HANDS OFF MY GRASS: POTENTIAL FIFTH AMENDMENT TAKINGS CHALLENGES TO CANNABIS CODES IN CALIFORNIA

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INTRODUCTION

The clean-air-loving, cannabis-smoking California residents have long enjoyed being at the forefront of both environmental and cannabis law.[1] The state was the first to enact a state air pollution control statute and to legalize cannabis in any capacity.[2] These two types of law often overlap, with many cannabis codes in California focusing on mitigating the environmental impact of the industry.[3] However, these environmentally-focused codes in the cannabis industry differ from standard environmental law in an important way: there have been no Fifth Amendment regulatory takings challenges.

The Takings Clause of the Fifth Amendment has long been used to overturn environmental codes.[4] But, in the eight years since California legalized recreational cannabis, there has not been a single regulatory takings challenge to environmentally focused cannabis codes—even though the cannabis industry is subject to far more unique and burdensome codes than most industries.[5] Based on recent trends in Supreme Court property rights

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1. This Note uniformly uses the term "cannabis" rather than "marijuana" unless directly quoting a source using the term due to the racism that is inextricably intertwined with the term "marijuana." *See generally* Meredith Clark, *Marijuana is More than Just a Word*, NEWSHOUSE: HIGH STAKES, https://www.thenewshouse.com/highstakes/marijuana-is-more-than-a-word/ (last visited Mar. 15, 2024) (explaining the difference between "marijuana" and "cannabis"); Simeon Spencer, *Redressing America's Racist Cannabis Laws*, LEGAL DEF. FUND (Aug. 4, 2022), https://www.naacpldf.org/cannabis-laws-racism/ (describing how the substance was named "marijuana" to "associate the drug with Mexican immigrants"); Matt Thompson, *The Mysterious History of "Marijuana,"* NPR, https://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana (Sept. 16, 2021); Deedee Sun, *Lawmakers Strike the Word 'Marijuana' from All State Laws, Calling Term Racist*, KIRO 7 (April 22, 2022, 7:39 PM), https://www.kiro7.com/news/local/lawmakers-strike-word-marijuana-all-state-laws-calling-term-racist/MJOQZ7OCK5CUDLBA2H53CYOJXE/ (detailing how politicians intentionally created a connection between Mexican immigrants and the word "marijuana" to manufacture negative public opinion towards both Hispanic peoples and cannabis users).

2. DAVID VOGEL, CALIFORNIA GREENIN': HOW THE GOLDEN STATE BECAME AN ENVIRONMENTAL LEADER 4–5 (Princeton Univ. Press 2018) (providing multiple examples of California's innovative environmental regulations); *California's Cannabis Laws*, CAL. DEP'T OF CANNABIS CONTROL, https://cannabis.ca.gov/cannabis-laws/laws-and-regulations/ (last visited Oct. 22, 2023).

3. RIVERSIDE COUNTY, CAL. CODE OF ORDINANCES § 17.302.120(G); RIVERSIDE COUNTY, CAL. CODE OF ORDINANCES § 17.302.070(B)(3); BERKELEY, CAL. CODE OF ORDINANCES § 12.22.070(C)(3); EL DORADO COUNTY, CAL. CODE OF ORDINANCES § 130.41.300(5)(C) (regulating cannabis cultivator's non-renewable energy use).

4. U.S. CONST. amend. V.; Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); Nollan v. Cal. Coastal Com., 483 U.S. 825, 837 (1987); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015-16 (1992); Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

5. Medicinal and Adult-Use Cannabis Regulation and Safety Act, CAL. BUS. & PROF. CODE § 26000.

jurisprudence, the lack of challenges is likely to change.[6] Commercial cannabis businesses are the perfect candidates to bring takings claims to a sympathetic Court because cannabis businesses are economically oppressed by restrictive tax requirements and competition with an illicit market.

This Note explores potential Fifth Amendment regulatory takings challenges to local environmentally focused cannabis codes. Section I introduces cannabis law, California's cannabis and environmental law, and regulatory takings law. Section II details three potential regulatory takings claims to cannabis codes from Riverside County, the city of Berkeley, and El Dorado County, California. Section III provides recommendations to avoid these potential takings challenges, largely through holistic regulation of all industries. This Note concludes there are budding claims in the cannabis industry that could upend cannabis regulation throughout the country if successful; thus, regulators should use their authority to reduce the likelihood of success for these challenges.

I. BACKGROUND

A. Cannabis Law

The United States has a tumultuous history with cannabis. This history officially began in 1937 with the first federal action relating to cannabis: the Marihuana Tax Act.[7] The Marihuana Tax Act effectively banned recreational cannabis use via a series of taxes and penalties. In order to be taxed under the Act, cannabis possessors were required to declare their cannabis, and thus required to admit to an activity that was illegal at the state level.[8] Approximately three decades after it was enacted, the Court deemed the Act unconstitutional under the Fifth Amendment right against self-incrimination.[9] The federal government responded quickly to this sudden per se legalization of cannabis by passing the Controlled Substances Act (CSA), which criminalizes most drug activity, the following year.[10] The Controlled Substances Act and the Drug Enforcement Agency (DEA) labeled cannabis a Schedule I drug, meaning it is a drug with no recognized medical use and

6. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 607 (2013) (clarifying that takings are not limited to forcing private citizens to give up physical land); Horne v. Dep't of Agric., 576 U.S. 351, 357 (2015) (expanding takings law to apply to personal property just as it does real property); Cedar Point Nursery v. Hassid, 594 U.S. 139, 152 (2021) (expanding the idea of per se takings to incorporate regulations allowing labor organizations onto private land).

7. Marihuana Tax Act of 1937, 75 P.L. 238.

8. *Id.* at § 2(a); Stephen Siff, *The Illegalization of Marijuana: A Brief History*, OHIO STATE UNIV.: ORIGINS (May 2014), https://origins.osu.edu/article/illegalization-marijuana-brief-history.

9. Leary v. United States, 395 U.S. 6, 53 (1969) (reversing a conviction under the Marihuana Tax Act because it violated Petitioner's 5th Amendment right against self-incrimination).

