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# Growing Pains: Using Racketeering Law to Protect Property Rights from State-Sanctioned Marijuana Operations

## I. Introduction

In June 2018, Oklahoma voters legalized medical marijuana, making it the thirtieth state to legalize marijuana for either medical or adult (“recreational”) use.<sup>1</sup> Legalization caused a scramble among state lawmakers and local governments to pass laws and promulgate regulations to administer this highly debated and often divisive industry.<sup>2</sup> Of course, Oklahoma is not the first state to experience these growing pains, and the fact that others have gone before might make Oklahoma’s path easier. Although commentators often focus on marijuana’s impact on the criminal justice system, medical community, and federal-state government relations,<sup>3</sup> legalization may have an underdiscussed and acute effect on property owners. For example, imagine a property owner in rural Oklahoma accustomed to enjoying the simple beauty of its open skies when one fall morning the distinct “skunk-like” odor from a neighbor’s marijuana harvest comes sweeping down the plain, settling above this rural oasis. Or, perhaps, a small diner on the main street in a small community experiences the congregation of dispensary patrons in front of the diner’s entryway who are illegally selling recently purchased medical marijuana to non-licensed users on the diner’s premises. What happens when a neighbor’s state-authorized marijuana activities interfere with another’s ability to enjoy and use real

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1. Tom Angell, *Oklahoma Voters Legalize Marijuana for Medical Use*, FORBES (June 26, 2018, 10:11 PM), <https://www.forbes.com/sites/tomangell/2018/06/26/oklahoma-voters-legalize-marijuana-for-medical-use/#20ab30791374>.

2. See *OSDH Issues Statement on Passage of State Question 788*, OKLA. STATE DEP’T OF HEALTH OFFICE OF COMM’NS (June 26, 2018), [https://www.ok.gov/triton/modules/newsroom/newsroom\\_article.php?id=150&article\\_id=43583](https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=150&article_id=43583); *Oklahoma State Department of Health Working to Implement Medical Marijuana Measure*, KFOR.COM (June 27, 2018, 10:36 AM), <https://kfor.com/2018/06/27/oklahoma-state-department-of-health-working-to-implement-medical-marijuana-measure/>; K. Butcher & Lili Zheng, *Gov. Mary Fallin Signs Controversial Emergency Rules for Medical Marijuana*, KFOR.COM (July 11, 2018, 3:07 PM), <https://kfor.com/2018/07/11/gov-mary-fallin-signs-emergency-rules-for-medical-marijuana/>; Meg Wingerter, *Unanswered Questions Remain as Oklahoma Medical Marijuana Rolls Out*, OKLAHOMAN (Aug. 1, 2018, 5:00 AM), <https://oklahoman.com/article/5603267/unanswered-questions-remain-as-oklahoma-medical-marijuana-rolls-out>.

3. See Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 77 (2015) (“The struggle over marijuana regulation is one of the most important federalism conflicts in a generation.”).

property? What happens when a state-sanctioned marijuana production facility or dispensary moves in next door? As Oklahoma's nascent medical marijuana industry grows, some property owners may find themselves struggling to answer such questions.

Oklahomans may find that the Tenth Circuit's decision in *Safe Streets Alliance v. Hickenlooper* is a promising tool to address property value reductions and nuisances created by state-sanctioned marijuana operations.<sup>4</sup> In *Safe Streets Alliance v. Hickenlooper*, the Tenth Circuit reversed the dismissal of a Colorado case that paired state nuisance law claims with the federal Racketeering Influenced and Corrupt Organizations Act (RICO).<sup>5</sup> These doctrines granted the federal court subject matter jurisdiction and allowed the plaintiffs to target a state-sanctioned marijuana production operation.<sup>6</sup> In spite of characterizing its holding as "narrow,"<sup>7</sup> the Tenth Circuit's decision subsequently inspired property owners in other jurisdictions to make similar RICO-based claims against state-sanctioned marijuana operations.<sup>8</sup> While RICO has the potential to be a useful tool for property owners opposed to state-sanctioned marijuana operations in their neighborhoods, *Safe Streets Alliance v. Hickenlooper* and its progeny demonstrate that most property owners likely will not receive favorable judgments. RICO will not be helpful to most property owners because they will be unable to prove that state-sanctioned marijuana operations proximately caused "clear and definite" (not speculative) injuries to their business or property.<sup>9</sup>

This Comment explores how property owners have used RICO to combat state-sanctioned marijuana operations when the marijuana operations of "Owner A" interfere with the property rights of the rest of the world. Part II discusses how RICO became a tool for property owners combatting nuisances caused by state-sanctioned marijuana operations and what a claimant must do to set the stage for a RICO claim by exploring nuisance law and state regulations that may eliminate the causes of injury to

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4. *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 876, 891 (10th Cir. 2017).

5. *Id.* at 891.

6. *Id.*

7. *Id.*

8. *See infra* Part IV.

9. Daniel Murner et al., *Racketeer Influenced and Corrupt Organizations*, 55 AM. CRIM. L. REV. 1619, 1669 (2018) ("The First, Second, Third, and Seventh circuits follow the rule that a RICO cause of action may not accrue unless the *amount of damages* is clear and definite and not speculative. In contrast, the Fourth, Sixth, Ninth, and Eleventh circuits hold that a RICO cause of action is ripe as long as plaintiff's *injury* is sufficiently definable and not speculative.").

property. Part III explains the requirements for a RICO claim, with particular focus on how that framework applies to medical marijuana. Part IV analyzes cases in Colorado, Oregon, California, and Massachusetts to demonstrate RICO's limited utility in combating state-sanctioned marijuana operations in Oklahoma. Part V discusses how the outcomes of these cases will likely affect the future of RICO claims against state-sanctioned marijuana operations and reveals the need for federal action on marijuana legalization. Part VI concludes by explaining that, while the RICO cases have not helped aggrieved property owners thus far, an ideally situated property owner could invoke RICO to recover treble damages for what normally would be a state-law nuisance claim.

## *II. Tilling the Soil for a RICO Claim*

For RICO to be a useful tool for property owners, a state-sanctioned marijuana operation must cause an injury to the property of another.<sup>10</sup> Most complaints about state-sanctioned marijuana operations concern odor.<sup>11</sup> Descriptions of marijuana's pungent odor include phrases such as "skunk-like" and lemon-like odors mixed with sulfur.<sup>12</sup> Terpenes—molecules found in the oils of a cannabis plant that repel insects—are responsible for marijuana's distinctive odor.<sup>13</sup> While terpenes are common in plants generally, marijuana has a higher concentration of terpenes that makes the plant more aromatic than others.<sup>14</sup> A powerful odor, however, indicates that marijuana was harvested at its peak and is desirable among producers and consumers.<sup>15</sup> Growing or storing marijuana in large quantities magnifies the odor and increases the likelihood that neighbors will complain. Further, the

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10. *See* 18 U.S.C. § 1964(c) (2012).

11. *See infra* Part IV.

12. *See* Thomas Fuller, 'Dead Skunk' Stench from Marijuana Farms Outrages Californians, N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/us/california-marijuana-stink.html>.

13. Dan Michaels, *Where Does Cannabis' Smell Come From? Learn About Terpenes*, GREENSTATE (Feb. 27, 2018), <https://www.greenstate.com/explained/what-are-terpenes-understanding-cannabis-aroma-molecules/>.

14. *See id.* ("Terpenes are common throughout the plant world, and while cannabis can create about 1,000 of them, we've catalogued about 20,000 in nature.")

15. Bill Daley, *Why Is Pot So Stinky?*, CHI. TRIB. (Apr. 20, 2016, 12:42 PM), <https://www.chicagotribune.com/lifestyles/ct-why-pot-smells-0420-20160420-story.html>.

marijuana industry creates waste that may be difficult to dispose of under state and local regulations.<sup>16</sup>

State-law nuisance claims generally provide the most direct remedy for odor-based complaints rather than federal racketeering laws. However, because of marijuana's classification as a controlled substance, property owners may utilize RICO in conjunction with state-law nuisance claims to gain federal jurisdiction. Even with federal jurisdiction, recovery remains limited to what is allowed by the state's nuisance laws.

For an odor-based claim to mature, the marijuana enterprise must operate in a manner that allows it to interfere with the rights of others.<sup>17</sup> As a result, state and local regulations will influence whether odor-based complaints may mature. Stricter regulations that limit the amount of marijuana that can be produced or maintained in a location will reduce the likelihood of odor-based complaints, whereas less stringent regulations that permit larger accumulations of marijuana in one location increase the likelihood of odor-based complaints. Exploring nuisance laws and the regulatory schemes for state-sanctioned marijuana operations proves useful in understanding the outcome of RICO-based litigation.

#### A. Nuisance Law

If the state-sanctioned marijuana activity of one property owner interferes with the use and enjoyment of another's property, the aggrieved property owner's counsel would likely look to state nuisance law for redress before federal racketeering laws. The Restatement (Second) of Torts identifies three legally significant meanings of a nuisance, which—generally—distill to conditions or activities that may be harmful or annoying to others.<sup>18</sup>

The doctrine of nuisance consists of both public and private nuisances.<sup>19</sup> Public nuisance includes “an unreasonable interference with a right common to the general public.”<sup>20</sup> Examples of public nuisances include the

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16. See Lester Black, *Washington's Weed Industry Has a Million-Pound Waste Problem*, STRANGER (July 26, 2017), <https://www.thestranger.com/weed/2017/07/26/25307388/washingtons-weed-industry-has-a-million-pound-waste-problem>.

17. See 18 U.S.C. § 1964(c) (2012) (stating RICO requires an injury to business or property); RESTATEMENT (SECOND) OF TORTS § 821A cmt. c (AM. LAW INST. 1979) (“[F]or a nuisance to exist there must be harm to another or the invasion of an interest . . .”).

18. RESTATEMENT (SECOND) OF TORTS § 821A(b); see also 50 OKLA. STAT. §§ 1, 2–21 (2011); 50 OKLA. STAT. § 1.1 (2019), <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=72104> (effective Nov. 1, 2019).

19. RESTATEMENT (SECOND) OF TORTS § 821A(a); see also 50 OKLA. STAT. §§ 2–3.

20. RESTATEMENT (SECOND) OF TORTS § 821B(1).

erection of structures that interfere with passage on public highways; the use of public spaces like parks or public squares; the navigation of waterways; or the existence of structures that affect the health, welfare, and safety of the general public.<sup>21</sup> Today, state laws and statutes provide varying definitions of public nuisance, often without the criminal liability once associated with its common-law roots.<sup>22</sup> An individual plaintiff must experience a harm that is distinguishable from the general harm experienced by the public to recover damages for a public nuisance claim.<sup>23</sup> In Oklahoma, a property owner must experience a “special injury” to bring an action based on public nuisance, meaning the injury of which the plaintiff complains must be in some way different from what other members of the public suffer.<sup>24</sup>

A property owner lacking the “special injury” required for a public nuisance claim, however, may suffer an injury sufficient to assert a private nuisance claim. A private nuisance exists when there “is a nontrespassory invasion of another’s interest in the private use and enjoyment of land.”<sup>25</sup> A private nuisance claim allows the plaintiff to recover for harm to the land, interference with its enjoyment and use, or harm to the plaintiff’s family and chattels.<sup>26</sup> Private nuisances may include interference with not only the actual use of land, but also the value of the land or enjoyment associated with occupying the land.<sup>27</sup> Nevertheless, the enjoyment of the land does not equate with emotional distress, which receives limited protection.<sup>28</sup> A plaintiff may only maintain a private nuisance action if the defendant’s conduct “interferes with the exercise of the particular rights and privileges that he owns.”<sup>29</sup>

Nuisance damages—both public and private—are limited to plaintiffs suffering “significant harm,” which means harm different than to be expected from “property in normal condition and used for a normal

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21. *Id.* § 821B cmt. a.

