the Gaming Commission itself has found it difficult to enforce a complete separation between the marijuana and gaming industries.<sup>99</sup> Indeed, during one hearing regarding marijuana, three of the five Gaming Commission members recused themselves due to their law firms having clients involved in the marijuana industry.<sup>100</sup>

### 3. Nevada Gaming Policy Committee

In 2018, following the legalization of recreational marijuana in Nevada, the Nevada Gaming Policy Committee adopted a resolution affirming the position that “Nevada gaming licensees shall not participate in the marijuana industry.”<sup>101</sup> Nevertheless, the resolution did offer that a casino resort could host a marijuana convention, subject to various caveats (namely that the convention cannot feature marijuana itself).<sup>102</sup> Former Nevada Governor Brian Sandoval, who also chaired the Gaming Policy Committee, noted at the time, “[n]one of those conventions have anything to do with consumption . . . [i]t’s about best practices associated with that business.”<sup>103</sup>

#### C. Las Vegas Casinos’ Position on Marijuana

Despite Nevada’s historic dependence on mining and nickname as the Silver State,<sup>104</sup> its economy is heavily dependent on gaming, tourism, and hospitality.<sup>105</sup> Indeed, tourism serves as the largest industry employer in Nevada.<sup>106</sup> The economic importance of gaming has even been codified in Nevada’s statutory code.<sup>107</sup> The economic importance of gaming helps

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<sup>98</sup> Nevada Regulators OK a Marijuana-Gaming Relationship, MARIJUANA BUS. DAILY (May 18, 2018), <https://perma.cc/EE9Q-U8NH>.

<sup>99</sup> Lewis, *supra* note 33, at 309.

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

<sup>101</sup> NEV. GAMING CONTROL BD., RESOLUTION OF THE NEVADA GAMING POLICY COMMITTEE REGARDING MARIJUANA AND GAMING (2018), <https://perma.cc/M755-H37W>.

<sup>102</sup> *Id.*

<sup>103</sup> Michelle Rindels, *Gaming Leaders Call for Bright Line Between Marijuana and Casinos*, NEV. INDEP. (Mar. 6, 2018, 2:05 AM), <https://perma.cc/64GS-7SVN>.

<sup>104</sup> Chris Calam, *Nevada: The Silver State*, THERMO FISHER SCI. (Jan. 30, 2018), <https://perma.cc/H7QW-MR2F>.

<sup>105</sup> See Samuel Stebbins, *These Are the Largest Industries in Every State*, USA TODAY (Aug. 31, 2018, 8:35 AM), <https://perma.cc/F627-CC59>; see also M.A. Smith, *Top 5 Industries in Nevada: Which Parts of the Economy Are Strongest?*, NEWSMAX (Apr. 14, 2015, 3:16 AM), <https://perma.cc/67M8-HFV2>.

<sup>106</sup> *Best States for Business 2019: Nevada*, FORBES, <https://perma.cc/YA4C-X4KB>.

<sup>107</sup> Lewis, *supra* note 33, at 307 (the economic importance of gaming is expressed in NEV. REV. STAT. § 463.0129(1)(a) (2015)).

explain why Las Vegas casinos have been hesitant to embrace an industry that—at least until cannabis’ legalization at the federal level—jeopardizes their very existence by putting their gaming licenses at risk.<sup>108</sup> After all, Nevada law makes it explicitly clear that a gaming license is a revocable privilege.<sup>109</sup>

For decades, Las Vegas casinos operated under the control of organized crime syndicates, with many financed using loans from the Jimmy Hoffa-controlled Teamsters Union.<sup>110</sup> Las Vegas did not shed its image as a mob haven until the latter half of the twentieth century, when casino magnates such as Steve Wynn introduced the concept of high-rise, over-the-top resorts.<sup>111</sup> As such, Las Vegas casinos have only recently overcome their “unsavory past,”<sup>112</sup> and thus may be understandably hesitant to associate themselves, even marginally, with an industry that still counts international drug cartels as major market participants.<sup>113</sup> With this in mind, Las Vegas casinos prohibit guest use of marijuana, including in hotel rooms.<sup>114</sup> Additionally, casinos do not allow patrons who are visibly impaired from marijuana usage to gamble.<sup>115</sup>

## II. Nevada Assembly Bill 132 and Employer Testing For Marijuana

Nevada Assembly Bill 132 makes it illegal for employers to deny a job applicant due to testing positive for marijuana.<sup>116</sup> The law comes at a time in which there is very little case law regarding employer testing of employee marijuana use.<sup>117</sup> Most of the case law that is available addresses employee discrimination in the context of medical marijuana use—

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<sup>108</sup> See Velotta, *supra* note 11.

<sup>109</sup> Lewis, *supra* note 33, at 306 (citing NEV. REV. STAT. § 463.0129(2) (2015)).

<sup>110</sup> See Jeff German, *The Mafia’s History in Las Vegas: From Bugsy Siegel to Anthony Spilotro*, LAS VEGAS REV. J. (Mar. 9, 2014, 7:33 AM), <https://perma.cc/4Q9B-JY9E>.

<sup>111</sup> See David Montero, *A Swift Fall for Steve Wynn, Who Spent Decades Shaping the Modern-Day Las Vegas Strip*, L.A. TIMES (Feb. 7, 2018, 5:20 PM), <https://perma.cc/S48S-6JJR>.

<sup>112</sup> Michelle Rindels, *Betting on Cannabis*, NEV. INDEP. (Dec. 8, 2019), <https://perma.cc/PCT9-FN9E>.

<sup>113</sup> See, e.g., Dennis Romero, Gabe Gutierrez, Andrew Blankstein & Robert Powell, *Foreign Cartels Embrace Home-Grown Marijuana in Pot-Legal States*, NBC NEWS (May 29, 2018), <https://perma.cc/DT6U-B9K7>.

<sup>114</sup> See Hana LaRock, *Smoking Laws in Las Vegas Casinos*, USA TODAY (Mar. 26, 2018), <https://perma.cc/5M6P-J3CH>.

<sup>115</sup> See Mike Adams, *No High Rollers Allowed: Stoned Marijuana Users Cannot Gamble In Nevada*, FORBES (Apr. 24, 2018, 11:35 AM), <https://perma.cc/SXM7-8XSY>.

<sup>116</sup> Hutchinson, *supra* note 16.

<sup>117</sup> See Alexis Gabrielson, *The “Right to Use” Takes Its First Hit: Marijuana Legalization and the Future of Employee Drug Testing*, 18 EMP. RTS. & EMP. POL’Y J. 241, 243 (2014).

leaving the larger context of recreational marijuana use a relatively unexplored area of law.<sup>118</sup>

#### A. *Overview of Nevada Assembly Bill 132*

For being such a sweeping and significant piece of legislation, Assembly Bill 132 is remarkably bare-bones, and provides little clarification regarding critical provisions.<sup>119</sup> For this reason, it is not readily apparent how employers will adhere to Assembly Bill 132's requirements, nor is it apparent how courts will interpret Assembly Bill 132.