10. 21 U.S.C. § 801 (1970).

carries a high potential for abuse.[11] The CSA and the DEA also created hefty penalties for cannabis-related crimes, with sentences for cannabis trafficking—for even a minuscule amount of cannabis—beginning at five years minimum.[12]

States have not always agreed with the federal government's views of cannabis. In 1996, states began legalizing cannabis at a state level—an action that directly opposed federal law.[13] States did not legalize cannabis to create preemption issues; cannabis had a reputation for therapeutic uses.[14] During the height of the AIDS epidemic, THC via cannabis was known for "pain relief, control of nausea and vomiting, and appetite stimulation," a relief that was invaluable to AIDS patients. State legalization was often an effort to lessen the impacts of this epidemic.[15]

Although the federal government did not take immediate action in response to the AIDS epidemic, it did begin the process of protecting cannabis users.[16] In 2001, five years after the first state legalized medicinal cannabis, the House of Representatives introduced the Farr Amendment, which prohibited the Department of Justice from interfering with state medical cannabis regulatory schemes.[17] It passed 15 years later.[18]

In the interim, many states took cannabis legalization up another step and legalized recreational cannabis use for adults over the age of 21.[19] Although still in the midst of its 15-year journey to grapple with medical cannabis, the federal government was able to act quicker on recreational cannabis. Just one year after California passed the first recreational cannabis law, the United States Deputy Attorney General James Cole—appointed by then-President Barack Obama—released what is known colloquially as the Cole Memo.[20] The Cole Memo is a non-binding memorandum meant to give guidance to

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11. 21 U.S.C. § 812(b)(1)–(c)(10).

12. *Id.* at § 841(b)(1)(D); DRUG ENF'T ADMIN., DRUGS OF ABUSE: A DEA RESOURCE GUIDE (2020) at 37.

13. COMPASSIONATE USE ACT, CAL. HEALTH & SAFETY CODE § 11362.5(b)(1); *California's Cannabis Laws*, CAL. DEP'T OF CANNABIS CONTROL, https://cannabis.ca.gov/cannabis-laws/laws-and-regulations/ (last visited Oct. 22, 2023).

14. NAT'L CONF. OF STATE LEGISLATORS, STATE MED. CANNABIS L. (Nat'l Conf. of State Legislators, July 12, 2024).

15. *Id*. (quoting MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE, INST. OF MED. (Janet E. Joy et al. eds., 1999)); Cyrus Dioun, *How the HIV/AIDS Epidemic Gave Rise to Today's Medical Marijuana Markets*, JAKE JABS CENTER FOR ENTREPRENEURSHIP, https://jakejabscenter.org/hiv-epidemic-medical-marijuana/ (last visited Oct. 27, 2024).

16. Dioun, *supra* note 15.

17. Michael "the Aging Ent" Schroeder, *Medical Cannabis Protection: The Rohrabacher-Farr Amendment*, CANNACON (Jan. 26, 2018), https://cannacon.org/medical-cannabis-protection-rohrabacher-farr-amendment/.

18. Commerce, Justice, Science, and Related Agencies Appropriations Act of 2016, H.R. 2578, 114th Cong. § 542 (2016): Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2016).

19. *State Laws*, NORML https://norml.org/laws/legalization/ (last visited 24 Feb. 2024).

20. Memorandum from James M. Cole, Deputy Att'y Gen., Off. of U.S. Dept. of Just., to all U.S. Attorneys (Aug. 29, 2013) (on file with U.S. Dept. of Just.) [hereinafter "Cole"].

law enforcement regarding the enforcement of federal cannabis laws.[21] The Cole Memo generally states that law enforcement officers should avoid interfering with state cannabis regulatory schemes unless the scheme does not advance the eight federal interests laid out in the memo.[22] The list of federal interests includes preventing underage consumption, minimizing illicit cannabis sales, and eliminating adverse public health concerns associated with cannabis.[23] Essentially, the Cole Memo gave states that had legalized recreational cannabis some security against federal prosecution of their cannabis industries.

However, in 2018, five years after the Cole Memo, the United States Attorney General Jeff Sessions—appointed by then-President Donald Trump—revoked the Cole Memo and other Obama-era cannabis protections.[24] Although the Sessions Memo initially caused some uncertainty with potential federal prosecutions in legal states, the Memo did not materially alter how state cannabis regulatory schemes operate. Both federal and state law enforcement officers still largely abide by the guidance in the Cole Memo; thus cannabis industry members in legal states are still generally safe from federal prosecution as long as they operate within the bounds of the Cole Memo.[25] This implicit continuation of the Cole Memo, even after its reversal, demonstrates the growing acceptance of cannabis as more and more states legalize it.

Cannabis remains a Schedule I drug under the CSA, but the federal government has recently begun loosening its criminalization of cannabis. In May 2024 the DEA proposed a rule to reclassify cannabis as a Schedule III substance rather than a Schedule I substance.[26] The DEA proposed the reclassification because of cannabis' accepted medical uses and low abuse potential.[27] The hearing for the proposed rule is scheduled for December 2, 2024.[28] Other examples include a law proposed in 2023 that would have

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21. Memorandum from James M. Cole, Deputy Att'y Gen., Off. of U.S. Dept. of Just., to all U.S. Attorneys (Aug. 29, 2013) (on file with U.S. Dept. of Just.) [hereinafter "Cole"].

22. *Id*.

23. *Id*.

24. Memorandum from Jefferson B. Sessions, III, Att'y Gen., Off. of U.S. Dept. of Just., to all U.S. Attorneys (Jan. 4, 2018) (on file with U.S. Dept. of Just.).

25. Yucel Ors, *Three Major Impacts of Jeff Sessions' Legal Marijuana Memo*, NAT'L LEAGUE OF CITIES (Jan. 10, 2018), https://www.nlc.org/article/2018/01/10/three-major-impacts-of-jeff-sessions-legal-marijuana-memo (explaining that after the Sessions Memo, localities were unsure how to, and if they should, work within the bounds of the Sessions Memo); Tom Firestone, *2 Years After Sessions Rescinded Cole Memo, Prosecutors Continue to Adhere to Obama-Era Enforcement Guidelines*, BENZINGA (Jan. 8, 2020), https://www.benzinga.com/markets/cannabis/20/01/15093079/2-years-after-sessions-rescinded-cole-memo-prosecutors-continue-to-adhere-to-obama-era-enforceme.