22. *Id.* § 821B cmts. b–d.

23. *Id.* § 821C(1).

24. *N.C. Corff P’ship, Ltd. v. OXY USA, Inc.*, 1996 OK CIV APP 92, ¶ 27, 929 P.2d 288, 295.

25. RESTATEMENT (SECOND) OF TORTS § 821D.

26. *Id.* § 821D cmt. a. Oklahoma’s definition of private nuisance is unspecific and essentially includes those not within the definition of public nuisances. 50 OKLA. STAT. § 3 (2011).

27. RESTATEMENT (SECOND) OF TORTS § 821D cmt. b.

28. *Id.*

29. *Id.* § 821E cmt. a.

purpose.”<sup>30</sup> Measuring “significant harm” is an objective standard based on “the standard of normal persons or property in the particular locality.”<sup>31</sup> Though a hypothetical “hypersensitive” person would be unable to recover based on events that others would not consider a substantial annoyance or disturbance,<sup>32</sup> courts consider the characteristics of the particular community when determining whether the activity constitutes a “substantial” annoyance.<sup>33</sup>

Complaints against state-sanctioned marijuana operations are likely to involve private nuisance claims about the odors associated with the production, storage, and use of marijuana on neighboring properties. Odors may constitute a nuisance when they pose a risk to public safety and health, or when they are “merely offensive and unpleasant.”<sup>34</sup> Further, smoke may create an actionable nuisance claim, and precedent may allow for recovery for cigarette smoke.<sup>35</sup> While a “fleeting whiff” of marijuana may not be offensive, at least one court has found that marijuana odor may become offensive to a reasonable person depending on the “intensity, duration, or frequency of the odor.”<sup>36</sup>

Property owners who pursue nuisance claims against state-sanctioned marijuana activities often complain about more than a “fleeting whiff.”<sup>37</sup> While there may be little recourse for a property owner whose neighbor’s recreational or medical marijuana use is annoying on occasion, large-scale production facilities may produce an odor of sufficient duration, intensity,

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30. *Id.* § 821F.

31. *Id.* § 821F cmt. d.

32. *Id.*

33. *Id.*

34. 66 C.J.S. *Nuisances* § 51 (2018).

35. *Id.* § 49; *see, e.g.*, *Birke v. Oakwood Worldwide*, 87 Cal. Rptr. 3d 602, 605 (Ct. App. 2009) (finding apartment resident sufficiently pleaded public nuisance based on cigarette smoke so as to withstand demurrer). *But cf.* *DeNardo v. Corneloup*, 163 P.3d 956, 957–58 (Alaska 2007) (finding there was no error in lower court’s decision that there was no duty of tenant to refrain from smoking, landlord not liable for trespass, and smoking is not “ultrahazardous”).

36. *State v. Lang*, 359 P.3d 349, 351, 355 (Or. Ct. App. 2015) (considering probable cause for disorderly conduct in response to a report about odor of marijuana).

37. *See* Complaint at 9, *Ainsworth v. Owenby*, 326 F. Supp. 3d 1111 (D. Or. 2018) (No. 6:17-cv-01935-MC) (citing “unmistakable skunk-like stench” and “thick, noxious smoke”); *see also* Amanda Chicago Lewis, *Inside the High-Tech Solution for Smelly, Smelly Weed*, ROLLING STONE (May 11, 2018, 8:12 PM ET), <https://www.rollingstone.com/culture/culture-features/inside-the-high-tech-solution-for-smelly-smelly-weed-630032/> [hereinafter *Lewis, High-Tech Solution*].

and frequency to warrant a nuisance claim.<sup>38</sup> For example, the owner of a 5000 square foot marijuana drying facility in Oregon can accommodate up to 12,000 pounds at a time.<sup>39</sup> The owner hired an engineer to design facilities consistent with the county's odor-eliminating regulations while also accommodating large, six-ton shipments and protecting the owner's investment.<sup>40</sup> Even with these efforts, the owner did not stop the complaints but has avoided litigation.<sup>41</sup>

### B. State and Local Regulations

In order to satisfy the preconditions for a successful common law claim for nuisance, state and local regulations must be lenient enough to permit a marijuana-odor nuisance to develop before a property owner can successfully use RICO to combat state-sanctioned marijuana operations. Since the Supreme Court's decision in *Gonzales v. Raich*, which noted "enforcement difficulties" in preventing locally cultivated marijuana from being transferred to other states,<sup>42</sup> states have designed regulatory schemes that prevent state-sanctioned marijuana from entering the stream of interstate commerce—in hopes of operating without federal interference.<sup>43</sup> As a result, states have limited the size and scope of permitted marijuana operations.<sup>44</sup> More stringent laws limit the areas where a state-sanctioned marijuana producer can operate in a manner that is likely to interfere with the property rights of neighbors. Comparing states with legalized

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38. See Noelle Crombie, *Marijuana Odors Bugging You? Annoyed Neighbors Have Few Options, Officials Say*, OREGONIAN (Mar. 20, 2015), [https://www.oregonlive.com/marijuana/index.ssf/2015/03/marijuana\\_odors\\_bugging\\_you\\_re.html](https://www.oregonlive.com/marijuana/index.ssf/2015/03/marijuana_odors_bugging_you_re.html) ("Smoking in public remains illegal, but there's little city officials can do when it comes to marijuana smoke bothering the neighbors."); Junnelle Hogen, *Pot's Pungent Odor Causing Quite the Stink*, REGISTER-GUARD (Eugene, Or.) (Feb. 25, 2016, 12:01 AM), <https://www.register-guard.com/rg/news/local/34040437-75/as-oregon-pot-grows-proliferate-so-do-complaints-about-plants-odor.html.csp> ("But as Oregon's legal recreational marijuana program unfolds, and more growers set up operation, homeowners find they have little recourse against the stench emitted by pot plants."); *Complaints About Pot Odors on the Rise in Maine*, PORTLAND PRESS HERALD (Nov. 22, 2017), <https://www.pressherald.com/2017/11/22/raising-a-stink/>.

39. Lewis, *High-Tech Solution*, *supra* note 37.

40. *Id.*

41. *Id.*

42. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

43. See Michael Cooper, *Safe Streets Alliance & the Tenth Amendment: Intrastate Cannabis Markets, Interstate Authority & Political Consequences*, 18 U.C. DAVIS BUS. L.J. 195, 203–04 (2018).

44. *Id.*



recreational use—such as Colorado, Oregon, and Washington—to states maintaining legalized medical marijuana illustrates how regulatory schemes address the deficiencies the Court identified in *Raich* as well as how the regulations may prevent odor-based nuisance claims.

Colorado began experimenting with limited-approval medical marijuana use in 2000 when the legislature adopted an affirmative defense for registered patients or caregivers facing possession charges.<sup>45</sup> Eventually, Colorado adopted the first regulatory scheme for the commercial sale of recreational marijuana in the United States.<sup>46</sup> In 2012, Colorado expanded its legalization of marijuana with Amendment 64 to the Colorado State Constitution, which decriminalized the possession, production, distribution, and cultivation of marijuana and related products.<sup>47</sup> Amendment 64 authorized local governments to “enact ordinances or regulations . . . governing the time, place, manner and number of marijuana establishment operations.”<sup>48</sup> Local governments may also ban cultivation and manufacturing facilities and retail facilities by ordinance, referendum, or initiative if approved through a general election ballot.<sup>49</sup> As a result, local governments in Colorado have authority to regulate marijuana cultivation, production, and distribution within their areas of influence.

Oregon transitioned from legalized medical use to recreational use in 2014 with similar restrictions to those adopted in Colorado.<sup>50</sup> Oregon adopted a canopy system for outdoor marijuana grows that limits the size of production to a maximum of 5000 square feet for outdoor grows and 1250 square feet for indoor grows.<sup>51</sup> Also, Oregon regulates homegrown marijuana by providing its production, possession, and storage must be hidden from plain view of any public place. Oregon also prohibits marijuana processors and retailers from establishing operations in residentially zoned areas.<sup>52</sup>

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45. Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147, 147 (2012).

46. *Id.* at 151.

47. COLO. CONST. art. XVIII, § 16; *see also* *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 876 (10th Cir. 2017).

48. COLO. CONST. art. XVIII, § 16(5)(f).

49. *Id.*

50. OR. REV. STAT. ANN. § 475B.005 (West 2018); *see also* Noelle Crombie, *Recreational Marijuana Sales in Oregon: A Timeline*, OREGONIAN (Sep. 30, 2016), [https://www.oregonlive.com/marijuana/index.ssf/2016/09/recreational\\_marijuana\\_sales\\_i.html](https://www.oregonlive.com/marijuana/index.ssf/2016/09/recreational_marijuana_sales_i.html).

51. OR. REV. STAT. ANN. §§ 475B.085(1)(a), 475B.096(2).

52. *Id.* §§ 475B.090(2)(c), 475B.105(2)(c).

Oregon intends for its state-based marijuana regulatory scheme to supersede contradictory municipal charters or local ordinances.<sup>53</sup> However, city or county governments may prohibit licensed marijuana premises by popular vote.<sup>54</sup> By 2018, eighty cities and sixteen counties prohibited marijuana production, processing, wholesale, and retail activities.<sup>55</sup> Local governments that do not prohibit marijuana activities may impose “reasonable regulations” that include limitations on production, cost, sale, hours of business, public access, and premises licensure.<sup>56</sup> However, “reasonable regulations” cannot expand beyond the state-dictated 1000-foot buffers between retail locations or other limits imposed on agricultural buildings.<sup>57</sup>

Like Colorado and Oregon, Washington began experimenting with medical marijuana<sup>58</sup> before legalizing adult, recreational use marijuana in 2012.<sup>59</sup> Washington adopted similar rules and regulations to those in Colorado and Oregon, including buffer zones and other protections.<sup>60</sup> Local governments also have the authority to “make and enforce within [their] limits all such local police, sanitary, and other regulations as are not in conflict with general laws.”<sup>61</sup> The Washington Court of Appeals confirmed the authority of local governments to enact regulations by holding that the state did not create an affirmative right to sell marijuana or remove local governments’ rights to limit marijuana retailers within their jurisdiction.<sup>62</sup> Rather than explicitly limiting local governments’ ability to ban marijuana sales, the legislature incentivized local cooperation through revenue sharing.<sup>63</sup> In Washington, the legalization of recreational marijuana has not

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53. *Id.* § 475B.454 (“The[se] provisions . . . are designed to operate uniformly throughout the state and are paramount and superior to and fully replace and supersede any municipal charter amendment or local ordinance inconsistent with the[se] provisions . . .”).