##### 1. Origins of the Bill

Nevada Governor Steve Sisolak characterized the passage of Nevada Assembly Bill 132 as a natural progression for the marijuana industry in Nevada.<sup>120</sup> He noted that as the "legal cannabis industry continues to flourish, it's important to ensure that the door of economic opportunity remains open for all Nevadans."<sup>121</sup> Democratic Assemblywoman Dina Neal, one of Assembly Bill 132's sponsors, asserted that the chief purpose of Assembly Bill 132 is to "ensure 'equity and fairness' for Nevadans who helped the state generate nearly \$70 million in tax revenue from marijuana but risk not being hireable for doing so."<sup>122</sup> Assemblywoman Neal also cited the fact that marijuana can remain detectable in one's system for up to thirty days (even though one obviously does not remain impaired for that long) as another rationale.<sup>123</sup>

##### 2. Opposition to the Bill

Some of Nevada's most powerful and influential interests came out in opposition to Assembly Bill 132.<sup>124</sup> Warren Hardy, a lobbyist for the Nevada Resorts Association, opposed the legislation.<sup>125</sup> Although he acknowledged

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<sup>118</sup> See *id.* at 249–52.

<sup>119</sup> See NEV. REV. STAT. § 613.132 (2019).

<sup>120</sup> See Eric Levenson & Chris Boyette, *Nevada Bans Employers From Refusing to Hire Those Who Fail Marijuana Tests*, CNN (June 12, 2019, 1:12 PM), <https://perma.cc/XB6U-WJVN>.

<sup>121</sup> *Id.*

<sup>122</sup> Colton Lochhead, *Trio Wants Marijuana Removed from Pre-Employment Drug Tests in Nevada*, LAS VEGAS REV. J. (Feb. 20, 2019, 7:15 PM), <https://perma.cc/G3PP-B6XJ>.

<sup>123</sup> Michael Lyle, *Bill Would Outlaw Rejecting Job Applicants Who Flunk a Pot Test*, NEV. CURRENT (Feb. 14, 2019), <https://perma.cc/KH7Q-WN54>.

<sup>124</sup> See Lochhead, *supra* note 122.

<sup>125</sup> *Id.*

it was a difficult issue, Hardy noted that employers have to “make sure their workplace is safe for both their customers and their other employees.”<sup>126</sup> The Nevada Resorts Association counts many major Las Vegas casinos among its members, including casinos belonging to Wynn Resorts, Las Vegas Sands, Caesars Entertainment, and MGM Resorts.<sup>127</sup> Assembly Bill 132 also received pushback from construction and trucking interests, which had concerns regarding the implications for their safety-centric professions.<sup>128</sup>

### 3. Legislative History

Three Democratic Nevada Assembly members introduced Assembly Bill 132 on February 13, 2019.<sup>129</sup> The Nevada Assembly approved Assembly Bill 132 on April 23, 2019 by a margin of 33–8, with Senate passage coming on May 24, 2019 by a narrower margin of 12–8.<sup>130</sup> On June 5, 2019, Nevada Governor Steve Sisolak approved Assembly Bill 132, which took effect on January 1, 2020.<sup>131</sup>

### 4. Bill Text and Important Provisions

Assembly Bill 132 amended Chapter 613 of the Nevada Code in two major ways, both aimed at protecting marijuana users in the workplace.<sup>132</sup> First, Assembly Bill 132 bans employers from not hiring “a prospective employee because the prospective employee submitted to a screening test and the results of the screening test indicate the presence of marijuana.”<sup>133</sup> Assembly Bill 132 exempts employers from this requirement if the employee applies for a position that is: (1) a firefighter; (2) emergency medical technician; (3) operator of a vehicle that is required by state or federal law to submit to testing; or (4) one that the employer determines “could adversely affect the safety of others.”<sup>134</sup>

Assembly Bill 132’s second major provision pertains to employers that test for marijuana after an employee has been hired.<sup>135</sup> This provision

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<sup>126</sup> *Id.*

<sup>127</sup> *Partner Resorts*, NEV. RESORTS ASS’N, <https://perma.cc/ASY9-A9LN>.

<sup>128</sup> *See* Lochhead, *supra* note 122.

<sup>129</sup> NEV. REV. STAT. § 613.132 (2019).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *See id.*

<sup>133</sup> *Id.* § 613.132(1).

<sup>134</sup> *Id.* § 613.132(2)(a)–(d).

<sup>135</sup> NEV. REV. STAT. § 613.132(3) (2019).

states that if an employer tests for marijuana “within the first 30 days of employment,” the employee has the right to rebut a positive result with an additional screening test that must receive “appropriate consideration” from the employer.<sup>136</sup> As Assembly Bill 132 does not actually prohibit employers from banning marijuana use among employees, this provision perhaps seeks to protect employees that may have used marijuana prior to being hired for a job that forbids its use.<sup>137</sup>

Assembly Bill 132 also contains several blanket exceptions allowing employers to avoid complying with all of its provisions.<sup>138</sup> Specifically, Assembly Bill 132 states that its provisions do not apply if they conflict with: (1) employment contracts or collective bargaining agreements; or (2) federal law.<sup>139</sup>

Overall, Assembly Bill 132 is relatively bare-bones for being such a consequential piece of legislation, as well as the first of its kind in the United States.<sup>140</sup> Assembly Bill 132, perhaps intentionally, does not provide clarification regarding its numerous exceptions, such as the type of jobs that might “adversely affect the safety of others.”<sup>141</sup>

In addition to its brevity, Assembly Bill 132 is not only notable for what it prohibits, but also for what it implicitly permits.<sup>142</sup> For example, it does not prohibit employers from firing employees who fail a marijuana test, even those who fail a test “within the first 30 days of employment.”<sup>143</sup> Additionally, Assembly Bill 132 does not forbid employers from firing employees who fail a marijuana test even if such employees also failed a test during the application process yet were nevertheless hired.<sup>144</sup> Despite this apparent flexibility for employers, it is important to keep in mind that employers are required by statute, at least for medical marijuana users, to make reasonable accommodations when feasible.<sup>145</sup>

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<sup>136</sup> *Id.*

<sup>137</sup> Allowing an employee to rebut a positive marijuana test within the first thirty days on the job may account for the fact marijuana can stay in one’s system for up to thirty days. *See* Lyle, *supra* note 123.

<sup>138</sup> NEV. REV. STAT. § 613.132(4) (2019).

<sup>139</sup> *Id.* § 613.132(4)(a)–(b). The bill also exempts employers from complying if the employee’s position is funded via federal grant. *Id.* § 613.132(4)(c).

<sup>140</sup> *See* Hutchinson, *supra* note 16.

<sup>141</sup> NEV. REV. STAT. § 613.132(2)(d) (2019).

<sup>142</sup> *See id.* § 613.132(2).

<sup>143</sup> *See id.* § 613.132(3).

<sup>144</sup> *See id.*

<sup>145</sup> NEV. REV. STAT. § 453A.800(3) (2019).