26. Schedules of Controlled Substances: Rescheduling of Marijuana, 89 Fed. Reg. 70148, 70149 (proposed May 21, 2024).

27. *Id.*

28. Schedules of Controlled Substances: Rescheduling of Marijuana, 89 Fed. Reg. 70148, 70149.

provided legal protections for federally regulated banks that work with state-legal cannabis industries.[29] Neither of these changes has had any binding, legal effects, but they demonstrate growing federal recognition of the cannabis industry.

Although acceptance of cannabis is increasing, the cannabis industry still faces immense economic challenges because it is federally illegal. First and most burdensome is Internal Revenue Service Code 280E, which prevents cannabis businesses from deducting ordinary business expenses from their taxes.[30] Although it is difficult to quantify exactly how 280E impacts the cannabis industry as a whole, an economics research firm based in Oregon estimated that cannabis businesses operating under a state cannabis regulatory scheme "paid over $1.8 billion in additional taxes when compared to ordinary businesses" in 2022 alone.[31] Further, because cannabis is federally illegal, there are no protections for people and industries that may collaborate with the cannabis industry, such as landlords, investors, and banks. Because these people and industries are deterred from working with cannabis, the industry suffers more.

The impacts of federal illegal status would lessen if the DEA rescheduled cannabis. Most notably, 280E—which only applies to Schedule I and Schedule II substances—would no longer apply to the cannabis industry, removing a high financial burden for the cannabis industry.[32] Additionally, Schedule III substances can be distributed as prescriptions if the Food and Drug Administration (FDA) approves.[33] Although the FDA does not currently approve of cannabis as a prescription drug, there is potential for a fully legal medical cannabis industry if the FDA alters its approval status.[34] Cannabis businesses would benefit greatly from rescheduling, but decreased economic opportunities would persist due to continued federal illegal status as a Schedule III substance.

The Cole Memo lessened some of the burden cannabis businesses face, but operating within the bounds of the federal interests listed in the Cole Memo requires the cannabis industry to jump through many additional hoops that other industries can avoid.[35] The Cole Memo helped usher in an era of painfully detailed state cannabis regulatory schemes, making it much more

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29. Secure and Fair Enforcement Banking Act of 2023, H.R. 2891, 118th Cong. § 5(a) (2023).

30. 26 U.S.C. § 280E.

31. Whitney Economics, *Economic Analysis Indicates Cannabis Industry Paid $1.8 Billion in Excess Taxes in 2022*, PR NEWSWIRE (May 8, 2023, 9:00 AM), https://www.prnewswire.com/news-releases/economic-analysis-indicates-cannabis-industry-paid-1-8-billion-in-excess-taxes-in-2022--301817848.html.

32. 26 U.S.C. § 280E.

33. JOANNA R. LAMPE, CONG. RSCH. SERV., LSB11105, LEGAL CONSEQUENCES OF RESCHEDULING MARIJUANA (2024).

34. *Id*.

35. Cole, *supra* note 20.

difficult to comply with the law when compared to non-cannabis industries, such as technology and transportation.[36] And if the people operating a legal cannabis business misstep while attempting to comply with the law, they risk spending the rest of their lives in jail.[37] After cannabis businesses successfully jump through regulatory hoops and begin operating legally, they must still compete with the ever-present illicit cannabis market not abiding by laws and offering much cheaper prices.[38]

B. Cannabis in California

California has a long history with cannabis law. State-level action on cannabis began just two years after the CSA in 1972 when California residents failed to pass Prop 19, an initiative to legalize recreational adult-use cannabis.[39] Local-level action on cannabis began the following year when the city of Berkeley, California passed an initiative ordering city police to prioritize other crimes over cannabis offenses.[40] Largely fueled by the AIDS epidemic and other painful diseases, California was the first state to legalize medicinal cannabis in 1996 under the Compassionate Use Act.[41] In the decades following the passage of the Compassionate Use Act, California voters struggled to pass a recreational cannabis use initiative, but voters

36. LAMPE, *supra* note 33.

37. DRUG ENF'T ADMIN., DRUGS OF ABUSE: A DEA RESOURCE GUIDE (2020) at 37 (showing that many cannabis-related offenses carry life sentences).

38. Joseph Detrano, *Cannabis Black Market Thrives Despite Legalization*, RUTGERS CTR. OF ALCOHOL & SUBSTANCE USE STUDIES, https://alcoholstudies.rutgers.edu/cannabis-black-market-thrives-despite-legalization (last visited Feb. 24, 2024).

39. Cameron A. Brown, *Getting it Right: Marijuana Policy in California*, STANFORD L. SCH. BLOG, https://www.latimes.com/projects/la-pol-ca-prop-64-last-time-california-tried-to-legalize-weed/. (last visited Oct. 27, 2024).

40. Earl Caldwell, *Marijuana Issue Stirs Up Berkeley*, N.Y. TIMES (May 6, 1973), https://www.nytimes.com/1973/05/06/archives/marijuana-issue-stirs-up-berkeley-council-restrained-order-of-one.html.

41. Compassionate Use Act, CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (1996); *California's Cannabis Laws*, CAL. DEP'T OF CANNABIS CONTROL, https://cannabis.ca.gov/cannabis-laws/laws-and-regulations (last visited Oct. 22, 2023); Richard Sandomir, *Dennis Peron, Early Medical Marijuana Advocate, Dies at 71*, N.Y. TIMES (Jan. 30, 2018), https://www.nytimes.com/2018/01/30/obituaries/dennis-peron-early-medical-marijuana-advocate-dies-at-71.html (discussing how the loss of a partner to AIDS led a man to become an advocate for medicinal cannabis in California); Carey Goldberg, *Medical Marijuana Use Winning Backing*, N.Y. TIMES (Oct. 30, 1996), https://www.nytimes.com/1996/10/30/us/medical-marijuana-use-winning-backing.html (explaining that medicinal cannabis was supported because it was beneficial to the sick).

eventually succeeded with Prop 64 in 2016.[42] California was the fifth state to legalize recreational adult-use cannabis.[43]

Throughout the years, California has built and maintained a reputation for being cannabis-friendly, and this reputation has only been bolstered by the state's legal action.[44] California is so experienced with cannabis that it is currently tackling legal issues no other state has considered.[45] However, things are not always positive for the cannabis industry in California. Many county and city governments strain the cannabis industry by regulating it more stringently than the state government.[46] This oversight often leads to cannabis-industry-members bearing economic burdens that their counterparts in other regions do not.