54. *Id.* § 475B.461(1).

55. *Record of Cities/Counties Prohibiting Licensed Recreational Marijuana Facilities*, OR. LIQUOR CONTROL COMM’N (rev. Jan. 11, 2019), [https://www.oregon.gov/olcc/marijuana/Documents/Cities\\_Counties\\_RMJOptOut.pdf](https://www.oregon.gov/olcc/marijuana/Documents/Cities_Counties_RMJOptOut.pdf).

56. OR. REV. STAT. ANN. § 475B.486(1).

57. *Id.* §§ 475B.105(2)(d), 475B.109, 475B.486(2).

58. *Cannabis Action Coal. v. City of Kent*, 322 P.3d 1246, 1249 n.2 (Wash. Ct. App. 2014).

59. *Emerald Enters., LLC v. Clark Cty.*, 413 P.3d 92, 95 (Wash. Ct. App. 2018).

60. WASH. REV. CODE ANN. § 69.50.331(8)(a) (West 2019).

61. WASH. CONST. art. XI, § 11.

62. *Emerald Enters.*, 413 P.3d at 98.

63. *Id.* at 101–02 (“This amendment allows counties, cities, and towns to share in the financial benefits resulting from marijuana retail sales in their jurisdictions.”).

affected local governments' ability to regulate the sale of marijuana within their jurisdictions.<sup>64</sup>

Washington's legislation is unique in that it also includes limitations regarding the presence of marijuana odors in housing units. Washington's regulations place limits on the production, processing, and growth of marijuana to avoid activities from being readily visible or easily smelled from public or private property.<sup>65</sup> This type of limitation on the presence of marijuana odor may limit many nuisance-based complaints in residential areas. If local regulations prevent marijuana activities from occurring either publicly or overtly on a large scale, local regulations will eliminate the activity before it significantly interferes with the rights of others.

States that have only legalized medical marijuana vary in their legislative restrictions. Most states impose rigid regulations to control the market, prevent diversion into other states, and reduce the likelihood of illegal marijuana sales.<sup>66</sup> However, other states take different approaches to how much authority local governments have to regulate. Two newcomers, Louisiana and Oklahoma, recently approved medical marijuana and their respective statutes exemplify the range of local regulation permitted.

Louisiana's strict production, consumption, and dispensary rules make it unlikely that local regulation will be necessary. Louisiana prohibits physicians from recommending smokable marijuana, and limits the medical conditions that qualify for a prescription.<sup>67</sup> Louisiana also limits the cultivation and production of marijuana to two state university agricultural centers, which prevents private producers from operating in rural neighborhoods.<sup>68</sup> Further, Louisiana limits the number of pharmacies licensed to dispense medical marijuana to ten in the entire state and dictates their placement within nine state regions.<sup>69</sup> The Louisiana Pharmacy Board determines the appropriateness of a pharmacy location based on its potential to impact religious organizations, schools, charities, hospitals, military bases, and other institutions.<sup>70</sup> Also, the selected pharmacies must provide documentation "that all applicable state and local building, fire and

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64. *See id.* at 96.

65. WASH. REV. CODE ANN. § 69.51A.260(2).

66. Cooper, *supra* note 43, at 204.

67. LA. STAT. ANN. § 40:1046 (2018).

68. *Id.* § 40.1046(H)(2)(a).

69. LA. ADMIN. CODE tit. 46, § 2445(G) (2019), <https://www.doa.la.gov/Pages/osr/LAC-46.aspx>.

70. *Id.* § 2447(A)(15)(b)(iii).

zoning requirements, and local ordinances will be met.”<sup>71</sup> These strict regulations make it unlikely that a RICO claim associated with marijuana odors interfering with property rights will develop in Louisiana.

Oklahoma’s medical marijuana rules are less rigid than Louisiana’s. Oklahoma limits possession to three ounces on one’s person, eight ounces in a residence, and six mature plants in a residence for licensed users.<sup>72</sup> Though licensed growers must meet licensing requirements, the statute provides “[t]here shall be no limits on how much marijuana a licensed grower can grow.”<sup>73</sup> Licensed processors must follow state requirements and Oklahoma State Department of Health (OSDH) regulations.<sup>74</sup> However, the statute does not place limitations on odor.<sup>75</sup> Like most other states, Oklahoma includes a 1000-foot buffer zone between retail establishments and schools.<sup>76</sup> However, Oklahoma limits local governments’ ability to regulate the location of retail marijuana operations. Under the statute, “[n]o city or local municipality may unduly change or restrict zoning laws to prevent the opening of a retail marijuana establishment.”<sup>77</sup> Shortly after legalization, this language caused legal challenges in cities that sought to

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71. *Id.* § 2447(A)(6)(c).

72. 63 OKLA. STAT. ANN. § 420(A) (West, Westlaw through Sept. 1, 2019 of the 1st Reg. Sess. of the 57th Legis.) (effective Nov. 1, 2019). In 2019 the Oklahoma Legislature passed the Oklahoma Medical Marijuana and Patient Protection Act (also known as the Oklahoma Unity Bill) designed to provide clarification and to enact stricter guidelines for the state’s marijuana program. The Oklahoma Unity Bill did little to address the deficiencies outlined regarding the limits on production, but the legislation did address concerns about labeling, testing, and the impact on workplaces. Prior to the passage of the Oklahoma Unity Bill, the Oklahoma State Department of Health (OSDH) sought to enact more rigid administrative rules, but these efforts were unsuccessful and resulted in significant controversy. *See generally* Oklahoma Medical Marijuana and Patient Protection Act, H.B. 2612 (Okla. 2019), [http://websvr1.lsb.state.ok.us/cf\\_pdf/2019-20%20ENR/hB/2612%20ENR.PDF](http://websvr1.lsb.state.ok.us/cf_pdf/2019-20%20ENR/hB/2612%20ENR.PDF); *see also* Sean Murphy, *Oklahoma Fast-Tracking Medical Marijuana, but with Pushback*, APNEWS (July 10, 2018), <https://apnews.com/48f40bdbeefb436abc83c59dc136b1fe>; Sean Murphy, *Oklahoma Health Department Revised Medical Marijuana Rules*, APNEWS (July 27, 2018), <https://www.apnews.com/44668d69099f497488d540d787ba844e>; Catherine Sweeney, *Pharmacy Board Fires Director; Marijuana Working Group Meets*, J. REC. (July 25, 2018), <http://journalrecord.com/2018/07/25/pharmacy-board-fires-director-marijuana-working-group-meets/>; Lauren Turner, *Unity Bill Hits a High Note with Legislators and Advocates*, OKLA. POL’Y INST. (Mar. 21, 2019), <https://okpolicy.org/unity-bill-hits-a-high-note-with-legislators-and-advocates/>.

73. 63 OKLA. STAT. § 422(D) (Westlaw).

74. *Id.* § 423.

75. *See id.*

76. *Id.* § 425(G).

77. *Id.* § 425(F).

limit retail marijuana operations.<sup>78</sup> However, the law is silent on local governments' ability to regulate marijuana production or cultivation facilities. OSDH's administrative rules require that commercial facilities meet local construction and safety codes.<sup>79</sup> Oklahoma's medical marijuana statute and related administrative code do little to protect property owners from cultivation and processing activities that may constitute nuisances. Considering the statutory bar on limiting the amount of marijuana a licensed producer may grow, Oklahoma may well have set the stage for a landowner to pair state nuisance law and RICO claims to challenge a neighboring operation that interferes with the use and enjoyment of that landowner's property or diminishes the value of the property if he or she can satisfy all RICO requirements. If Oklahoma approves recreational use in the future without stricter regulations, the RICO option may be an even more attractive solution for aggrieved property owners because the expanded legalization would both increase the number of individuals who could consume marijuana and expand the market for the drug.

### *III. Weedkiller: Understanding RICO*

Passed in 1970 as part of the federal government's effort to eradicate organized crime,<sup>80</sup> RICO allows both criminal and civil actions for engaging in racketeering activities.<sup>81</sup> Section 1961 contains an extensive list of criminal activities, known as predicate acts, that constitute racketeering.<sup>82</sup> The activities encompass almost any conceivable transaction involved in the growth, transportation, distribution, and sale of any controlled substance, but RICO's application is not limited to illegal drug operations.<sup>83</sup> Cases often involve fraud and target both large and small operations.<sup>84</sup> RICO's private right of action empowers individuals to serve

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78. Anna Codutti, *As Some Ordinances Shut Out Marijuana Businesses, See How Oklahoma Cities Are Regulating Patients, Cannabis Industry*, TULSA WORLD (July 17, 2019), [https://www.tulsaworld.com/photo/video/slideshows/medical-marijuana-ordinances-prompt-lawsuits-how-are-cities-across-oklahoma/collection\\_b3e65b2c-cbeb-11e8-b5c8-1356a0c4b59f.html#1](https://www.tulsaworld.com/photo/video/slideshows/medical-marijuana-ordinances-prompt-lawsuits-how-are-cities-across-oklahoma/collection_b3e65b2c-cbeb-11e8-b5c8-1356a0c4b59f.html#1).

79. OKLA. ADMIN. CODE § 310:681-6-2 (West, Westlaw, through rules published in vol. 36, no. 21 of the Oklahoma Register dated July 15, 2019).

80. Murner et al., *supra* note 9, at 1620.

81. 18 U.S.C.A. §§ 1961–1968 (Westlaw through Pub. L. No. 116–53).

82. *Id.* § 1961(1).

83. *Id.* § 1961(1)(D).

84. *E.g.*, *Anza v. Ideal Steel Supply, Corp.*, 547 U.S. 451, 454–55 (2006) (alleging tax, mail, and wire fraud in internet tobacco sales scheme); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 253 (1994) (asserting RICO against anti-abortion groups seeking to

as “private attorneys general”<sup>85</sup> if the individual has been “injured in his business or property” by the racketeering activities.<sup>86</sup>

*A. Elements of a RICO Claim*

When the government employs RICO against a defendant, the prosecution must prove, under § 1962,<sup>87</sup> that a person:

- (i) through the commission of two or more acts (ii) constituting a pattern of racketeering activity (iii) directly or indirectly invested in, maintained an interest in, or participated in, an enterprise, (iv) the activities of which affected interstate or foreign commerce.<sup>88</sup>

Moreover, in a civil RICO claim, a plaintiff must prove the elements, an injury to property or business, and proximate cause.<sup>89</sup>

Under a RICO action, a “person” is “any individual or entity capable of holding a legal or beneficial interest in property.”<sup>90</sup> RICO also requires that there be a pattern of racketeering activities, meaning at least two prohibited acts occurred within ten years.<sup>91</sup> Further, the acts must be “continuous and interrelated,” not isolated criminal violations.<sup>92</sup> An enterprise under RICO encompasses a variety of organizations and groups such as corporations, labor unions, or small groups of individuals associated together for a common purpose without a formal legal identity.<sup>93</sup> Finally, the complainant must demonstrate the racketeering activity’s impact on interstate or foreign commerce, but the effect may be indirect or even de minimis.<sup>94</sup>

Engaging in two separate but unrelated criminal acts is insufficient to meet the pattern of racketeering activities because RICO requires a pattern of activity that is “continuous and interrelated.”<sup>95</sup> The Supreme Court articulated a two-prong test for proving a pattern of activity. First, one

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prevent women from obtaining abortions); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 484 (1985) (alleging mail and wire fraud as predicate acts).