## B. Overview of Employer Testing for Marijuana

When considering employer policies for testing employees for marijuana, it is important to distinguish between medicinal use and recreational use, as the former more directly invokes the Americans with Disabilities Act (“ADA”) and other anti-discrimination provisions.<sup>146</sup> Nevertheless, casinos do not seem to distinguish between recreational and medical marijuana use when establishing employee drug testing policies.<sup>147</sup>

### 1. Recreational vs. Medical Marijuana

Professor Stacy Hickox of Michigan State University notes that an employer terminating an employee for using medical marijuana could run afoul of state antidiscrimination statutes as well as the ADA.<sup>148</sup> She opines that an employer drug testing regime that focuses on “evidence of actual impairment” would represent a viable middle ground that still allows employers to maintain safety standards.<sup>149</sup>

Other attorneys, such as Alexis Gabrielson, have observed that employers lack the necessary legal guidance regarding the appropriate response to marijuana legalization.<sup>150</sup> Gabrielson notes that as a general matter, courts have sided with employers in legal disputes arising from an employee’s termination due to marijuana use, although there is little case law on the issue.<sup>151</sup>

In addition to seeking legal recourse under the ADA, employees that are fired for marijuana use may be able to take advantage of the public policy exception to at-will employment.<sup>152</sup> Generally speaking, employees can only seek recourse under the ADA if they use marijuana for medicinal purposes.<sup>153</sup> As such, employees are more likely to utilize the public policy exception when suing an employer, as it would potentially protect both recreational and medical marijuana use.<sup>154</sup>

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<sup>146</sup> See Gabrielson, *supra* note 117, at 249–52.

<sup>147</sup> See Velotta, *supra* note 18.

<sup>148</sup> See Stacy Hickox, *Clearing the Smoke on Medical Marijuana Users in the Workplace*, 29 QUINNIPIAC L. REV. 1001, 1001–03 (2011).

<sup>149</sup> Stacy A. Hickox, *Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment*, 29 HOFSTRA LAB. & EMP. L.J. 273, 274 (2012).

<sup>150</sup> See Gabrielson, *supra* note 117, at 243.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 243–44.

<sup>153</sup> See *id.* at 247–48.

<sup>154</sup> See *id.* at 269.

The Nevada Supreme Court has previously recognized a public policy exception to at-will employment,<sup>155</sup> although it is unclear whether the exception would apply to employees fired for marijuana use. Indeed, Nevada case law appears to be silent on this issue, although the Nevada Supreme Court's stance on marijuana in the context of workplace accidents might imply marijuana use is not covered under the public policy exception.<sup>156</sup> The dispositive factor regarding whether the public policy exception applies to employees fired for failing a drug test is often "whether the legislature (or the voters) intended for a particular law to announce public policy in the area of employee drug testing."<sup>157</sup>

## 2. Other Jurisdictions That Protect Job Applicants Who Use Marijuana

New York City has banned employers from testing job applicants for marijuana.<sup>158</sup> At the state level, Maine is the only other jurisdiction besides Nevada that has implemented protections for marijuana users.<sup>159</sup> Nevertheless, Maine does not have specific language that clearly addresses drug testing during the job application process.<sup>160</sup> As such, Assembly Bill 132—being the first state-level law of its kind—is both unprecedented in scope and has no analogous regulatory scheme that offers guidance or adequate comparison.<sup>161</sup> In other words, Assembly Bill 132 is operating in unchartered territory.

## 3. Las Vegas Casinos' Testing for Marijuana

MGM Resorts, Caesars Entertainment, Wynn Resorts, and Las Vegas Sands are four of the major gaming companies that operate in Las Vegas.<sup>162</sup> Collectively, they own twenty-three casino resorts on the Las Vegas Strip, and account for over sixty percent of its hotel rooms.<sup>163</sup> As such, examining the practices employed by these four companies can offer an accurate

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<sup>155</sup> See, e.g., *Hansen v. Harrah's*, 675 P.2d 394, 396 (Nev. 1984).

<sup>156</sup> See *Desert Valley Constr. v. Hurley*, 96 P.3d 739, 741–42 (Nev. 2004).

<sup>157</sup> See Gabrielson, *supra* note 117, at 270.

<sup>158</sup> Int. No. 1445-A, 2019 N.Y.C. Council (May 10, 2019), <https://perma.cc/7FMP-UYQ2>.

<sup>159</sup> See Hutchinson, *supra* note 16.

<sup>160</sup> See *id.*; see also Hannah Dineen, *Verify: Can Employers in Maine Still Test for Marijuana?*, NEWS CTR. ME. (Oct. 28, 2019, 9:16 AM), <https://perma.cc/H4ZX-GCUT>.

<sup>161</sup> See generally, Hutchinson, *supra* note 16.

<sup>162</sup> Howard Stutz, *Big Changes Churn Through Nevada Casino Giants*, NEV. INDEP. (Mar. 25, 2019, 2:15 AM), <https://perma.cc/3WCF-4MUT>.

<sup>163</sup> *Id.*

overview useful in evaluating the marijuana testing policies of Las Vegas casinos. With this in mind, Caesars Entertainment changed its hiring policies in 2018 and stopped screening applicants for marijuana.<sup>164</sup> Nevertheless, MGM Resorts, Las Vegas Sands, and Wynn Resorts all retained their policies of screening applicants for marijuana use.<sup>165</sup> As such, Assembly Bill 132 is significant since it directly upsets the status quo employed by most of the major Las Vegas casinos.<sup>166</sup>

### III. How Nevada Assembly Bill 132 Creates Challenges For Casinos

Assembly Bill 132 poses a three-tiered threat to Las Vegas casinos that could inflict both short-term and long-term damage to their financial well-being. This threat comprises of: (1) increased regulatory scrutiny at the state and federal levels; (2) increased lawsuits from both casino patrons and employees; and (3) a detrimental impact to casinos' overall brand and image.

#### A. *Regulatory Scrutiny*

Assembly Bill 132 has the potential to expose casinos to increased scrutiny from both Nevada gaming regulators and the federal government. Although Assembly Bill 132 may not seem incredibly consequential, given gaming regulators' highly restrictive posture towards marijuana issues, it does upset the status quo in a major way. Indeed, Las Vegas casinos must now operate under a statutory mandate that could compel the hiring of individuals that knowingly use marijuana.<sup>167</sup>

##### 1. Oversight from State Regulators

Nevada gaming regulators have been diligent in maintaining a strict separation between the gaming and marijuana industries.<sup>168</sup> Although the Gaming Commission and Gaming Control Board will respect the judgment of the state legislature and the governor regarding Assembly Bill 132, their overall regulatory posture towards marijuana will likely remain very

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<sup>164</sup> Richard N. Velotta, *Caesars No Longer Screening Job Applicants for Marijuana Use*, LAS VEGAS REV. J. (May 7, 2018, 6:00 PM), <https://perma.cc/7ZGF-5XXL>.