This Note highlights three California localities that regulate cannabis more stringently than the state. First, Riverside County only grants permits to indoor cannabis cultivators that have an on-site renewable energy source.[47] Second, the City of Berkeley requires all cannabis cultivators to purchase 100% renewable energy from the local utility.[48] And finally, El Dorado County requires indoor cultivators to source their power from renewable sources or to purchase off-site carbon offsets for any non-renewable energy usage.[49] Although modern cannabis-related challenges in California focus on

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42. Medicinal and Adult-Use Cannabis Regulation and Safety Act, Cal. Bus. & Prof. Code § 26000; Thomas Suh Lauder & Jon Schleuss, *The Last Time California Tried to Legalize Weed it Failed. What Happened?*, L.A. TIMES (Nov. 4, 2016, 1:16 PM), https://www.latimes.com/projects/la-pol-ca-prop-64-last-time-california-tried-to-legalize-weed/.

43. NAT'L. CONF. OF STATE LEGISLATURES, STATE MEDICAL CANNABIS LAWS REPORT (July 12, 2024).

44. *17 Stoner States: Where's Marijuana Use Highest?*, CBS NEWS (Oct. 25, 2011), https://www.cbsnews.com/pictures/17-stoner-states-wheres-marijuana-use-highest (explaining that California is among the top ten states with the highest cannabis consumption); DJ Summers & Alix Martichoux, *4 California Cities Among Nation's Best for Weed: Report*, KTLA, https://ktla.com/news/nexstar-media-wire/new-city-earns-title-of-nations-top-city-for-weed-report (last updated Apr. 16, 2023, 10:28 AM) (showcasing that four California cities are among the top ten best cities for cannabis in the US); Piper McDaniel*, Pay No Attention to the Crime Behind the Emerald Curtain*, NAT'L FOREST FOUND., https://www.nationalforests.org/blog/pay-no-attention-to-the-crime-behind-the-emerald-curtain (explaining that three counties in Northern California are known for having the perfect environment to grow the best cannabis).

45. See, e.g., CAL. GOV'T CODE § 12954(a)(1) (2024) (making it unlawful for employers to discriminate against employees for off the job cannabis consumption); *Cannabis*, GREENBURG GLUSKER, https://www.greenbergglusker.com/cannabis (last visited Sept. 8, 2024) (showcasing a law firm in California that has dealt with novel cannabis issues, such as intellectual property concerns).

46. *Where Cannabis Businesses Are Allowed*, CAL. DEP'T OF CANNABIS CONTROL, https://cannabis.ca.gov/cannabis-laws/where-cannabis-businesses-are-allowed (last visited Sept. 8, 2024).

47. RIVERSIDE COUNTY, CAL., CODE OF ORDINANCES § 7.302.120(G); RIVERSIDE COUNTY, CAL., CODE OF ORDINANCES § 17.302.070(B)(3).

48. BERKELEY, CAL., CODE OF ORDINANCES § 12.22.070(C)(3).

49. EL DORADO COUNTY, CAL., CODE OF ORDINANCES § 130.41.300(5)(C) (2024).

other legal issues, the likelihood of challenges to codes of all sorts increases as the juvenile cannabis industry grows.[50]

C. Environmental Law and Regulation in California

California has long been a leader in mitigating negative environmental impacts, and many of its actions have withstood legal challenges. The state became notable for its environmental action in 1884 when the Ninth Circuit affirmed a California court's order that banned gold miners from dumping mining debris into rivers flowing into the Sacramento Valley.[51] But this was just the beginning. From 1947 to 1977, California was the first state to enact a state air pollution control statute, enact emissions standards for motor vehicle pollutants, establish a coastal protection agency, and adopt energy efficiency standards for appliances.[52] The hallmark of California's efforts to protect the environment happened in 1970 when the state passed the California Environmental Quality Act, which requires localities to evaluate and mitigate the environmental impacts of proposed development projects.[53]

California still strives to protect the environment. In 2022, California became the first state to host an auction for offshore wind leases on the West Coast.[54] The state has also recently imposed stringent requirements for single-use plastic to reduce waste from packaging materials.[55] And perhaps its boldest move yet, California has set a goal of 60% renewable energy by 2030 through its Renewable Portfolio Standard.[56]

California's effort to protect the environment is clear through both state action and local laws and regulations. County and city codes throughout California have specific environmental protection provisions, such as limited waterfront development to protect shoreline ecology, timber harvesting regulation to protect timberlands, and floodplain management to minimize

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50. United States v. Daniels, 77 F.4th 337, 355 (5th Cir. 2023) (reasoning that habitually using cannabis is not grounds for revocation of 2nd Amendment rights); Kidder v. Cnty. of Los Angeles, No. CV 14-06218-SVW-E, 2015 U.S. Dist. LEXIS193582 at *8 (C.D. Cal. Mar. 9, 2015) (defining the power of the police to arrest people for cannabis possession after the legalization of medical cannabis); AK Futures LLC v. Boyd St. Distro, LLC, 35 F.4th 682, 695 (9th Cir. 2022) (challenging a copyright and a trademark for a cannabis-related product, Delta-8); People v. Whalum, 50 Cal. App. 5th 1, 3, 15 (Cal. App. 4th, 2020) (describing the scope of sentence dismissal under Prop 64); HNHPC, Inc. v. Dep't of Cannabis Control, 94 Cal. App. 5th 60, 67 (Cal. App. 4th, 2023) (granting an injunction against the Department of Cannabis Control due to their failure to perform statutory duties).

51. Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753, 809 (9th Cir. 1884); VOGEL, *supra* note 2, at 4.

52. *Id.* at 4–5.

53. CAL. PUB. RES. CODE § 21000 (1970).

54. *California Ramps Up Commitment to Clean Energy with Historic Offshore Wind Sale*, OFF. OF GOVERNOR GAVIN NEWSOM (Dec. 6, 2022) https://www.gov.ca.gov/2022/12/06/california-ramps-up-commitment-to-clean-energy-with-historic-offshore-wind-sale/.