85. *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 269–70 (1992).

86. 18 U.S.C. § 1964(c) (2012).

87. *Id.* § 1962.

88. *Murner et al.*, *supra* note 9, at 1622.

89. *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 881 (10th Cir. 2017).

90. 18 U.S.C.A. § 1961(3) (Westlaw).

91. *Id.* § 1961(5).

92. *Murner et al.*, *supra* note 9, at 1625–26.

93. 18 U.S.C.A. § 1961(4) (Westlaw).

94. *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 258 (1994); *see also Murner et al.*, *supra* note 9, at 1622, 1637–38.

95. *Murner et al.*, *supra* note 9, at 1625–26.

“must show that the racketeering predicates are related.”<sup>96</sup> Second, they must “amount to or pose a threat of continued criminal activity.”<sup>97</sup> While the circuit courts disagree as to how litigants must prove “relationship” and “continuity,”<sup>98</sup> most circuits apply a “two-tiered analysis for the continuity prong, which focuses on the length of time and number of acts.”<sup>99</sup>

RICO’s definition of enterprise broadly includes both legal and non-legal entities,<sup>100</sup> public and private organizations, and formal and informal relationships.<sup>101</sup> Informal relationships may constitute associations-in-fact when participants have “a shared purpose, continuity, and unity.”<sup>102</sup> The enterprises do not have to be business organizations<sup>103</sup> and do not require an economic purpose.<sup>104</sup> At a minimum, the association-in-fact requires “a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.”<sup>105</sup> The broad definition of enterprise has limits and cannot be applied to municipal corporations, meaning RICO has limited use against government entities.<sup>106</sup>

RICO prohibits four classes of activities: receiving or investing income received, either directly or indirectly, from racketeering activities;<sup>107</sup> using racketeering to acquire an interest in enterprises engaged in “interstate or foreign commerce;”<sup>108</sup> conducting or engaging in, as the enterprise’s affairs as an employee or individual associated with a racketeering enterprise;<sup>109</sup> or conspiring in any of the above activities.<sup>110</sup> Any claim alleging a conspiracy

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96. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

97. *Id.*

98. Murner et al., *supra* note 9, at 1627.

99. *Id.* at 1628.

100. 18 U.S.C.A. § 1961(4) (Westlaw through Pub. L. No. 116-53).

101. Murner et al., *supra* note 9, at 1631–32.

102. *Id.* at 1632.

103. *Boyle v. United States*, 556 U.S. 938, 944 n.2 (2009).

104. *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 257 (1994).

105. *Boyle*, 556 U.S. at 946.

106. *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991) (“The RICO claims against Antelope and District fail because government entities are incapable of forming a malicious intent.”) (citing *Biondolillo v. Sunrise*, 736 F. Supp. 258, 260–61 (S.D. Fla. 1990); *N. Star Contracting Corp. v. Long Island R.R. Co.*, 723 F. Supp. 902, 907-08 (E.D.N.Y. 1989); *In re Citisource, Inc. Securities Litig.*, 664 F. Supp. 1069, 1080–81 (S.D.N.Y. 1988); *Massey v. Okla. City*, 643 F. Supp. 81 (W.D. Okla. 1986)).

107. 18 U.S.C. § 1962(a) (2012).

108. *Id.* § 1962(b).

109. *Id.* § 1962(c).

110. *Id.* § 1962(d).

in violation of § 1962(d) requires proving the elements of another § 1962 violation.<sup>111</sup> While RICO readily applies to individuals directly engaged in the operations of a criminal enterprise, the fact that RICO includes claims against individuals who participate in activities that support a prohibited activity may open the way for stacking additional charges against defendants.

### *B. Civil Remedies and the Proximate Cause Requirement*

Section 1964 outlines the civil remedies available under RICO.<sup>112</sup> Federal district courts have subject matter jurisdiction to order appropriate remedies, which may include divesting participants' interests in the enterprise, reasonably restricting future activities, or dissolving the enterprise.<sup>113</sup> RICO authorizes both the U.S. Attorney General<sup>114</sup> and private individuals to seek these civil remedies.<sup>115</sup> However, the private individual must have been "injured in his business or property" by a § 1962 violation.<sup>116</sup> If the private individual succeeds, she recovers triple damages, costs, and reasonable attorney's fees.<sup>117</sup> Civil action does not require a prior criminal prosecution or conviction of the members of the criminal enterprise,<sup>118</sup> meaning a property owner can bring a claim against a state-sanctioned marijuana operation even without a federal, criminal prosecution. A preponderance of evidence standard applies to civil RICO claims rather than the more stringent standard of reasonable doubt applied in the criminal context, which reduces the burden on civil plaintiffs.<sup>119</sup>

A simplistic reading of RICO creates the impression that proving the elements of a RICO claim only requires proving that the marijuana operation violated the statute by engaging in racketeering activity and that activity injured property. However, the Supreme Court rejected such a

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111. *Tal v. Hogan*, 453 F.3d 1244, 1270 (10th Cir. 2006) ("By its terms, § 1962(d) requires that a plaintiff must first allege an independent violation of subsections (a), (b), or (c), in order to plead a conspiracy claim under subsection (d)."); *see also* *BancOklahoma Mortg. Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089, 1103 (10th Cir. 1999).

112. 18 U.S.C. § 1964 (2012).

113. *Id.* § 1964(a).

114. *Id.* § 1964(b).

115. *Id.* § 1964(c).

116. *Id.*

117. *Id.*

118. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 (1985).

119. *Fireman's Fund Ins. Co. v. Sites*, 258 F.3d 1016, 1023 (9th Cir. 2001) ("[A] civil RICO plaintiff must prove his case only by a preponderance of the evidence.") (citing *Wilcox v. First Interstate Bank of Or.*, 815 F.2d 522, 531–32 (9th Cir. 1987)).



simple interpretation of RICO in *Holmes v. Securities Investor Protection Corp.*<sup>120</sup>

In *Holmes*, the Supreme Court considered a securities-fraud RICO claim, pursued by the Securities Investor Protection Corporation, alleging a conspiracy to manipulate stocks.<sup>121</sup> Looking to the language of § 1964(c) regarding an injury to business or property, the Court noted RICO's language could "be read to mean that a plaintiff is injured 'by reason of' a RICO violation, and therefore may recover, simply on showing that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury."<sup>122</sup>

The Court rejected this simplistic reading for not being the "compelled" construction based on legislative intent and statutory history.<sup>123</sup> Congress's heavy reliance on the Sherman Act in formulating RICO influenced the adopted construction.<sup>124</sup> Adopting the language from the Sherman Act showed Congress intended to adopt the Act's contemporary judicial interpretations, also later used in the Clayton Act, that rejected simplistic interpretation and incorporated common-law proximate cause principles.<sup>125</sup> Thus, the RICO civil claims require proximate cause.<sup>126</sup>

*Holmes* identified three reasons why proximate cause is critical to RICO private action.<sup>127</sup> First, less direct injuries make it more difficult to determine the degree to which the plaintiff's damages are "attributable to the [stated] violation" rather than independent factors.<sup>128</sup> Second, the Court sought to avoid "complicated rules" that would be required to allocate damages among various defendants, which may be voluminous or lead to "multiple recoveries."<sup>129</sup> Third, the Court articulated the following:

[T]he need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate

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120. 503 U.S. 258, 266–67 (1992).

121. *Id.* at 262.

122. *Id.* at 265–66.

123. *Id.* at 266.

124. *Id.* at 267–68.

125. *Id.*

126. *Id.* at 268.

127. *Id.* at 269–70.

128. *Id.* at 269.

129. *Id.*

the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.<sup>130</sup>

In addition to proving proximate cause, the property owner must prove injury to property or business.<sup>131</sup> Proving injury to business or property can be tricky because the losses must be concrete rather than speculative.<sup>132</sup> Further, RICO does not provide recovery for personal injuries.<sup>133</sup> Federal courts rely on state law definitions of injury to property, which further complicates matters.<sup>134</sup> Some states, such as Oregon, include claims about diminished use and enjoyment of property within the definition of personal injury<sup>135</sup> while others, like Colorado, incorporate use and enjoyment within the definition of injury to property.<sup>136</sup> The reliance on state-law definitions for injury to property influences circuit precedent as well resulting in different types of injuries being recoverable in different circuits.<sup>137</sup> This means property owners targeting state-sanctioned marijuana operations must look to their state law definitions of personal injury and injury to property before bringing a claim about the diminished use and enjoyment of their property under RICO.

Jurisdictions consistently recognize diminished property values as injuries to property although some jurisdictions may require that a property owner either attempt to monetize the interest or at least express a desire to monetize such an interest by either attempting to sell or lease the affected property.<sup>138</sup> Leaseholders face additional challenges in alleging injury to

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130. *Id.* at 269–70.

131. 18 U.S.C. § 1964(c) (2012).

132. *Oscar v. Univ. Students Coop. Ass’n*, 965 F.2d 783, 785 (9th Cir. 1992) (en banc), *abrogated by* *Boar, Inc. v. Cty. of Nye*, 499 F. App’x 713 (9th Cir. 2012).

133. *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 885 (10th Cir. 2017).

134. *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005).

135. *See Ainsworth v. Owenby*, 326 F. Supp. 3d 1111, 1122 (D. Or. 2018) (“A defendant’s interference with a possessor’s ‘comfort and enjoyment’ of her property is a ‘personal injury’ . . .”).

136. *Hickenlooper*, 859 F.3d at 886.

137. *See Ainsworth*, 326 F. Supp. 3d at 1122–23 (noting distinction between Oregon and Colorado law and impact on decisions in the Ninth and Tenth Circuits); *see also Hickenlooper*, 859 F.3d at 886 (“But Colorado also has long recognized that invasion of one’s property by noxious odors itself gives rise to a nuisance claim and is a direct injury to property.”).