<sup>165</sup> See Devin O'Connor, *Las Vegas Casinos Grapple with Marijuana Legalities and Employee Testing Issues*, CASINO.ORG (May 9, 2018, 10:20 AM), <https://perma.cc/8FJA-XAHD>.

<sup>166</sup> See NEV. REV. STAT. § 613.132 (2019).

<sup>167</sup> See, e.g., Lewis, *supra* note 33, at 306–10.

<sup>168</sup> See *id.*

scrutinizing.<sup>169</sup> After all, the current status quo is so restrictive that it even requires a casino to report patrons that it suspects of owning a marijuana business.<sup>170</sup> If anything, Nevada gaming regulators may subject casinos to additional scrutiny to ensure that casinos' compliance with Assembly Bill 132 is limited in scope and does not sow the seeds for a gradual integration of marijuana.<sup>171</sup> Nevada's overall posture regarding marijuana regulation has arguably become more restrictive in the past few years, as evidenced by a recent bill creating a mandatory distance of 1,500 feet between certain marijuana establishments and casinos.<sup>172</sup> Increased regulatory scrutiny inevitably results in increased compliance costs, which would cut into casinos' bottom line.<sup>173</sup>

## 2. Oversight from Federal Regulators

Although it is perhaps less likely, casinos may also receive increased regulatory scrutiny from the federal government (and thus incur increased compliance costs)<sup>174</sup> as a result of Assembly Bill 132. After all, marijuana remains illegal at the federal level since it is a Schedule I controlled substance.<sup>175</sup> To be sure, the prospect of the federal government raiding a Las Vegas casino is likely slim to none. For example, MGM Resorts enjoys considerable influence in Washington D.C., as evidenced by its recent successful effort to block the opening of a tribal casino thousands of miles away in Connecticut.<sup>176</sup> MGM Resorts' recent opening of a lobbying shop in Washington D.C. further suggests that it, along with other casinos, will continue to exert influence regarding gaming issues<sup>177</sup>—which would include blunting federal intervention related to incorporating marijuana into casinos.

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<sup>169</sup> As recently as 2018, Nevada's Gaming Policy Committee stated that cannabis conventions (that did not feature cannabis products) were the only legal intersection between the gaming and marijuana industries. See Rindels, *supra* note 103.

<sup>170</sup> Horwath, *supra* note 12.

<sup>171</sup> See Velotta, *supra* note 11.

<sup>172</sup> See Assemb. B. 533, 2019 Assemb. & S., 80th Sess. (Nev. 2019); see also Rindels, *supra* note 112.

<sup>173</sup> See William D. Eggers, Mike Turley & Pankaj Kishnani, *The Regulator's New Toolkit*, DELOITTE (Oct. 18, 2018), <https://perma.cc/3G3Z-3K9L>.

<sup>174</sup> See *id.*

<sup>175</sup> See DRUG ENF'T ADMIN., CONTROLLED SUBSTANCES—ALPHABETICAL ORDER 11 (Aug. 20, 2020), <https://perma.cc/6WSU-7374>; see also German Lopez, *Marijuana is Illegal Under Federal Law Even in States that Legalize It*, VOX (Nov. 14, 2018, 4:14 PM), <https://perma.cc/SEQ5-VWV8>.

<sup>176</sup> See Nick Juliano, *Zinke's Agency Held Up Indians' Casino After MGM Lobbying*, POLITICO (Feb. 1, 2018, 5:00 AM), <https://perma.cc/7DSV-X5LR>.

<sup>177</sup> See Tony Owusu, *MGM Resorts Opens Lobbying Office in Washington D.C.*, THE STREET (Jan. 13, 2017, 2:42 PM), <https://perma.cc/29TP-4BDZ>.

The fact that the federal government would likely never raid or shut down a Las Vegas casino does not mean that “unwanted federal attention” could not be so burdensome and costly so as to significantly outweigh any benefit of incorporating marijuana into an entertainment portfolio.<sup>178</sup> Nevada gaming regulators seem to subscribe to this idea, as they routinely defer to the federal illegality of marijuana when justifying why gaming and marijuana cannot mix.<sup>179</sup> One possible reason why cannabis and gaming cannot mix—beyond the fact that marijuana is illegal at the federal level—is that both are cash-centric businesses.<sup>180</sup>

Kieran Beer of the Association of Certified Anti-Money Laundering Specialists notes that “pretty much any cash-intensive business can be used to launder money.”<sup>181</sup> With this in mind, casinos that “knowingly welcome patrons who derive their funds from selling marijuana [an illegal business under federal law] . . . could be prosecuted for a conspiracy to commit money laundering.”<sup>182</sup> It is for this reason that most banks refuse to “provide services to marijuana-related businesses.”<sup>183</sup>

Since 2013, gaming operations in the United States have been forced to return roughly \$150 million as a result of federal enforcement of the Bank Secrecy Act—a sign of how serious and financially punitive it is to run afoul of federal money laundering regulations.<sup>184</sup> Overall, the federal government may subject casinos that embrace marijuana to additional scrutiny, not necessarily due to a *prima facie* violation of the Controlled Substances Act, but because of the heightened money laundering risk.<sup>185</sup>

## B. *Legal Liability*

Assembly Bill 132 inevitably increases the likelihood that casinos are hiring individuals that use marijuana on a regular basis. Having a

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<sup>178</sup> See Jennifer Gaynor, Gregory Gemignani, Jeffrey Silver & Kate Lowenhar-Fisher, *United States: Changes To Nevada Gaming Law By The 2019 State Legislature*, MONDAQ (July 24, 2019), <https://perma.cc/7HHF-QWQF>.

<sup>179</sup> See, e.g., Horwath, *supra* note 12; Velotta, *supra* note 11.

<sup>180</sup> See Renae Merle, *Banks Want a Hit of the Marijuana Business. Will They Get to Partake?*, WASH. POST (Feb. 13, 2019, 6:27 PM), <https://perma.cc/5REP-2WAY>; J.S. Kim, *Why I Trust Casinos More Than Banks*, SEEKING ALPHA (Feb. 9, 2010, 2:45 AM), <https://perma.cc/HX3W-LRSB>.

<sup>181</sup> Virginia Chamlee, *How Do Criminals Launder Money Through a Restaurant?* EATER (Sept. 1, 2016, 3:00 PM), <https://perma.cc/FD84-9MLW>.

<sup>182</sup> See Rindels, *supra* note 103.

<sup>183</sup> *Id.*

<sup>184</sup> Kevin Rosenberg & Jeffrey Setness, *The Government's Recent Gaming Enforcement Actions: What Lessons Can Be Learned So Your Casino Does Not Make the Same Mistakes?*, NEV. GAMING LAW, Sept. 2016, at 48.

<sup>185</sup> See *id.*; Lewis, *supra* note 33, at 316–17.

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workforce comprised of individuals who use marijuana on a regular basis could widen the scope of casinos' legal liability in certain circumstances; namely, in the context of guest injuries and employees who are fired for marijuana usage.