55. CAL. PUB. RES. CODE §§ 42050-42057.

56. CAL. PUB. RES. CODE § 399.11.

future flood damage.[57] Localities in California also protect the environment by regulating cannabis—a high energy-consuming industry—more stringently than other industries to reduce greenhouse gas emissions.[58] California courts appear sympathetic to local environmental restrictions and often uphold them against takings challenges.[59] Although some local environmental laws in California have been struck down in both state and federal courts, most takings challenges in California are unsuccessful for plaintiffs.[60]

D. Fifth Amendment Regulatory Takings Law

1. The Beginning of Regulatory Takings

Takings claims to cannabis codes stem from the Framers of the Constitution.[61] The Fifth Amendment forbids the government from taking private property for public use "without just compensation."[62] The legal meaning of this short provision has been hotly debated. The Supreme Court first interpreted this clause as it relates to regulations in the 1922 case *Pennsylvania. Coal Co. v. Mahon*.[63] In *Penn. Coal*, the Court considered the constitutionality of a law prohibiting mining that could impact the integrity of the land above the operation. The Court held that the law was an unconstitutional taking, determined regulations that go too far are a Fifth Amendment regulatory taking requiring just compensation.[64]

This rule stood unaltered for over 50 years, until the Court handed down *Pennsylvania Central Transportation Co. v. New York*.[65] In *Penn. Central*,

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57. BERKELEY, CAL., CODE § 11.56.020 (1986); SANTA CRUZ COUNTY, CAL., CODE § 16.52.010 (1982); SANTA BARBRA, CAL., CODE § 22.24.020 (2018).

58. RIVERSIDE COUNTY, CAL., CODE OF ORDINANCES § 17.302.120(G); RIVERSIDE COUNTY, CAL., CODE OF ORDINANCES § 17.302.070(B)(3); BERKELEY, CAL., CODE OF ORDINANCES § 12.22.070(C)(3); EL DORADO COUNTY, CAL., CODE OF ORDINANCES § 130.41.300(5)(C); Jocelyn Durkay & Duranya Freeman, *Electricity Use in Marijuana Production*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/energy/electricity-use-in-marijuana-production (Aug. 1, 2016) (showing California's electricity use).

59. Allegretti & Co. v. Cnty. of Imperial, 138 Cal. App. 4th 1261, 1285 (Cal. App. 4th, 2006) (upholding a county ordinance limiting the amount of water a landowner could extract from an aquifer under a takings claim); Lindstrom v. Cal. Coastal Comm'n, 40 Cal. App. 5th 73, 112 (Cal. App. 4th, 2019) (upholding a required permit for applicants to waive any future right to build a seawall under a takings claim); Ocean Harbor House Homeowners Ass'n v. Cal. Coastal Comm'n, 163 Cal. App. 4th 215, 245–46 (Cal. App. 6th, 2008) (holding a seawall mitigation fee under a takings claim).

60. Monks v. City of Rancho Palos Verdes, 167 Cal. App. 4th 263, 310 (Cal. Ct. App. 2d 2008) (upholding a seawall mitigation fee under a takings claim); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

61. U.S. CONST. amend. V.

62. *Id*.

63. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

64. *Id*. at 413.

65. Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

the Court upheld a development restriction on Grand Central Station based on its landmark status, even though the restriction significantly diminished its property value. *Penn. Central* both functionally overruled *Penn. Coal* and established a new analysis for takings claims.[66] Since *Penn. Central*, regulatory takings claims have been analyzed under a three-factor analysis: (1) the economic impact of the regulation in question on the owner, (2) the interference with the property owner's reasonable investment backed expectations, and (3) the character of the government action involved in the regulation.[67] This test significantly alters the previous *Penn. Coal* test and no longer allows for property owners to succeed on claims based solely on the negative economic consequences of regulations.

2. The Evolution of Regulatory Takings

The Court has continued to adapt its regulatory takings jurisprudence to better suit modern property concerns. In the 1980s and 90s, the Court established a new category of regulatory takings—takings per se.[68] In the 1982 case of *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court expanded takings law to bypass the *Penn. Central* factors for regulations resulting in permanent physical occupations on private property. Eliminating the multi-factored test makes it easier to bring a successful takings claim in these situations.[69] The New York law at issue in *Loretto* prohibited property owners from interfering with cable line installation on rental properties.[70] Functionally, this law required property owners to allow cable lines on their property, regardless of their desires or intentions with their rental property. The plaintiff, a New York City landlord, did not want cable lines on her rental units and subsequently brought a takings challenge to the law in New York state court.[71] The claim moved through the judicial system, culminating with the Supreme Court granting certiorari in 1981.[72] The Court reasoned that the New York regulation resulted in a permanent physical occupation because the cable lines had to remain on Loretto's property if she continued to use it as a rental property.[73] This permanent occupation removed Loretto's right to exclude others from her property—a

66. Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
67. *Id*.
68. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015–16 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987); Dolan v. City of Tigard, 512 U.S. 374, 390 (1994).
69. *Loretto*, 458 U.S. at 433–35.
70. *Id.* at 421.
71. *Id.* at 424.
72. Loretto v. Teleprompter Manhattan CATV Corp., 454 U.S. 938 (1981) (granting certiorari).
73. *Loretto*, 458 U.S. at 439.

right essential to owning private property.[74] The Court determined that regulatory takings jurisprudence up to this point did not satisfactorily deal with issues such as Loretto's. Therefore, it held that laws resulting in permanent physical occupations of private property violated the Fifth Amendment Takings Clause.[75]

The Court did not cease its exploration into the Fifth Amendment after creating takings per se. Regulatory takings expanded one more time before the turn of the century through the creation of regulatory takings via exactions. Generally, an exaction is a demand for compensation.[76]