138. *Ainsworth*, 326 F. Supp. 3d at 1124–25; *see Hickenlooper*, 859 F.3d at 887; *Oscar v. Univ. Students Coop. Ass’n*, 965 F.2d 783, 786–87 (9th Cir. 1992) (en banc), *abrogated by* *Boar, Inc. v. Cty. Of Nye*, 499 F. App’x 713 (9th Cir. 2012).

property if the claim is based on diminution of value.<sup>139</sup> The Ninth Circuit previously noted that a diminished resale value does not affect a leaseholder because the leaseholder could gain from such a circumstance because a significant downturn in value would reduce the amount of rent expected of the leaseholder.<sup>140</sup>

While proving injury to property presents challenges depending on the state law and circuit precedent, an informed property owner can tailor pleadings to meet the requirements needed to sufficiently plead a RICO injury to property or business. Establishing proximate cause will be key to success in a RICO-based complaint because the property owner not only has to prove that there was an injury to property or business but also that the criminal activity caused that injury. Property owners must keep both the elements of RICO and the practical difficulties of substantiating property damage in mind when bringing a RICO claim against a state-sanctioned marijuana operation in court.

#### *IV. The Initial Crop of RICO Cases*

When *Safe Streets Alliance v. Alternative Holistic Healing* returned to the District Court of Colorado on remand, other property owners and their attorneys took notice, and filed similar suits in federal courts in Oregon, California, and Massachusetts.<sup>141</sup> These claims, including those in *Safe Streets Alliance v. Alternative Holistic Healing, LLC*, have proven unsuccessful thus far. Nevertheless, property owners in early cases had some success using RICO to either reach a settlement or to terminate the marijuana operation.<sup>142</sup>

##### *A. Cultivating Claims in Colorado*

Colorado was a trailblazer in recreational marijuana legalization and in the use of RICO to combat state-sanctioned marijuana operations. Parties brought two separate RICO claims in February 2015 in the District Court of Colorado: *Safe Streets Alliance v. Medical Marijuana of the Rockies*<sup>143</sup> and

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139. *Oscar*, 965 F.2d at 786–87.

140. *Id.*

141. See *Crimson Galeria Ltd. P’ship v. Healthy Pharms, Inc.*, 337 F. Supp. 3d 20 (D. Mass. 2018); *Ainsworth*, 326 F. Supp. 3d at 1115–16; *Quillinan v. Ainsworth*, No. 4:17-cv-00077-KAW, 2018 WL 2151936, at \*1 (N.D. Cal. May 10, 2018).

142. Court Docket, *McCart v. Beddow*, No. 3:17-cv-00927-AC (D. Or. Jan. 1, 2018) (referencing a Court Minute dictating that the parties settled and staying the case).

143. Complaint, *Safe Sts. All. v. Med. Marijuana of the Rockies, LLC*, No. 1:15-cv-00350-MSK (D. Colo. Feb. 19, 2015).

*Safe Streets Alliance v. Alternative Holistic Healing, LLC*.<sup>144</sup> A Washington D.C.-based non-profit organization, the Safe Streets Alliance<sup>145</sup> (the Alliance), was a plaintiff in both cases and filed suit in federal court.<sup>146</sup> The group joined with individual property and business owners to target individual marijuana producers.<sup>147</sup> Though a former Justice Department official served as chair of the Alliance and a D.C.-based law firm represented the Alliance,<sup>148</sup> the number and identity of its membership remains largely unknown.<sup>149</sup>

*Safe Streets Alliance v. Medical Marijuana of the Rockies* involved a hotel seeking to prevent a marijuana dispensary from operating nearby in Frisco, Colorado.<sup>150</sup> The complaint asserts that “marijuana businesses [are] bad neighbors” that discourage legitimate customers while attracting bad ones, create traffic disruptions, depreciate property values, and smell bad.<sup>151</sup> The defendants included not only the marijuana operation and its owner, but also the property owner who agreed to sell and lease the property to the marijuana operation; individual investors; the construction contractor; the Bank of the West, which provided banking services; a bond company; and the operation’s accountant.<sup>152</sup> The court quickly dismissed the bank, which reported that it was not aware that the defendants participated in the marijuana industry.<sup>153</sup> In June 2015, the court voluntarily dismissed the

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144. Complaint, *Safe Sts. All. v. Alt. Holistic Healing, LLC*, No. 1:15-cv-00349-REB-CBS (D. Colo. Feb. 19, 2015), 2015 WL 5007944.

145. Ricardo Baca, *Who Exactly Is Behind the Lawsuits over Colorado’s Legal Marijuana?*, DENVER POST (Jan. 15, 2016, 10:56 AM), <https://www.denverpost.com/2016/01/15/who-exactly-is-behind-the-lawsuits-over-colorados-legal-marijuana/?clearUserState=true>.

146. John Ingold, *Jury Finds in Favor of Colorado Marijuana Grow in Closely Watched Federal Lawsuit*, COLO. SUN (Oct. 31, 2018, 4:55 PM MDT), <https://coloradosun.com/2018/10/31/colorado-safe-streets-rico-lawsuit-verdict/>.

147. *See, e.g.*, *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 876–77 (10th Cir. 2017).

148. Baca, *supra* note 145.

149. *See id.*; *see also Hickenlooper*, 859 F.3d at 879.

150. Complaint, *Safe Sts. All. v. Alt. Holistic Healing, LLC*, No. 1:15-cv-00349-REB-CBS (D. Colo. Feb. 19, 2015), 2015 WL 5007944.

151. *Id.* at 3.

152. *Id.* at 5–6.

153. Ricardo Baca, *Anti-Pot Racketeering Suit Settles, Opens Door for Future RICO Claims*, DENVER POST (Dec. 30, 2015, 10:48 AM), <https://www.denverpost.com/2015/12/30/anti-pot-racketeering-suit-settles-opens-door-for-future-rico-claims/> (“One defendant, Bank of the West, was dropped from the lawsuit in February after it closed all bank accounts belonging to Medical Marijuana of the Rockies . . . and denied that it knew the nature of [the] business.”).

Alliance from *Safe Streets Alliance v. Medical Marijuana of the Rockies*.<sup>154</sup> In December 2015, the hotel settled with the marijuana operation, which had closed its existing operation due to the litigation, as well as with other defendants.<sup>155</sup> The case's short lifespan makes it difficult to identify many lessons-learned. Initially, a RICO lawsuit appeared to give property owners opposed to state-sanctioned marijuana operations leverage to push settlement, terminate the marijuana operation, or both. The expense of litigation and the stigma of being characterized as a criminal enterprise in court were powerful deterrents to marijuana operators.

Unlike *Safe Streets Alliance v. Medical Marijuana of the Rockies*, the *Safe Streets Alliance v. Alternative Holistic Healing, LLC* plaintiffs refused to settle and inspired other RICO-based claims.<sup>156</sup> In *Safe Streets Alliance v. Alternative Holistic Healing, LLC*, the Alliance joined with rural property owners, the Reillys,<sup>157</sup> who, at the time they filed the lawsuit, used property that they owned in a rural development for riding horses and other recreational activities.<sup>158</sup> A marijuana operation opened on a neighboring lot, and the Reillys alleged that the marijuana operation and its "noxious odors" harmed their property in two ways.<sup>159</sup> First, operating an open drug conspiracy in the neighborhood affected property values, which constitutes an injury to property under RICO, and second, the odors from marijuana production interfered with the use and enjoyment of the property.<sup>160</sup> In addition to the RICO claim, *Safe Streets Alliance v. Alternative Holistic Healing, LLC*, included an equity claim against the State of Colorado using the Supremacy Clause of the United States Constitution as a preemptive force to combat the state's marijuana legalization regime.<sup>161</sup> The District Court of Colorado initially dismissed the complaint because the Reillys had not sufficiently pleaded injury to property proximately caused by the marijuana operation's violation of the Controlled Substances Act (CSA).<sup>162</sup>

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154. Notice of Voluntary Dismissal of Plaintiff Safe Streets, *Safe Sts. All. v. Med. Marijuana of the Rockies, LLC*, No. 15-cv-00350-MSK-MJW (D. Colo. June 15, 2015).

155. Baca, *supra* note 145.

156. See *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 879 (10th Cir. 2017).

157. *Id.*

158. *Id.* The Reillys later built a home on the property, which may have affected the jury's verdict. Kathleen Foody & Associated Press, *Lawsuit over Pot, Property Values Could Have Broad Impacts*, DENVER POST (Oct. 28, 2018, 12:00 pm), <https://www.denverpost.com/2018/10/28/denver-marijuana-property-tax-lawsuit/>.

159. *Hickenlooper*, 859 F.3d at 879–80.

160. *Id.*

161. *Id.* at 876–77.

162. *Id.* at 880–81.

Although the Tenth Circuit upheld the dismissal of the equity claim in *Safe Streets Alliance v. Hickenlooper*, the court remanded the RICO claim because “the landowners [had] plausibly alleged at least one § 1964(c) claim against each of [the] defendants.”<sup>163</sup>

On remand, the Tenth Circuit’s opinion provided guidance for the District Court of Colorado. First, the Tenth Circuit established that the marijuana operation was engaged in an activity that would be indictable under the CSA and therefore satisfied RICO’s definition of racketeering activity.<sup>164</sup> Second, the Reillys sufficiently pleaded a shared “purpose, relationship, and longevity” and proved an “association-in-fact” enterprise existed under RICO.<sup>165</sup> Third, the Tenth Circuit noted that the “cultivating, distributing, and selling” involved in the enterprise “undisputedly affects interstate commerce.”<sup>166</sup> Further, the defendants, who admitted that they agreed to engage in activities to produce marijuana for sale, met RICO’s requirement that the individuals be engaged in the operation and management of the enterprise.<sup>167</sup> Fourth, the plaintiffs sufficiently alleged a pattern of activity “that present[ed] a threat of ongoing criminal activity.”<sup>168</sup> Finally, the landowners sufficiently pleaded that the neighboring criminal enterprise and its odor interfered with their rights to use and enjoy as well as their property values, meaning the claim could proceed.<sup>169</sup>

Equipped with the Tenth Circuit’s guidance, the district court granted summary judgment on the § 1962(c) claim in *Safe Streets Alliance v. Alternative Holistic Healing, LLC*.<sup>170</sup> No genuine issue of material fact existed: the defendants were engaged unlawfully in an enterprise that affected interstate commerce and constituted a pattern of racketeering activity.<sup>171</sup> In his decision, the district judge averred the landowners had to prove (1) violation of § 1962, (2) injury to business or property, and (3) causation.<sup>172</sup> With regard to the § 1962 violation, the defendants only

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163. *Id.* at 877.

164. *Id.* at 882 (“It follows, therefore, that operating a marijuana cultivation facility of the type . . . described . . . necessarily would involve *some* racketeering activity.”).

165. *Id.* at 883.

166. *Id.*

167. *Id.* at 884.

168. *Id.*

169. *Id.* at 886–87.

170. *Safe Sts. All. v. Alt. Holistic Healing, LLC*, No. 15-cv-00349-REB-SKC, 2018 WL 3861156, at \*1 (D. Colo. Aug. 14, 2018).

171. *See* Order Re: Summary Judgment Motions at 15–16, *Alt. Holistic Healing, LLC*, No. 1:15-cv-00349-REB-SKC (D. Colo. Aug. 1, 2018).