### 1. Tort Suits from Casino Guests

One commenter, Haley Lewis, has noted that casinos already expose themselves to potential legal action by prohibiting guests from using marijuana.<sup>186</sup> In particular, casino guests can potentially file suit and allege that such a prohibition violates state statutes enumerating protections for medicinal users.<sup>187</sup> While this may be true, casinos that comply with Assembly Bill 132 may be inviting legal action from casino guests in a different way. Casinos that knowingly hire individuals who use marijuana, perhaps on a regular basis, could potentially be widening the scope of their tort liability.

Consider a casino guest, Guest A, who is injured as a result of a casino employee's negligence. In Guest A's case, the employee at fault uses marijuana on a regular basis and tested positive following the injury. Now consider a second casino guest, Guest B, who is also injured as a result of a casino employee's negligence. In Guest B's case, the employee at fault completely refrains from marijuana use and tested negative following the injury. Assuming other factors remain constant, Guest A would most likely have a better chance to recover.

This aforementioned conclusion would likely hold true even if the employee at fault in Guest A's case was not demonstrating visible signs of impairment. Indeed, it is not exactly a stretch to assert, as one federal research study has suggested,<sup>188</sup> that marijuana reduces reaction time. In certain contexts, Nevada already imposes the rebuttable presumption that marijuana detected in an employee's system is the cause of a workplace accident.<sup>189</sup> In these contexts, marijuana use only has to be one (of possibly multiple) proximate causes of the accident.<sup>190</sup> As such, should the Nevada Supreme Court extend this jurisprudence to the casino context, Guest A may have the added benefit of a lower evidentiary burden.

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<sup>186</sup> See Lewis, *supra* note 33, at 315–16.

<sup>187</sup> See *id.*

<sup>188</sup> See *Effects of Marijuana—With and Without Alcohol—On Driving Performance*, NAT'L INST. ON DRUG ABUSE, <https://perma.cc/7BWL-SGFZ>; Eliza Gray, *How Much Does Marijuana Impact Your Driving?*, TIME (June 23, 2015, 6:00 AM), <https://perma.cc/6CC7-UH9F>.

<sup>189</sup> See *Desert Valley Constr. v. Hurley*, 96 P.3d 739, 741–42 (Nev. 2004).

<sup>190</sup> See *id.* at 742.

## 2. Lawsuits from Casino Employees

Depending on the circumstances, employees who are fired due to marijuana use already have potential avenues of legal recourse.<sup>191</sup> A casino that complies with Assembly Bill 132 and hires an applicant who it knows uses marijuana may wish to fire such an employee if he or she demonstrates impairment while on the job as a result of marijuana use. Perhaps a casino may wish to maintain a strict no tolerance policy on marijuana use regardless of whether that employee demonstrates impairment on the job. In either case, such an employee would likely have a stronger case for a lawsuit against the casino as opposed to if the employee had been hired without the employer knowing of his or her marijuana use. Indeed, the employee might argue that there was an implicit understanding or waiver at the time of hiring regarding the employee's marijuana use, especially if the casino omitted at the time of hiring that marijuana use among employees is prohibited—an omission that is certainly plausible, as some Nevada employers have cited the difficulty of attracting employees while maintaining a strict no tolerance policy.<sup>192</sup>

Under the aforementioned scenario, the fired employee would possibly be able to use the doctrine of equitable estoppel.<sup>193</sup> Pursuant to the four-part test articulated by the Nevada Supreme Court, the terminated employee would argue that: (1) the casino understood that it would fire employees that used marijuana; (2) the employee was justified in thinking that the casino intended for him or her to act on its conduct during the hiring process; (3) the employee did not realize he or she would be fired over marijuana use; and (4) the employee detrimentally relied on the implied understanding that his or her marijuana use would not be an issue.<sup>194</sup>

### C. *Economic Damage and Detriment to Brand*

Adhering to Assembly Bill 132 and hiring individuals that use marijuana may, on the margins, inflict damage to Las Vegas casinos' overall brand, resulting in long-term economic loss. Las Vegas has made great strides to become a multi-faceted entertainment destination.<sup>195</sup> By implicitly condoning employee marijuana use, casino resorts may in the process alienate two important groups of patrons: families and individuals over sixty-five.

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<sup>191</sup> See Gabrielson, *supra* note 117, at 243–44.

<sup>192</sup> See Velotta, *supra* note 164.

<sup>193</sup> See *Chequer, Inc. v. Painters & Decorators Joint Comm.*, 655 P.2d 996, 998–99 (Nev. 1982).

<sup>194</sup> See *id.*

<sup>195</sup> See Glusac, *supra* note 5.

## 1. Las Vegas as a Family-Friendly Destination

Although it may sound counterintuitive, Las Vegas has at times sought to market itself as a family-friendly destination with attractions suitable for both children and adults.<sup>196</sup> Admittedly, the city's days of trying to market itself towards children may have peaked in the 1990s.<sup>197</sup> Nevertheless, gambling revenue could certainly decline in the future,<sup>198</sup> creating a need for Las Vegas casino resorts to diversify their entertainment offerings, which would mean, inter alia, providing more options for children.

Las Vegas casinos that fail to maintain a no-tolerance policy regarding marijuana use among its employees would risk some families viewing casinos as inappropriate entertainment destinations.<sup>199</sup> Erin McMullen, a Boyd Gaming lobbyist, has noted that some casinos currently offer child-friendly attractions such as bowling alleys and movie theaters, and even host student sports events.<sup>200</sup>

## 2. Alienating Gamblers Over Sixty-Five Years Old

Individuals older than sixty-five provide an important revenue stream for Las Vegas casinos, as that age group accounted for roughly nineteen percent of all visitors to Las Vegas in 2018.<sup>201</sup> This age group is also the most likely to oppose legalized marijuana.<sup>202</sup> As such, it is possible that were the gaming industry in Nevada to increasingly associate itself with the marijuana industry, Las Vegas casinos could see a tangible decline in patronage from older individuals. Admittedly, casinos hiring employees that use marijuana would likely not cause a sudden decline in patronage from older gamblers, yet it would represent an important initial step in a direction of increased tolerance of marijuana.

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<sup>196</sup> Tom Hawley, *Video Vault: The 'Family Friendly' Phase of Las Vegas*, NEWS 3 LAS VEGAS (June 27, 2018), <https://perma.cc/9PQD-SPWQ>.

<sup>197</sup> *Id.*

<sup>198</sup> See, e.g., Howard Stutz, *Nevada Gaming Revenues Decline 3.1 Percent in August; Strip Down 1.2 Percent*, LAS VEGAS REV. J. (Oct. 10, 2012, 5:59 AM), <https://perma.cc/VD8E-74K4>.

<sup>199</sup> See Ruth Spencer & Nadja Popovich, *Pot-Smoking Parents Explain the Rules of Getting High at Home Around the Kids*, GUARDIAN (Apr. 20, 2014), <https://perma.cc/JL4J-26DW>.

<sup>200</sup> Rindels, *supra* note 112.

<sup>201</sup> LAS VEGAS CONVENTION & VISITORS AUTH., LAS VEGAS VISITOR PROFILE STUDY 51 (2018), <https://perma.cc/77Y6-6RLS>.