The Supreme Court first recognized exactions as a taking in the 1987 case of *Nollan v. California Coastal Commission*.[77] In *Nollan*, the California Coastal Commission granted a development permit to a homeowner with the mandatory condition to create an easement on the property allowing the public to reach the beach behind their property.[78] The Coastal Commission based this condition on the government's interest in maintaining the public's ability to view the beach.[79] The Court struck down this permit condition as an unconstitutional exaction under the Fifth Amendment because the condition—allowing the public to access the beach via Petitioner's property—did not further the government interest of allowing the public to view the beach.[80] The Court then created the first requirement for a constitutional exaction: there must be an "essential nexus" connecting the condition in the permit to the state interest exacerbated by the development.[81]

The Court created the second requirement for a constitutional exaction in 1994 with *Dolan v. City of Tigard*.[82] In *Dolan*, a city granted a development permit with the condition that a portion of the private property must be turned into a public greenway.[83] The condition was the city's attempt to mitigate the increase in storm water runoff that would result from the development; but the Court struck it down because the requirement for a greenway was disproportionality burdensome compared to the risk of stormwater runoff.[84] In doing so, it created the second requirement for a constitutional exaction: there must be "rough proportionality" between the condition and the impact of the proposed development.[85]

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74. *Loretto*, 458 U.S. at 433.
75. *Id*. at 434–35.
76. *Exaction*, BLACK'S LAW DICTIONARY, (11th ed. 2019).
77. Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 837, 841–42 (1987).
78. *Id*. at 827.
79. *Id*. at 828.
80. *Id*. at 836.
81. *Id*.
82. Dolan v. City of Tigard, 512 U.S. 374, 390 (1994).
83. *Id*. at 377.
84. *Id*. at 377, 394–95.
85. *Dolan*, 512 U.S. at 391.

3. The Expansive View of Exactions

Courts today continue the Supreme Court's trend of stretching regulatory takings beyond what *Penn. Central* initially laid out, particularly with relation to exactions. Although the Court's view on exactions in *Nollan* and *Dolan* was already a carve-out from *Penn. Central*, some state courts have gone further by broadly interpreting what can qualify as an unconstitutional exaction.[86] In 2010, a court in Texas defined an exaction as "a condition to obtaining governmental approval of a requested land development."[87] By applying to allow government approval, this case took a more inclusive view of exactions than *Nollan* and *Dolan*, which both only pertain to permit conditions.[88]

Ten years later, another Texas court expanded on this view, reasoning that "any demand for an action the landowner is not already legally required to take might qualify as an exaction."[89] The court did not stop there. It further emphasized its logic by explaining: "we find no cases holding a government's demand for land owner action qualifies as an exaction only if the demand is for a present monetary payment or land dedication."[90] This definition of "any demand for an action" and the accompanying logic is far broader than the original understanding of "permit conditions."[91] Following this pattern of definitional expansion, modern legal scholars have defined an exaction as: "The wrongful act of a[] . . . person in compelling payment of a fee or reward for his services, under color of his official authority, where no payment is due."[92] This definition, once again, is a drastic expansion from the original understanding of exactions in the 1980s.

The continued generalization of the definition of exactions algins with modern property law expansion. The Supreme Court has been expanding property rights generally via the Fifth Amendment. This trend began in 2013 when the Court decided *Koontz v. St. John's River Water Management District*, which held that monetary exactions are still exactions.[93] This case affirmed the idea that exactions expand beyond land dedications, the kind of dedication at issue in *Nollan,* o also include monetary dedications.[94] Thus,

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86. Selinger v. City of McKinney, No. 05-19-00545-CV, 2020 Tex. App. LEXIS 4849 at *2, *9 (Tex. App. 2020); City of Carrollton v. RIHR Inc., 308 S.W.3d 444, 449–50 (Tex. App. 2010).

87. *City of Carrollton*, 308 S.W.3d at 449 (citing Town of Flower Mound v. Stafford Ests., L.P., 71 S.W.3d 18, 30 (Tex. App.-Fort Worth 2002), *aff'd*, 135 S.W.3d 620, 630 (Tex. 2004)).

88. Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 837 (1987); *Dolan*, 512 U.S. at 390.

89. *Selinger*, 2020 Tex. App. LEXIS 4849 at *11 (citing *City of Carrollton*, 308 S.W.3d at 449).

90. *Id*.

91. *Id*.; *Nollan*, 483 U.S. at. 836–37.

92. BLACK'S LAW DICTIONARY, *supra* note 76.

93. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 618 (2013).

94. *Koontz*, 570 U.S. at 618; *Nollan*, 483 U.S. at 837.

more private landowners can bring Fifth Amendment takings claims after the Court handed down *Koontz*.

The Court continued to open the doors of the judicial system to more aggrieved landowners as the 21st century continued. In 2015, the Court decided *Horne v. Department of Agriculture*, in which it determined that the Fifth Amendment applies to personal property, although historically it has only applied to real property.[95] Fifth Amendment expansion has carried on through the 2020s, when, in 2021, the Court determined that allowing labor organizers onto private land is an unconstitutional taking of private property.[96]

These cases, taken together, demonstrate the potential for an oncoming shift in regulatory taking law to a broader scale than what has already been accomplished. Although these trends favor interpreting a broader variety of regulations and laws as takings, no court has interpreted industry-specific energy requirements—as are at issue in California—as a taking yet. Further, no cannabis code in a state with a legal cannabis industry, whether medicinal use or adult use, as interpreted any cannabis code as a taking. But patterns in the judicial system are likely to be indicators of future case decisions; no court has interpreted takings this way, but that does not preclude the ever-changing judicial system from ever interpreting takings this way. There is no explicit, binding precedent compelling courts to rule in favor of cannabis property owners in takings cases. However, anti-environmental takings challenges in the cannabis industry are not unfounded because the Court appears sympathetic to property rights, and therefore sympathetic to a novel, pro-property rights claim brought under the Fifth Amendment.