172. *Id.* at 4.

challenged that a RICO enterprise existed.<sup>173</sup> The remaining defendant controlled two limited liability companies (6480 Pickney, LLC and Camp Feel Good, LLC) that produced the marijuana for resale on the land neighboring the Reillys' property.<sup>174</sup> Claiming 6480 Pickney, LLC was an "alter ego," the defendant denied that an enterprise existed.<sup>175</sup> This argument was irrelevant, according to the district judge, because of the Tenth Circuit's finding that an enterprise existed.<sup>176</sup> The Tenth Circuit's decision, as well as *Raich*, required the district court to find that the effect on interstate commerce existed.<sup>177</sup> In addition, the district court also found that growing marijuana for sale is racketeering activity under RICO.<sup>178</sup> The district court asserted that "[e]ach act of cultivation and sale constitutes a separate violation of the CSA and therefore a predicate RICO offense."<sup>179</sup>

Genuine issues of material fact existed with regard to injury to business or property and causation.<sup>180</sup> The judge characterized the defendants' evidence regarding improved value as being "somewhat thin" but believed it was a question for the jury.<sup>181</sup> While the plaintiffs alleged the value of their property decreased due to the marijuana operation, the defendants alleged the opposite—proximity to the production increased the value of the land.<sup>182</sup>

As *Safe Streets Alliance v. Alternative Holistic Healing, LLC* moved to a jury trial, the parties wrangled over experts.<sup>183</sup> The plaintiffs presented a real estate professor whose meta-analysis and review of relevant literature resulted in an estimate that the Reillys' property depreciated around \$24,000.<sup>184</sup> The defense objected to the plaintiffs' expert witness, but the court rejected the defendant's motion, admonishing it as "long on argument,

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173. *Id.*

174. *Id.* at 3.

175. *Id.* at 5.

176. *Id.* at 6.

177. *Id.* at 7–8.

178. *Id.* at 8.

179. *Id.* at 9.

180. *Id.* at 11.

181. *Id.*

182. *Id.* at 12–14. The judge had harsh words for the defense's effort to "correct" the testimony of its expert by using an errata sheet based on an assertion that the expert had been unable to qualify a statement regarding the value of the land being offset by the above-market price paid by the plaintiffs for their property. *Id.*

183. *Safe Sts. All. v. Alt. Holistic Healing, LLC*, No. 15-cv-00349-REB-SKC, 2018 WL 3861156, at \*1 (D. Colo. Aug. 14, 2018).

184. *Id.*

but woefully short on authority or analysis.”<sup>185</sup> Under the evidence rules, the court stated that even a landowner without skilled training could be considered a “skilled witness.”<sup>186</sup> Further, the court denied the motion to disqualify and also denied the request for the court to appoint an expert.<sup>187</sup> Before trial, the plaintiffs opposed the defense’s use of county tax documents that showed plaintiff’s property had increased in value after the defendants began their marijuana production because the assessor did not account for changes in property use on adjacent lots.<sup>188</sup>

*Safe Streets Alliance v. Alternative Holistic Healing, LLC* demonstrates that experts are critical to the outcome of a RICO claim that alleges injury caused by state-sanctioned marijuana operations. Under RICO, injury to property “requires proof of concrete financial loss”<sup>189</sup> as Congress did not intend “to provide a federal cause of action and treble damages to every tort plaintiff.”<sup>190</sup> While the Federal Rules of Evidence may consider a landowner a “skilled witness” when it comes to valuing property,<sup>191</sup> a jury will likely want more than the property owner’s assessment. Ultimately, the Reillys failed to convince the jury that the state-sanctioned marijuana production sufficiently injured their property.<sup>192</sup> In *Safe Streets Alliance v. Alternative Holistic Healing, LLC*, the defendants ultimately scored a victory for state-sanctioned marijuana producers although that outcome seemed uncertain when the case first appeared. Initially the litigation caused distress among marijuana producers.<sup>193</sup> The Reillys’ failure in *Safe Streets Alliance v. Alternative Holistic Healing, LLC* allayed fears because it now appears that proving a RICO case may be too difficult for many

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185. *Id.* at \*2.

186. *Id.*; see also FED. R. EVID. 702 advisory committee’s notes to 1972 amendments.

187. *Alt. Holistic Healing*, 2018 WL 3861156, at \*4.

188. Plaintiff’s Pretrial Brief at 2, *Reilly v. 6480 Pickney, LLC*, No. 1:15-cv-00349-REB-SKC (D. Colo. Oct. 22, 2018).

189. *Oscar v. Univ. Students Coop. Ass’n*, 965 F.2d 783, 785 (9th Cir. 1992) (en banc), *abrogated by Boar, Inc. v. Cty. of Nye*, 499 F. App’x 713 (9th Cir. 2012).

190. *Id.* at 786.

191. See FED. R. EVID. 702 advisory committee notes to 1972 amendments; *Alt. Holistic Healing, LLC*, 2018 WL 3861156, at \*2.

192. Final Judgment at 1, *Reilly v. 6480 Pickney, LLC*, No. 1:15-cv-00349-REB-SKC (D. Colo. Nov. 8, 2018).

193. See Amanda Chicago Lewis, *How Anti-Mafia Laws Could Bring Down Legal Pot*, ROLLING STONE (Aug. 28, 2017, 3:08 PM ET), <https://www.rollingstone.com/culture/culture-features/how-anti-mafia-laws-could-bring-down-legal-pot-206233/> [hereinafter Lewis, *Anti-Mafia Laws*].



property owners.<sup>194</sup> The outcome informs what may occur in other RICO-based claims; however, the outcome does not preclude all similar claims.

*B. Spreading Seeds in Oregon*

On June 13, 2017, six days after the Tenth Circuit's decision in *Safe Streets Alliance v. Hickenlooper*, an attorney who owned property affected by a state-sanctioned marijuana operation in Oregon, withdrew a nuisance-based state court claim and filed a RICO claim in federal district court.<sup>195</sup> In *McCart v. Beddow*, the plaintiffs sued the owners and tenants on a neighboring property, three limited liability companies associated with the property, operators of retail marijuana facilities who purchased marijuana from the neighboring property, and the Bank of America, which held a mortgage on the neighboring property.<sup>196</sup> The aggrieved landowners asserted many misdeeds by the parties, including damage to easements caused by increased traffic in the neighborhood, trespass and harassment, the creation of the "powerful and unmistakable skunk-like stench of marijuana" that prevented the landowners from using and enjoying the outdoor areas of their home, and the presence of guard dogs that interfered with the landowners' horses.<sup>197</sup> In addition to interfering with the use and enjoyment of the property, the landowners alleged the marijuana operation adversely impacted the value of the property because the illegal activities next door would scare away potential buyers.<sup>198</sup> The landowners asserted twenty-three claims against the various defendants under either subsection 1962(c), (d), or both.<sup>199</sup> In January 2018, the landowners settled the suit.<sup>200</sup> The quick resolution of *McCart* provided little opportunity for the court to apply the law and showed the power of RICO litigation to force either settlement or termination of the enterprise. Like in *Safe Streets Alliance v. Medical Marijuana of the Rockies*, the defendant-marijuana producers in *McCart* likely sought settlement to avoid the cost of extended litigation and

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194. See Paul Elias, *Colorado Jury's Pot Verdict May Discourage Similar Property Value Lawsuits Against Cannabis Companies*, DENVER POST (Nov. 1, 2018, 10:32 PM), <https://www.denverpost.com/2018/11/01/colorado-pot-grower-property-value-lawsuit/>.

195. Complaint at 1–2, *McCart v. Beddow*, No. 3:17-cv-00927-AC (D. Or. June 13, 2017).

196. *Id.* at 3–8.

197. *Id.* at 27–28.

198. *Id.* at 30–31.

199. *Id.* at 31–61.

200. See Notice of Voluntary Dismissal with Prejudice Pursuant to FRCP 41(a)(1)(A)(i), *McCart*, No 3:17-cv-00927-AC (D. Or. Jan. 24, 2018).

the stigma of being characterized as a criminal enterprise that was engaged in racketeering activity.<sup>201</sup>

In December 2017, a group of property owners in Butte Creek Estates, a rural, Oregon neighborhood, filed the second case in Oregon, *Ainsworth v. Owenby*. A nearby marijuana production allegedly damaged the properties in Butte Creek Estates in violation of RICO and state private nuisance laws.<sup>202</sup> The defendants included the Owenbys, who owned the property where the marijuana enterprise operated; other individuals who participated in the operation of the enterprise; and the mortgage company.<sup>203</sup> A “skunk-like stench” allegedly pervaded over the neighborhood due to the operators burning “marijuana debris” and running exhaust fans in a greenhouse.<sup>204</sup> Due to the operation, traffic increased on the dead-end streets in the neighborhood turning the roads “into busy, and at times unsafe, commercial roadways.”<sup>205</sup> Butte Creek Estates residents complained of a grass fire started by the marijuana production, the presence of guard dogs, increased traffic, and reports of prowling and break-ins.<sup>206</sup>

Due to the drug trafficking in the neighborhood, Butte Creek Estates residents formed a neighborhood watch, purchased security equipment, installed new fencing, and acquired firearms.<sup>207</sup> Because “dream” homes usually do not involve illegal drug manufacturing, loud noises, and awful odors, the marijuana production allegedly adversely affected property values in the neighborhood.<sup>208</sup> Further, the residential zoning prevented the neighborhood from being attractive to other marijuana producers because local ordinances prohibited marijuana production in those zones.<sup>209</sup> The private nuisance claim alleged that the defendants’ property was in a “rural residential” area, the production violated local ordinances, and the operation did not fall within the state’s “right to farm” laws.<sup>210</sup> Other

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201. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 492 (1985) (“[A] civil RICO proceeding leaves no greater stain than do a number of other civil proceedings.”). The Supreme Court has discounted the stigma that the label of racketeer may have noting that a RICO claim is no more stigmatizing than any other civil proceeding. However, media coverage of *Hickenlooper* indicates otherwise. *See Lewis, Anti-Mafia Laws*, *supra* note 193.

202. *Ainsworth v. Owenby*, 326 F. Supp. 3d 1111, 1115–16 (D. Or. 2018).

203. *Id.* at 1116–17, 1116 n.2.

204. Complaint at 9, *Ainsworth*, 326 F. Supp. 3d 1111 (No. 6:17-cv-01935-MC).

205. *Id.* at 10.

206. *Id.* at 15–16.

207. *Id.* at 16.

208. *Id.* at 17.