<sup>202</sup> Jennifer De Pinto, Fred Backus, Kabir Khanna & Anthony Salvanto, *Marijuana Legalization Support at All-Time High*, CBS NEWS (Apr. 20, 2017, 11:57 AM), <https://perma.cc/2NHG-DDBM>.

#### IV. A Paradigm For Casinos Under Nevada Assembly Bill 132

Assuming the goal is to completely avoid having to comply with Assembly Bill 132, Las Vegas casinos should seek to take advantage of three of the enumerated exceptions (safety exception, contract exception, and federal law exception).<sup>203</sup> In the event courts deem casinos ineligible to utilize one or more of the enumerated exceptions, casinos should implement a post-hiring drug testing regime to achieve the end goal of prohibiting employee marijuana use.

##### A. *Casinos Can and Should Utilize Nevada Assembly Bill 132's Enumerated Exceptions*

Las Vegas casinos that take advantage of Assembly Bill 132's enumerated exceptions should be able to avoid compliance with respect to most, if not all of their workforce. The benefit of utilizing more than one of the enumerated exceptions is that a court may deem a particular employee not within the purview of a particular exception—thus necessitating use of a different exception.

##### 1. Safety Exception

Under Assembly Bill 132, Nevada employers can reject applicants for testing positive for marijuana if they determine that the position is one that places the employee in a position that “could adversely affect the safety of others.”<sup>204</sup> For Las Vegas casinos, it is not readily apparent how they could plausibly argue this exception applies to the entirety, or even most, of their workforce. Indeed, it is difficult to discern how many of the positions within a casino resort impact public safety. For example, the job description of dealers, a common position within casinos, has little to no connection to public safety.<sup>205</sup>

Making it even more difficult for Las Vegas casinos to utilize Assembly Bill 132's safety exception is the fact that the Nevada Supreme Court “begins its statutory analysis with the plain meaning rule.”<sup>206</sup> Under this rule, the Nevada Supreme Court will give a statute's terms their plain meaning if legislative intent is unambiguous and apparent on its face.<sup>207</sup>

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<sup>203</sup> NEV. REV. STAT. §§ 613.132(4)(d), (5)(a)–(b) (2019).

<sup>204</sup> *Id.* § 613.132(2)(c) (2019).

<sup>205</sup> See, e.g., *What Are the Duties of a Blackjack Dealer?* ZIPRECRUITER, <https://perma.cc/M4W6-CHFH>.

<sup>206</sup> *Clark County v. S. Nev. Health Dist.*, 289 P.3d 212, 215 (Nev. 2012).

<sup>207</sup> *Id.*

Additionally, the Nevada Supreme Court uses the entirety of a statute as context when interpreting a particular word or provision.<sup>208</sup> With that in mind, a plain meaning interpretation of Assembly Bill 132 might lead to the conclusion that the safety exception only applies to positions with a clear, direct link to public safety.<sup>209</sup> One example of such positions would be firefighters, as indicated in the text of Assembly Bill 132.<sup>210</sup>

Although the safety exception may seem facially inapplicable, it is important to note that Assembly Bill 132's text stipulates that it is left up to the "determination of the employer" whether a position could "adversely affect the safety of others."<sup>211</sup> Assembly Bill 132 does not provide any further clarification or limiting mechanisms that constrain this deference given to employers.<sup>212</sup> In fact, Assembly Bill 132's legislative history indicates that legislators acknowledged that the safety exception could have broad application, yet nevertheless failed to change the provision so as to limit its scope.<sup>213</sup>

With this legislative history in mind, Las Vegas casinos should seek to make the determination as often as possible that a particular position affects public safety. These determinations must be creative, yet within reason, and should be enumerated in job descriptions so as to avoid allegations of post-hoc opportunism and pretextual reasoning. For example, a casino could plausibly argue that employees who work on a casino floor, such as dealers and pit bosses, affect public safety by: (1) ensuring that intoxicated guests do not become physically aggressive; (2) guarding against criminal organizations illegally laundering money;<sup>214</sup> and (3) looking after the overall well-being of guests.

The 2017 Las Vegas mass shooting that killed fifty-eight individuals is a sobering example of how casino resort employees could affect public safety despite their job descriptions seeming to suggest otherwise.<sup>215</sup> Employees of the Mandalay Bay Resort and Casino, including room service and maid staff, had interacted with the shooter over ten times in the days leading up to the shooting, which was perpetrated through the window of

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<sup>208</sup> *See id.*

<sup>209</sup> *See* NEV. REV. STAT. § 613.132(2)(c) (2019).

<sup>210</sup> *Id.* § 613.132(2)(a).

<sup>211</sup> *Id.* § 613.132(2)(d)

<sup>212</sup> *See id.*

<sup>213</sup> NEV. LEGIS. COUNSEL BUREAU, MINUTES OF THE SENATE COMMITTEE ON COMMERCE AND LABOR 10 (May 10, 2019), <https://perma.cc/ZFS7-2ZPF>.

<sup>214</sup> *See* Jenny Wilson, *21 Charged in Casino-Based Money Laundering Scheme*, LAS VEGAS REV. J. (Mar. 9, 2017, 7:33 PM), <https://perma.cc/XH93-69U7>.

<sup>215</sup> *See* Dakin Andone, *Hotel Staff Interacted with Las Vegas Shooter More than 10 Times Before Massacre*, CNN (Jan. 6, 2018, 11:41 PM), <https://perma.cc/44DA-HFSK>.

a hotel room.<sup>216</sup> Additionally, a Mandalay Bay maintenance worker that was working in a different room on the shooter's floor was one of the first individuals to report the shooting.<sup>217</sup>

## 2. Contract Exception

Assembly Bill 132's provisions do not apply if "they are inconsistent or otherwise in conflict with the provisions of an employment contract or collective bargaining agreement."<sup>218</sup> Unionized labor is a powerful force in Las Vegas, and has particular influence within Las Vegas casinos.<sup>219</sup> For instance, in the summer of 2018, MGM Resorts narrowly avoided a strike from 50,000 members of the Culinary Workers Union.<sup>220</sup> That particular strike would have had an estimated financial impact of over \$10 million a day.<sup>221</sup>

Even dealers have started to unionize, as evidenced by dealers from four Las Vegas casinos recently joining the United Auto Workers union in 2019.<sup>222</sup> Keeping in mind that many casino workers belong to a union, and that this number may grow in the future,<sup>223</sup> Las Vegas casinos could avoid complying with Assembly Bill 132 by embedding clauses within employees' contracts and collective bargaining agreements that forbid marijuana use. Admittedly, this may require a concession from casinos, yet should not come at too high of a cost considering that a prohibition on marijuana use has been the status quo at most of the major Las Vegas casinos.<sup>224</sup>

## 3. Federal Law Exception

Assembly Bill 132's provisions do not apply if "they are inconsistent or otherwise in conflict with the provisions of federal law."<sup>225</sup> This exception

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<sup>216</sup> *Id.*

<sup>217</sup> See *Worker Warned Hotel Before Las Vegas Shooter Opened Fire on Crowd*, CBS NEWS (Oct. 11, 2017, 9:37 PM), <https://perma.cc/2TVS-QZTC>.