II. TWO FIFTH AMENDMENT TAKINGS CHALLENGES TO CANNABIS CODES IN CALIFORNIA

A. Unconstitutional Taking Per Se in Riverside County, CA

The first potential takings-challenge victim is Riverside County. Riverside's cannabis codes may run afoul to takings jurisprudence, which prohibits government-induced permanent physical intrusions on private property.[97] Riverside County code requires all indoor cannabis cultivators to have on-site renewable energy.[98] Without this, cannabis cultivators are unable to obtain a permit to operate in Riverside County.[99] These

95. Horne v. Dep't of Agric., 576 U.S. 351, 357 (2015).
96. Cedar Point Nursery v. Hassid, 594 U.S. 139, 162 (2021).
97. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982).
98. RIVERSIDE COUNTY, CAL., CODE OF ORDINANCES § 17.302.120(G).
99. *Id.*

requirements are analogous to the law that the Supreme Court determined to be a taking under the Fifth Amendment in *Loretto*.[100]

Just as in *Loretto* where New York City landlords were required to allow cable lines on their property, cannabis cultivators in Riverside County are required to allow renewable energy sources on their property.[101] Although there are differences between the New York law and the Riverside County code, the crux of *Loretto*—permanent physical occupation—is clearly present in the Riverside County code.[102] The renewable energy source must be on private property to obtain a permit in Riverside County. In other words, cannabis cultivators must allow a permanent physical occupation—a renewable energy source—on their property to operate legally in the county.

The extent of the word "permanent" may complicate this analysis. Legally, "permanent" is commonly understood as "not subject to fluctuation, or alteration, fixed or intended to be fixed."[103] Here, the on-site renewable energy source likely can be removed, albeit cumbersomely, due to the inherent non-permanence of renewable energy sources.[104] At face value, this would lead to an unsuccessful takings claim in Riverside County because the physical occupation is not permanent. However, permanence was relevant to the analysis in *Loretto* as well; the cable lines on plaintiff's property could be removed by the cable company, but they were functionally permanent if she wanted to continue to use her property as rental units.[105] Here, the renewable energy source is functionally permanent because, although it can technically be removed, it cannot be removed if the property owner wants to continue to use the property for the cannabis industry. Thus, just as in *Loretto*, the physical occupation is functionally permanent and is likely a taking that requires just compensation.

B. Unconstitutional Exactions in Berkeley, CA and El Dorado County, CA

Riverside County is not the only municipality in California that is vulnerable to takings challenges due to its cannabis regulatory scheme. The City of Berkeley and El Dorado County are also potentially susceptible to Fifth Amendment exaction challenges based on current judicial trends. These

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100. *See Loretto*, 458 U.S. at 421 (requiring an installment of cable lines on a property is an unconstitutional taking).

101. *Id.*; RIVERSIDE COUNTY, CAL., CODE OF ORDINANCES § 17.302.120(G).

102. RIVERSIDE COUNTY, CAL., CODE OF ORDINANCES § 17.302.120(G).

103. *Permanent*, BLACK'S LAW DICTIONARY (5th ed. 1983).

104. Jessi Wyatt, *Repowering and Decommissioning: What Happens in Communities When Solar and Wind Projects End?*, GREAT PLAINS INST. (April 1, 2020), https://betterenergy.org/blog/repowering-and-decommissioning-what-happens-in-communities-when-solar-and-wind-projects-end/ (explaining that renewable energy sources have non-perpetual lifespans and can be removed from the project site when the lifespan ends).

105. *Loretto*, 458 U.S. at 452.

trends suggest that courts may be willing to expand their definition of an exaction to encompass the codes at issue in the City of Berkeley and El Dorado County. Berkeley requires all cannabis cultivators in the city to purchase 100% renewable energy from the local community choice energy provider.[106] Similarly, El Dorado County requires cannabis cultivators to power their entire operation through renewable energy in one of three forms: (1) on-grid power, (2) on-site zero net energy power, or (3) off-site carbon offsets.[107] Cannabis cultivators cannot operate legally in either of these municipalities unless these conditions are met.[108] A court would likely find that these city codes would constitute exactions.

Local California governments like Berkeley and El Dorado County are demanding that private property owners obtain full renewable energy to power their cannabis operation—an action that no other industry or private landowner is legally required to take. In some lower courts throughout the country, this alone would constitute the codes as exactions.[109] Furthermore, these municipalities are compelling cannabis cultivators to make a payment, in the form of renewable energy purchases, where no payment is due for any other industry to develop property. Based on the common legal understanding of an exaction, the California codes are likely to be considered exactions.[110]

Even based on the historic parameters in *Nollan* and *Dolan*, a court would likely find the Berkeley and El Dorado County codes unconstitutional exactions.[111] *Nollan* and *Dolan* require an essential nexus between a state interest and the condition, and rough proportionality between the conditions of the exaction and the impact of the development.[112] Put simply, if exactions do not closely support a state interest or if they are too burdensome compared to the burden of the permitted project, just compensation is required.

Berkeley and El Dorado County likely tailored their cannabis regulatory schemes to a government interest enough to prevent a successful takings challenge under *Nollan*. This case requires an essential nexus between a state interest and the exaction, or a connection between the exaction's reasoning and effect.[113] Many local governments justify portions of their cannabis regulatory scheme as ways to minimize negative impacts to both the people

106. BERKELEY, CAL., CODE OF ORDINANCES § 12.22.070(C)(3).

107. EL DORADO COUNTY, CAL., CODE OF ORDINANCES § 130.41.300(5)(C).

108. *Id*.; BERKELEY, CAL., CODE OF ORDINANCES § 12.22.070(C)(3).

109. Selinger v. City of McKinney, No. 05-19-00545-CV, 2020 Tex. App. LEXIS 4849 at *11 (Tex. App. 2020) (citing City of Carrollton v. RIHR, Inc., 308 S.W.3d 444, 449 (Tex. App. 2010)).

110. *See* BLACK'S LAW DICTIONARY, *supra* note 76; *see also Carrollton*, 308 S.W.3d at 448–451 (discussing exactions).

111. Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 837 (1987); Dolan v. City of Tigard, 512 U.S. 374, 390 (1994).

112. *Nollan*, 483 U.S. at 837 (essential nexus); *Dolan*, 512 U.S. at 391 (rough proportionality).

113. *Nollan*, 483 U.S. at 837.

and the environment in the locality.[114] Specifically, Berkeley and El Dorado County's codes at issue here likely further the government's interest in minimizing negative environmental impacts because renewable energy sources emit less greenhouse gas emissions than nonrenewable energy sources.[115] Thus, the *Nollan* essential nexus requirement is likely satisfied, and a court would not deem these codes unconstitutional solely under a *Nollan* analysis.