209. *Id.*

210. *Id.* at 30.

complaints alleged the property owners suffered from physical ailments such as headaches and coughs.<sup>211</sup>

In August 2018, the court dismissed the RICO claim without prejudice “because Plaintiffs fail[ed] to allege a compensable property injury under the civil RICO statute,”<sup>212</sup> although the court allowed the Butte Creek Estates residents to amend their complaint.<sup>213</sup> The court noted that to establish standing, the plaintiff must show an “injury-in-fact” that is “‘fairly traceable’” to the actions of the defendant that is “‘likely to be ‘redressed by a favorable decision.’”<sup>214</sup> The Butte Creek Estates residents alleged three injuries including diminished property values, loss of use and enjoyment, and expenses related to security equipment, fencing, and firearms.<sup>215</sup> Because they had ceased marijuana production on the property, the marijuana operators alleged the Butte Creek Estates residents could no longer claim the first two injuries. Further, reimbursement for enhanced security measures like security systems and firearms were not injuries to business or property, meaning the expenditures were not compensable under RICO.<sup>216</sup>

Absence of an allegation of a compensable injury, not a lack of constitutional standing, led to the dismissal without prejudice and leave to amend in August 2018.<sup>217</sup> Constitutional standing existed under RICO because of “a cognizable injury-in-fact” arising from “the lost use and enjoyment of their properties.”<sup>218</sup> Further, the plaintiffs had standing for past interferences due by smoke, noise, and odor in Butte Creek Estates.<sup>219</sup> However, the plaintiffs lacked statutory standing because the “impaired use and enjoyment of . . . land is a non-compensable personal injury.”<sup>220</sup>

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211. *Id.* at 30–31.

212. *Ainsworth v. Owenby*, 326 F. Supp. 3d 1111, 1116 (D. Or. 2018).

213. *Ainsworth v. Owenby*, No. 6:17-CV-01935-MC, 2019 WL 1387681, at \*1 (D. Or. Mar. 27, 2019).

214. *Ainsworth*, 326 F. Supp. 3d at 1119 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

215. *Id.*

216. *Id.* The Ninth Circuit previously left open the possibility that expenditures for security systems might satisfy the financial loss requirement. *Oscar v. Univ. Students Coop. Ass’n*, 965 F.2d 783, 786 (9th Cir. 1992) (en banc), *abrogated by Boar, Inc. v. Cty. of Nye*, 499 F. App’x 713 (9th Cir. 2012).

217. *Ainsworth v. Owenby*, No. 6:17-CV-01935-MC, 2019 WL 1387681, at \*1 (D. Or. Mar. 27, 2019).

218. *Ainsworth*, 326 F. Supp. 3d at 1119.

219. *Id.*

220. *Id.* at 1122.

In *Ainsworth*, the injury was non-compensable because federal courts rely on state law to define “property,” and Oregon distinguishes between injuries to property and personal injuries in nuisance claims.<sup>221</sup> Oregon considers interference with one’s rights to use and enjoy property to be a personal injury, but decreased value or physical damage to property is considered to be an injury to property.<sup>222</sup> This reasoning transferred to the federal court because the Ninth Circuit had adopted a similar distinction.<sup>223</sup> The court stated that although the claims brought by the plaintiffs in *Ainsworth*, were “actionable under Oregon nuisance law, such harms to human comfort [were] not compensable under RICO.”<sup>224</sup>

Butte Creek Estates residents’ claims differed from those in *Safe Streets Alliance v. Hickenlooper* because the Tenth Circuit relied on Colorado law that did not distinguish between personal and property injury.<sup>225</sup> Both Oregon law and Ninth Circuit precedent bound the *Ainsworth* court.<sup>226</sup> The Ninth Circuit uses a two-part test to determine if a plaintiff plausibly alleged an injury to property.<sup>227</sup> “First, the alleged injury must be to a recognized property interest,” rather than a purely personal or emotional injury.<sup>228</sup> Second, there must be a “concrete financial loss.”<sup>229</sup> In *Ainsworth*, the initial complaint lacked this type of loss.

The court’s statements regarding security equipment fencing, and camera expenses describe how many property owners likely view proximity to a state-sanctioned marijuana operation.

Plaintiffs in the present case cannot transform their apprehension of third-party prowlers into a compensable RICO injury simply by reaching for their wallets. Stated differently, it is not enough that Plaintiffs have alleged concrete financial losses because those losses are derivative of their emotional distress and not a property interest recognized under Oregon law—the financial

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221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 1123.

225. *Id.*

226. *Id.*

227. *Id.* at 1121.

228. *Id.* (citing *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (en banc)).

229. *Id.* (quoting *Oscar v. Univ. Students Coop. Ass’n*, 965 F.2d 783, 785 (9th Cir. 2005) (en banc)).

loss is necessary but not sufficient to state a cognizable RICO claim.<sup>230</sup>

As a result, the landowners' RICO claim hinged on the loss in value of the property, and the court noted plaintiffs needed to include either efforts to monetize their property interest such as by sale or, at a minimum, the intent to do so.<sup>231</sup> The court again looked to the Ninth Circuit and its treatment of speculative losses as a result of diminished value of property.<sup>232</sup> While the Ninth Circuit has eased its requirements for concrete loss, the circuit still requires pleading the intent to monetize or failed efforts to monetize in order to establish a tangible loss.<sup>233</sup> The Butte Creek Estates residents plaintiffs did not wish to sell or lease their lands, which left only an "abstract harm" based on a reasonable inference that the property values had decreased.<sup>234</sup> To establish a reasonable inference, property owners do not have to have complicated statistics or expensive appraisals, but they had to provide more than just their own assertions that their property values had decreased.<sup>235</sup> In the Ninth Circuit, property owners need to show attempts or desires to "convert . . . interests into a pecuniary form."<sup>236</sup>

Demanding either efforts or the desire to monetize interest provides another distinction between the *Ainsworth* case and *Safe Streets Alliance v. Hickenlooper*. While the Ninth Circuit precedent did not bind the Tenth Circuit's decision in *Safe Streets Alliance v. Hickenlooper*, the two circuits approach proximate cause in a similar manner.<sup>237</sup> The Oregon District Court found the Tenth Circuit's analysis of proximate cause in *Safe Streets Alliance v. Hickenlooper* to be both persuasive and consistent with the Ninth Circuit's three-factor test.<sup>238</sup>

On September 28, 2018, Butte Creek Estates residents filed an amended complaint in an attempt to remedy the deficiencies in the alleged injuries.<sup>239</sup> This time, the complaint included an unfavorable home appraisal obtained when one of the Butte Creek Estates residents sought a home-equity loan to

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230. *Id.* at 1124.

231. *Id.* at 1125.

232. *See id.*

233. *Id.*

234. *Id.* at 1126.

235. *Id.*

236. *Id.*

237. *See id.* at 1127.

238. *Id.* at 1127–28.

239. *See* First Amended Complaint at 1, *Ainsworth v. Owenby*, No. 6:17-cv-01935-MC (D. Or. Sept. 28, 2018).

finance a new fence the property owner was building in response to the marijuana operation.<sup>240</sup> The home's decreased value led to a smaller loan being available, and the property owners using a less secure and less attractive fencing than they desired.<sup>241</sup> The amended complaint also included enhanced allegations of trespass by the marijuana enterprise and its animals.<sup>242</sup> Further, the amended complaint detailed incidents of harassment and intimidation, including slashed tires, allegedly caused by the marijuana producers or their associates.<sup>243</sup> In March 2019 the district court dismissed for failure to state a claim finding that the inability to secure a higher home equity loan due to a lower home value was not a compensable injury to property under Oregon law.<sup>244</sup> Rather than suffering a concrete financial loss, the depressed home valuation prevented the home owner from acquiring greater debt.<sup>245</sup> Further, the homeowner did not allege that the neighboring marijuana enterprise resulted in banks demanding higher interest rates or other unfavorable terms.<sup>246</sup> As a result, Oregon seems to be an unlikely jurisdiction for a RICO claim to succeed largely in part to Oregon's distinction between personal injury and property injury.

### *C. Blowing Smoke in California*

Two cases in California further illustrate the challenges facing plaintiffs using RICO to target state-sanctioned marijuana operations. In 2017, antiques dealers, appearing pro se, filed suit in the Northern District of California asserting five claims under RICO and another federal claim alleging that more than sixty defendants engaged in criminal enterprises for the purpose of cultivating and distributing marijuana.<sup>247</sup> In *Quillinan v. Ainsworth*, antique dealers rented storage space in a commercial warehouse.<sup>248</sup> When a marijuana operation purchased the warehouse, the new owners gave the antiques dealers thirty days' notice to vacate.<sup>249</sup> Unable to obtain an adequate, alternative storage facility, the antiques

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240. *Id.* at 13.

241. *Id.*

242. *Id.* at 12.

243. *Id.* at 20–21.

244. *Ainsworth v. Owenby*, No. 6-17-cv-01935-MC, 2019 WL 1387681, at \*1–2 (D. Or. Mar. 27, 2019).

245. *Id.* at \*2.

246. *Id.*

247. *Quillinan v. Ainsworth*, No. 4:17-cv-00077-KAW, 2018 WL 2151936, at \*1 (N.D. Cal. May 10, 2018).

248. *Id.* at \*2.

249. *Id.*

dealers had to sell or dispose of property and relocate to less desirable facilities.<sup>250</sup> The antiques dealers argued the purchase of the storage warehouse was the result of racketeering activity associated with marijuana cultivation and distribution.<sup>251</sup>

The district court dismissed the initial complaint, but the Ninth Circuit, reversed and remanded.<sup>252</sup> On remand, the district court “dismiss[ed] without leave to amend, because any amendment would be futile.”<sup>253</sup> The court determined that the antiques dealers lacked standing because the termination of the lease was legal and did “not become a criminal act purely based upon the nature of the business or entity that does it.”<sup>254</sup> The court distinguished *Quillinan* from *Safe Streets Alliance v. Hickenlooper* because the antiques dealers did not experience a nuisance caused by the marijuana operation’s odor or a reduced property value.<sup>255</sup> The marijuana enterprise did not cause the antique dealers’ inability to obtain affordable alternative storage.<sup>256</sup> Rather, the lost lease caused the injury, and any new owner could have terminated the lease, meaning this was not an injury caused by criminal activity.<sup>257</sup> The antiques dealers appealed the dismissal to the Ninth Circuit; however, the court dismissed the appeal due to appellant’s failure to respond to a court order.<sup>258</sup>

*Quillinan* is distinguishable from the other RICO cases that were inspired by *Safe Streets Alliance v. Hickenlooper*. First, the antiques dealer in *Quillinan* did not allege interference with the use and enjoyment or value of property due to marijuana odors. Rather, the antiques dealers alleged that a marijuana enterprise caused them to lose profits when they had to sell inventory at reduced prices. Second, the antiques dealers were not the owners of the affected warehouse but had a possessory interest per a lease and alleged an injury to their business. As a result, the antiques dealers failed to sufficiently plead the required injury to property or business.<sup>259</sup>

In 2018 four families in Sonoma County, California, filed suit alleging that an unlicensed marijuana operation caused injury to their neighboring

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250. *Id.*

251. *Id.* at \*4.

252. *Id.* at \*2.

253. *Id.* at \*1.

254. *Id.* at \*4.

255. *Id.* at \*5.

256. *Id.*

257. *Id.*

258. *Quillinan v. Ainsworth*, No. 18-16197, 2018 WL 4676696, at \*1 (9th Cir. Aug. 24, 2018).