<sup>218</sup> NEV. REV. STAT. § 613.132(4)(a) (2019).

<sup>219</sup> See Anita Snow, *Las Vegas MGM Union Workers Reach Deal With Casino*, CHI. TRIB. (June 3, 2018, 1:41 PM), <https://perma.cc/F4TQ-GKFQ>.

<sup>220</sup> See Ben Popken, *Las Vegas Casinos Could Lose \$10 Million a Day in Strike*, NBC NEWS (May 31, 2018, 9:41 PM), <https://perma.cc/EA97-LY72>.

<sup>221</sup> *Id.*

<sup>222</sup> Todd Prince, *Dealers at 4 Las Vegas Casinos Vote to Join United Auto Workers Union*, LAS VEGAS REV. J. (Mar. 20, 2019, 9:51 AM), <https://perma.cc/C3ZW-NSH8>.

<sup>223</sup> See *id.*

<sup>224</sup> See Velotta, *supra* note 18.

<sup>225</sup> NEV. REV. STAT. § 613.132(4)(b) (2019).

perhaps offers the best opportunity for Las Vegas casinos to avoid complying with Assembly Bill 132. Notably, the exception does not state that Assembly Bill 132's provisions have to *violate* federal law.<sup>226</sup> Instead, the exception offers the lower threshold of its provisions being "inconsistent" or "in conflict" with federal law.<sup>227</sup>

As marijuana is a Schedule I substance under federal law,<sup>228</sup> it would not be a stretch to assert that prohibiting employers from denying applicants who use marijuana is inconsistent with federal law—at a minimum, implicitly condoning employee marijuana use is certainly inconsistent with the spirit of federal law. After all, federal employees themselves are required to refrain from marijuana use.<sup>229</sup>

#### B. *Casinos Should Test for Marijuana Use After the Hiring Process*

Assembly Bill 132 does not forbid employers from testing employees for marijuana after they have been hired, even if a particular employee tested positive during the application process and was hired nevertheless.<sup>230</sup> In fact, Assembly Bill 132 seems to acknowledge this possibility and protects marijuana users who have been hired for a position that forbids marijuana use by allowing employees to rebut a positive test within their first thirty days on the job.<sup>231</sup>

As a potential failsafe, if courts deem casinos ineligible to use Assembly Bill 132's enumerated exceptions, Las Vegas casinos should consider instituting a post-hiring marijuana testing regime, preferably one that tests after an employee's first thirty days of employment. This practice would have a dual benefit: (1) it would avoid triggering Assembly Bill 132's protection for employees that test positive within their first 30 days on the job; and (2) it would allow casinos to maintain a no tolerance policy regarding marijuana use, thus providing the aforementioned benefits of decreased legal liability, regulatory scrutiny, and detriment to their brand. However, using this failsafe is not preferable to utilizing Assembly Bill 132's enumerated exceptions since it would potentially subject casinos to wrongful termination and employee discrimination lawsuits.<sup>232</sup>

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<sup>226</sup> See *id.*

<sup>227</sup> *Id.*

<sup>228</sup> DRUG ENF'T ADMIN., *supra* note 175, at 11.

<sup>229</sup> See Eric Katz, *Federal Agencies Can Fire Employees for Accidentally Using Marijuana*, *Federal Court Rules*, GOV. EXEC. (Feb. 5, 2019), <https://perma.cc/4URK-P2GB>.

<sup>230</sup> See NEV. REV. STAT. § 613.132(3) (2019).

<sup>231</sup> *Id.*

<sup>232</sup> See Gabrielson, *supra* note 117, at 243–44.

## V. Other Considerations

Although Assembly Bill 132 is unprecedented and without a comparable equivalent at the state level, it is nonetheless important to note that other jurisdictions also face similar challenges with respect to employee marijuana use. Likewise, it should be noted that the laws pertaining to marijuana are constantly evolving and thus Assembly Bill 132 cannot be considered in a vacuum.

### A. Casinos in Other Jurisdictions

The degree to which Las Vegas casinos can look to other jurisdictions for guidance varies. Ultimately, the state of Nevada and its casinos must make their own decision regardless of how other jurisdictions proceed, especially since they have the unique circumstance of gambling providing the most tax revenue for the state.<sup>233</sup>

#### 1. Casinos in Other States

Nevada is not the only state that has legalized both gambling and forms of marijuana.<sup>234</sup> As such, Nevada is not alone in addressing the challenges that legalized marijuana poses for the gaming industry. Nevertheless, given the unparalleled size of Nevada's gaming industry, as well as Nevada's reputation as an efficient regulator of the gaming industry, other states will inevitably follow its lead with respect to managing the intersection of marijuana and gaming—not vice versa.<sup>235</sup> Given this discrepancy in scale, Las Vegas casinos should not necessarily look to other states for guidance and should instead craft their own strategy regarding legalized marijuana. After all, "there is even more at stake in Nevada than in other jurisdictions because gaming is the primary source of revenue for the state."<sup>236</sup> For example, New Jersey—which has a robust gambling presence in Atlantic City—gets most of its tax revenue from its income tax (which Nevada does not have).<sup>237</sup>

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<sup>233</sup> Lewis, *supra* note 33, at 318.

<sup>234</sup> *See id.* at 317–18.

<sup>235</sup> *See id.*

<sup>236</sup> *See id.* at 318.

<sup>237</sup> Richard F. Keevey, *Budget Basics: Where the State Gets Its Money (Part 2)*, NJ SPOTLIGHT NEWS (Sept. 20, 2017), <https://perma.cc/992J-ZWVD>; Jim Probasco, 9 States With No Income Tax, INVESTOPEDIA (Feb. 28, 2020), <https://perma.cc/LPA6-ZFLG>.

## 2. Casinos on Native American Reservations

Native American casinos, which are distinct from state casinos given their ability to operate stems from federal jurisdiction,<sup>238</sup> offer an interesting corollary to this discussion—and perhaps a more helpful signpost for Las Vegas casinos than other states.<sup>239</sup> Native American reservations are subject to federal law<sup>240</sup> and thus would presumably be equally at risk of regulatory scrutiny, if not more so, than Nevada casinos should their casinos develop relationships with marijuana businesses.<sup>241</sup> Indeed, the Supreme Court has routinely asserted that Congress has “plenary” power over Native American affairs.<sup>242</sup>

One commenter, Lauren Adornetto, has observed that Native American tribes may seek to open marijuana dispensaries as a way to combat the rampant poverty that plagues many reservations.<sup>243</sup> With this in mind, the “Wilkinson Memo” is a Department of Justice document confirming that the “Cole Memo” (seen as implicitly allowing states to pursue marijuana legalization) also applies to Native American reservations.<sup>244</sup>

Haley Lewis asserted in a 2016 article in the *UNLV Gaming Law Journal* that “it remains unclear how marijuana will affect tribal gaming, but it seems evident that at some point it will.”<sup>245</sup> The Tulalip Reservation, located outside of Seattle, Washington, is one example of a tribe that has legalized both cannabis and gaming.<sup>246</sup> The Tulalip Resort Casino even hosted the first Tribal Marijuana Conference in 2015.<sup>247</sup>

While the Tulalip Resort Casino does not seem to have a publicly available marijuana policy, reviews from resort patrons suggest that the

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<sup>238</sup> Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701–2721).