However, *Dolan*—the other half of takings-by-exactions analysis—is likely not satisfied by the Berkeley and El Dorado County codes. For an exaction to be constitutional, the *Dolan* Court reasons, "the city [promulgating the code] must make some sort of individualized determination that the required dedication is related . . . to the impact of the proposed development." [116] Said concisely, there must be rough proportionality between the exaction and the impacts of the proposed development. The Court further explains that "[n]o precise mathematical calculation is required" to determine rough proportionality.[117] But rough proportionality is not always as simple to determine as it was in *Dolan*—keeping a floodplain open clearly limits the pressures on neighboring bodies of water. [118] But what is the most effective way of measuring the proportionality of the codes at hand?

Logically, many justify codes such as Berkeley's and El Dorado County's as proportional because the cannabis cultivators are only required to bear the burden of their own greenhouse gases. The renewable energy requirements offset the energy being used at the cultivation site; and thus, the cannabis industry is reducing greenhouse gas emissions in proportion to their greenhouse gas usage. However, cannabis is the only high-energy industry that is required to bear the burden of their own greenhouse gas emissions by having to purchase renewable energy. Thus, the traditional proportionality analysis created in *Dolan* is ineffective here because of the complexities surrounding modern property concerns. Instead, courts should adopt one of two novel analysis methods moving forward: the currently situated approach or the historically situated approach.

These two approaches would provide clearer guidelines for judges when ruling on codes similar to the two at issue here. They also represent a more

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114. RIVERSIDE COUNTY, CAL., CODE OF ORDINANCES § 17.302.010.

115. *Carbon Dioxide Emissions from Electricity,* WORLD NUCLEAR ASS'N, https://world-nuclear.org/information-library/energy-and-the-environment/carbon-dioxide-emissions-from-electricity.aspx (Sept. 3, 2024) (showcasing that fossil fuel energy sources emit almost half of all CO2 emissions in the country, but non-fossil fuel energy sources typically only produce CO2 during construction phases).

116. *Dolan*, 512 U.S. at 391.

117. *Id*. at 395.

118. *Id*. at 393.

fair and just approach to judicial review of codes for polluting industries. The currently situated approach determines proportionality based on the burden placed on other similarly situated regulated entities. For instance, the energy impacts of the cannabis industry should be compared to other high-energy consumers—such as chemical manufacturers.[119] Under this analysis, the Berkeley and El Dorado County requirements would likely be deemed not proportional because they do not evenhandedly distribute the burden of reducing greenhouse gas emissions among industries that negatively contribute to emissions. In other words, the cannabis industry is the only high-energy consuming industry that must pay more for the environmental impacts of its high-energy use.

The second approach—the historically situated approach—is a broader version of the currently situated approach. This approach determines proportionality based on the burden placed on industries that have historically contributed the most to the problem the state is attempting to remedy. Thus, when looking at codes targeting an industry's greenhouse gas emissions, proportionality would be determined by looking at the codes targeting the industries that have historically contributed the most to greenhouse gas emissions. Under this analysis, the two local codes at hand would not be proportional because, as a newly legal industry, cannabis has not historically contributed a large amount of greenhouse gas emissions into the atmosphere. Rather, the historically situated approach would call for higher burdens on industries that have historically produced more greenhouse gas emissions, such as construction and transportation.[120] Under both modern approaches, the Berkeley and El Dorado County codes would be disproportionate, unconstitutional exactions that require just compensation from the state.

III. RECOMMENDATIONS

The warming environment and excessive use of fossil fuels in both the United States and the earth at large has led to an extreme need for new technologies that reduce planet-warming emissions—such as renewable energy. The codes discussed in this Note, though susceptible to constitutional challenges, help reduce greenhouse gas emissions by reducing fossil fuel usage. Although states may have to abandon the specific codes at issue here

119. *Energy- and Emissions-Intensive Industries*, OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY, https://www.energy.gov/eere/iedo/energy-and-emissions-intensive-industries (last visited Mar. 17, 2024).

120. Hannah Ritchie et al., *Breakdown of Carbon Dioxide, Methane and Nitrous Oxide Emissions by Sector*, OUR WORLD IN DATA, https://ourworldindata.org/emissions-by-sector (January 2024).

to avoid legal challenges, they should not be forced to abandon their interest in reducing fossil fuel usage.

Localities in California can alter their methods to avoid constitutional challenges while still reducing fossil-fuel usage within state lines. First, Riverside County can avoid *Loretto* claims regarding their on-site renewable energy requirement by requiring cannabis businesses to obtain the same amount of renewable energy in another way. Other approaches include requiring businesses to buy community choice energy, buy in to community solar, or help fund state solar or wind projects. These approaches all reduce fossil fuel usage and greenhouse gas emissions while satisfying the *Loretto* test but would run into the same potential constitutional issues as the codes in Berkeley and El Dorado County.

The constitutional issues in Berkeley and El Dorado County can also be avoided while still furthering state interests. Under either of the two recommended approaches—the currently situated or the historically situated approach—localities can avoid takings challenges by regulating in a holistic manner. In other words, the localities could satisfy the rough proportionality requirement for exactions by either regulating all similarly situated industries equally or regulating all industries equally by increasing the state Renewable Portfolio Standard. In California, this would entail regulating all high-energy consuming industries or high-greenhouse-gas-emitting industries as strictly as cannabis is regulated. Cannabis businesses could still be required to purchase additional renewable energy but so would data centers, indoor greenhouses, etc. These approaches would do more to truly further the state interests in reducing emissions, rather than just singling out an industry that is already oppressed due to a lack of federal legalization.

CONCLUSION

The cannabis industry has struggled to operate efficiently under the law since primary legalization, and those struggles persist to this day. The struggle is the perfect catalyst for a lawsuit that, although potentially economically beneficial, may destroy local, pro-environment regulation as it stands today. The Fifth Amendment takings clause protects those in the US from arbitrary government overreach through the law laid out in *Loretto*, *Nollan*, and *Dolan*. But it is also a potential weapon for industries—like cannabis—that are overwhelmed by regulation. To avoid chaos at the hands of this weapon, courts should interpret *Dolan* proportionality more holistically, and regulators should craft more rounded laws within similarly situated industries. There are budding claims in the bud industry, but it is not too late to nip them before they blossom.