<sup>239</sup> See Lewis, *supra* note 33, at 318–19.

<sup>240</sup> “As U.S. citizens, American Indians and Alaska Natives are generally subject to federal, state, and local laws. On federal Indian reservations, however, only federal and tribal laws apply to members of the tribe, unless Congress provides otherwise.” *Frequently Asked Questions*, U.S. DEP’T OF THE INTERIOR, <https://perma.cc/CG9V-5B76>.

<sup>241</sup> Marijuana is illegal at the federal level. See, e.g., Lopez, *supra* note 175.

<sup>242</sup> Lauren Adornetto, Comment, *Indian Country Complexities and the Ambiguous State of Marijuana Policy in the United States*, 65 BUFFALO L. REV. 329, 344–46 (2017).

<sup>243</sup> See *id.* at 357–58.

<sup>244</sup> See *id.* at 338–43.

<sup>245</sup> Lewis, *supra* note 33, at 319.

<sup>246</sup> David Treuer, *From Casinos to Cannabis: The Native Americans Embracing the Pot Revolution*, GUARDIAN (Mar. 15, 2019, 2:00 PM), <https://perma.cc/R77H-SQ9E>.

<sup>247</sup> Jacob Sullum, Opinion, *From Casinos To Cannabis: Indian Tribes Eye Pot Profits*, FORBES (Mar. 12, 2015, 7:11 PM), <https://perma.cc/7MRP-D7PV>.

casino bans marijuana consumption on its premises.<sup>248</sup> If accurate, these reviews should not come as a surprise, as the Tulalip Reservation likely does not want to jeopardize the 2,500 jobs and \$200 million in revenue that the resort provides.<sup>249</sup>

Native Americans reservations that have legalized both cannabis and gaming such as the Tulalip Reservation likely find themselves in a similar predicament as Las Vegas casinos—and thus would be prudent to exercise caution at least until the legalization of marijuana at the federal level. Given the federal government’s involvement in Native American gaming issues,<sup>250</sup> Las Vegas casinos can potentially take cues in the future from how the federal government regulates the intersection of marijuana and tribal gaming—should such regulation occur.

### B. *Considerations for the Future*

The state-enforced separation<sup>251</sup> between the gaming and cannabis industries in Nevada may not be as severe in the future.<sup>252</sup> Public acceptance of marijuana will likely continue to grow<sup>253</sup> and the federal government may continue its wait-and-see approach to marijuana policy.<sup>254</sup> Despite Nevada’s aforementioned ban on landlord-tenant relationships between marijuana and gaming interests,<sup>255</sup> there are “at least four people [in Nevada] newly listed as owners and board members of marijuana companies . . . who appear to be current employees of gaming companies or married to licensees.”<sup>256</sup> Notably, the Nevada Gaming Control Board has not indicated that these four individuals are running afoul of gaming regulations.<sup>257</sup> Instead, the Board noted “[a]s Nevada statutes and circumstances regarding marijuana change and evolve, the Board often engages in discussions with licensees to identify solutions that will ensure they are in

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<sup>248</sup> *Tulalip Resort Casino Questions & Answers*, TRIPADVISOR, <https://perma.cc/LK33-7MPV>.

<sup>249</sup> See Marc Stiles, *Tulalip Tribes Plan New \$100 Million Casino*, PUGET SOUND BUS. J. (Sept. 15, 2017, 2:29 PM), <https://perma.cc/SMT4-5BM5>.

<sup>250</sup> Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701–2721).

<sup>251</sup> See, e.g., Velotta, *supra* note 11.

<sup>252</sup> See Rindels, *supra* note 112.

<sup>253</sup> Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RES. CTR. (Nov. 14, 2019), <https://perma.cc/NB5Z-SZPN>.

<sup>254</sup> Kyle Jaeger, *One Year After Jeff Sessions Rescinded A Federal Marijuana Memo, The Sky Hasn't Fallen*, MARIJUANA MOMENT (Jan. 4, 2019), <https://perma.cc/GCM3-MWPB>.

<sup>255</sup> Velotta, *supra* note 96.

<sup>256</sup> Rindels, *supra* note 112.

<sup>257</sup> See *id.*

compliance with our gaming laws and regulations.”<sup>258</sup> Such a statement from the Gaming Control Board perhaps indicates a less restrictive approach moving forward.

In addition to a less restrictive regulatory posture at the state level, the federal government is beginning to indicate a possible future change in its stance towards marijuana.<sup>259</sup> For example, the Republican chairman of the Senate Banking Committee has indicated a willingness to consider legislation that would give marijuana companies access to the banking system.<sup>260</sup> Some Republican congressmen, such as Rep. Matt Gaetz of Florida, even support legalizing cannabis at the federal level.<sup>261</sup> Nevertheless, legalization of marijuana at the federal level would primarily mitigate only the risk associated with increased regulatory scrutiny—the litigation risk from employees and patrons, as well as the detriment to casinos’ brand and image could still persist. As such, Las Vegas casinos would be prudent to proceed carefully in the future with respect to incorporating marijuana into their entertainment portfolios.

## Conclusion

Assembly Bill 132 poses a threat to Las Vegas casinos in the form of increased regulatory scrutiny, lawsuits from casino guests and employees, and damage to their overall brand. Although some of these risks may not manifest themselves immediately or may become moot, they deserve to be taken seriously, especially as Nevada derives a significant portion of its tax revenue from the gaming industry.<sup>262</sup>

Las Vegas casinos should consider these risks and develop a comprehensive response to Assembly Bill 132, one rooted in a calculated utilization of the bill’s enumerated exceptions. In doing so, Las Vegas casinos may also be able to develop a strategy for how to address marijuana legalization in the long term. After all, it is certainly not unfathomable to imagine Nevada, or the federal government, eventually passing a law that bans employer drug testing altogether, or makes marijuana usage a non-fireable offense.

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<sup>258</sup> *Id.*

<sup>259</sup> See, e.g., Zachary Warmbrodt, *Crapo Plans Landmark Cannabis Banking Vote*, POLITICO (Sept. 13, 2019, 5:02 AM), <https://perma.cc/LS9A-HYPC>.

<sup>260</sup> See *id.*

<sup>261</sup> Marty Johnson, *Matt Gaetz to Kellyanne Conway Over Marijuana Legalization: “OK, Boomer,”* THE HILL (Nov. 23, 2019, 2:22 PM), <https://perma.cc/Q7QV-9BBX>.

<sup>262</sup> Lewis, *supra* note 33, at 318.