259. *See* 18 U.S.C. § 1964(c) (2012).

properties.<sup>260</sup> In *Bokaie v. Green Earth Coffee, LLC*, the complaint included familiar statements about the pervasive “skunk-like” odor of marijuana in the area.<sup>261</sup> However, the injuries claimed included medical complications associated with asthma, disrupted sleep, and increased “cleaning, medical, legal, and other expenses.”<sup>262</sup> Lastly, the four families in *Bokaie* alleged that the criminal enterprise in the neighborhood had negatively affected their property values.<sup>263</sup>

Unsurprisingly, the court established the existence of a racketeering enterprise and the elements of a RICO violation.<sup>264</sup> The court determined that “[b]y definition, growing or dealing in cannabis constitutes racketeering.”<sup>265</sup> Despite this finding, *Bokaie* and *Ainsworth* had similar deficiencies. Like discussed previously in *Ainsworth*, the neighboring landowners in *Bokaie* failed to prove injury to their property or business.<sup>266</sup> The four families in *Bokaie* alleged personal injuries, like medical expenses, that are not permitted by Ninth Circuit precedent or California law.<sup>267</sup> Further, the four families’ claim of diminished value failed under California law, which limits recovery for diminution of value in circumstances with continuing nuisances to avoid double recovery.<sup>268</sup> In *Bokaie*, the nuisance abated when the marijuana operation ceased operations.<sup>269</sup> In December 2018, the court dismissed the RICO claim without prejudice, allowing the parties to amend.<sup>270</sup> Even if the plaintiffs had revised their complaint, any amendment probably would not remedy the flaws inherent in the claim in *Bokaie*, as the plaintiffs cannot recover for personal injuries, and the defunct marijuana operation was no longer affecting their property values. These inherent flaws likely motivated the four families filing notices of voluntary dismissal with prejudice in January 2019.<sup>271</sup>

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260. *Bokaie v. Green Earth Coffee, LLC*, No. 18-cv-05244-JST, 2018 WL 6813212, at \*1 (N.D. Cal. Dec. 27, 2018).

261. *Id.* at \*2.

262. *Id.*

263. *Id.*

264. *Id.* at \*4.

265. *Id.*

266. *Id.* at \*5.

267. *Id.*

268. *Id.* at \*6.

269. *Id.*

270. *Id.* at \*7.

271. Notice of Voluntary Dismissal with Prejudice at 2, *Bokaie*, No. 3:18-cv-05244-JST (N.D. Cal. Jan. 21, 2019).



*D. Abandoning the Crop in Massachusetts*

Though *Safe Streets Alliance v. Hickenlooper* appeared to encourage the plaintiffs in a Massachusetts case, *Crimson Galeria v. Healthy Pharms, Inc.*,<sup>272</sup> to file a RICO-based claim, the jury verdict in *Safe Streets Alliance v. Alternative Holistic Healing, LLC* in October 2018 likely discouraged them from further pursuing the claim.<sup>273</sup> Fewer than ten days after the *Safe Streets Alliance v. Alternative Holistic Healing, LLC* verdict, the Harvard Square property owners in *Crimson Galeria* filed to dismiss with prejudice all pending claims voluntarily.<sup>274</sup> Although no longer pending, *Crimson Galeria* was perhaps the boldest of the RICO-based claims due to the scope and nature of the alleged injuries and damages.

In *Crimson Galeria*, property owners in the Harvard Square area of Cambridge, Massachusetts, initiated civil RICO proceedings against the operators of a marijuana cultivation facility and a proposed retail dispensary in late 2017.<sup>275</sup> The complaint asserted the distasteful conditions marijuana businesses bring to neighborhoods including foul odors, undesirable populations, and criminal activity that adversely affects property values and the ability to find suitable renters.<sup>276</sup> Initially, the complaint included claims against state and local officials who licensed the operations.<sup>277</sup> The court unsurprisingly dismissed those claims because the plaintiffs in *Crimson Galeria*, like those in *Safe Streets Alliance v. Hickenlooper*, lacked a substantive right to enforce the CSA and could “[n]ot invoke the [c]ourt’s equitable power through this lawsuit.”<sup>278</sup>

The Harvard Square property owners claimed increased difficulty in attracting buyers or renters and the inability to obtain financing for a proposed expansion of a property due to the marijuana activities in the neighborhood.<sup>279</sup> To prove their injuries, the plaintiffs relied heavily on experts such as a licensed real estate appraiser.<sup>280</sup> The appraiser compared

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272. *Crimson Galeria Ltd. P’ship v. Healthy Pharms, Inc.*, 337 F. Supp. 3d 20, 32 (D. Mass. 2018).

273. See Stipulation of Voluntary Dismissal with Prejudice at 1, *Crimson Galeria*, No. 1:17-cv-11696-ADB (D. Mass. Nov. 9, 2018).

274. *Id.*

275. *Crimson Galeria*, 337 F. Supp. 3d at 26–27.

276. Complaint at 10, *Crimson Galeria*, No. 1:17-cv-11696-ADB (D. Mass. Sept. 7, 2017).

277. *Crimson Galeria*, 337 F. Supp. 3d. at 34.

278. *Id.*

279. *Id.* at 29.

280. *Id.*

the “stigma” of association with the marijuana activities to that of association with “a drug and alcohol treatment center or groundwater-contaminated property” and estimated the loss of value of \$18,785,000 plus an additional \$8,290,000 in lost profits.<sup>281</sup> The Harvard Square property owners initiated the action before the proposed retail facility opened in December 2017 and later amended their complaint after the facility opened.<sup>282</sup>

On October 5, 2018, the Harvard Square property owners filed an amended complaint against the remaining defendants.<sup>283</sup> The Harvard Square property owners alleged injury to their property of approximately \$29,064,200 as a result of the medical marijuana patients illegally selling their legally acquired marijuana on the property owners’ premises in addition to the associated odor, traffic, and noise caused by the marijuana operation.<sup>284</sup> The remaining defendants included Healthy Pharms, Inc.; Timbuktu Real Estate, LLC; 3 Brothers Real Estate, LLC; two individuals with ownership interests in the three businesses; and Century Bank, which provided financing for Timbuktu.<sup>285</sup> The amended complaint alleged multiple violations of the RICO statute and nuisance claims as well as a request for declaratory judgment.<sup>286</sup>

The amended complaint also addressed weaknesses related to proximate cause that were evident in the court’s treatment of the initial complaint.<sup>287</sup> For example, the Harvard Square property owners emphasized the “open and ongoing” federal crimes as causing depressed market values and making the area less attractive to customers, renters, and potential buyers.<sup>288</sup> The complaint alleged the marijuana operation’s enterprise produced loud noises, impacted traffic, affected the safety of the area, and introduced undesirable odors.<sup>289</sup>

To prove damages, the Harvard Square property owners again offered an expert real estate appraiser who believed the marijuana enterprise had “substantially diminished” the value of the Harvard Square property

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281. *Id.* Note that a verdict in favor of the plaintiffs would yield treble damages making the potential reward significant. See 18 U.S.C. § 1964(c) (2012).

282. *Crimson Galeria*, 337 F. Supp. 3d at 30.

283. First Amended Complaint at 1, *Crimson Galeria*, No. 1:17-cv-11696-ADB (D. Mass. Oct. 5, 2018).

284. *Id.* at 4.

285. *Id.* at 5–7.

286. *Id.* at 44–52.

287. *Id.* at 34–44.

288. *Id.* at 34.

289. *Id.*

owner's property making it difficult to find appropriate renters and buyers and reducing available financing for legitimate businesses in the area.<sup>290</sup> The Harvard Square property owners also alleged that the dispensary's patrons were carrying out illegal drug transactions on their property and provided photographic proof.<sup>291</sup> As a result of the marijuana operations, the Harvard Square property owners experienced slowed development of residential units and banks provided less financing in spite of a normally robust market in the area.<sup>292</sup> Experts presented by the Harvard Square property owners included an economist, noise consultants, and traffic specialists.<sup>293</sup> In addition, the Harvard Square property owners had tangible economic losses—reduced financing for planned projects—to support their claims of injury.<sup>294</sup>

The *Crimson Galeria* property owners abandoned their claims in November 2018, within weeks of the pro-marijuana operation verdict in *Safe Streets Alliance v. Alternative Holistic Healing, LLC*, although the property owners appeared to be better-situated than many of the other potential plaintiffs across the nation.<sup>295</sup> *Crimson Galeria* involved an enormous sum of money, especially if tripled for RICO-based damages, experts in multiple fields, and evidence of the marijuana directly affecting established businesses in the Cambridge area.<sup>296</sup> The quick demise of *Crimson Galeria*, especially so close to the marijuana operation's victory in Colorado, may indicate that the use of RICO to combat state-sanctioned marijuana operations is not likely to succeed in court.<sup>297</sup>

#### V. Evaluating the Harvest: Lessons for Potential Claimants

While circumstances may arise that perfectly situate a property owner to use RICO to combat state-sanctioned marijuana activity, the RICO cases indicate that most property owners are unlikely to succeed.<sup>298</sup> For those

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290. *Id.* at 35–36.

291. *Id.* at 36, 41–43.

292. *Id.* at 36.

293. *Id.* at 37–39.

294. *Id.* at 37.

295. Stipulation of Voluntary Dismissal with Prejudice at 1, *Crimson Galeria*, No. 1:17-cv-11696-ADB (D. Mass. Nov. 9, 2018).

296. First Amended Complaint at 1, *Crimson Galeria*, No. 1:17-cv-11696-ADB (D. Mass. Oct. 5, 2018).

297. Stipulation of Voluntary Dismissal with Prejudice at 1, *Crimson Galeria*, No. 1:17-cv-11696-ADB (D. Mass. Nov. 9, 2018).

298. *See supra* Part IV.

who believe they may be perfectly situated, the current RICO cases provide some insight into the obstacles that property owners must overcome.<sup>299</sup> As demonstrated by *Safe Streets Alliance v. Alternative Holistic Healing, LLC*, the issue of establishing a RICO violation for the cultivation, production, or sale of marijuana is likely to be one for which there is no genuine dispute of material fact, which means the issue may result in summary judgment.<sup>300</sup> As the Tenth Circuit explained, “Marijuana is a controlled substance under the CSA. So the manufacture, distribution, and sale of that substance is, by definition, racketeering activity under RICO.”<sup>301</sup> Proving injury to business or property, and causation between the racketeering activity and that injury pose greater challenges.<sup>302</sup>

As the RICO cases demonstrate, the alleged injury to property or business caused by state-sanctioned marijuana operations will likely be tied to nuisances created by odors associated with marijuana operations and the diminution of property value based on proximity to a criminal enterprise. However, property owners may not recover for “emotional, personal, or speculative future injuries.”<sup>303</sup> While recovery may be available for infringing on the use and enjoyment of the land, property owners bringing claims under RICO must tie their damages to the value of the property. During the pleading stages, property owners may not have to provide experts to prove that their property value is diminished. However, *Safe Streets Alliance v. Alternative Holistic Healing, LLC* and *Crimson Galeria* show that experts attesting to the value of the property both before and after the marijuana operation commenced will be critical to success beyond the pleading stage.<sup>304</sup> In some jurisdictions, such as Oregon and California, property owners will likely have to show that they sold property, rented it, or attempted to do so at a lower value than before the marijuana operation commenced. However, many property owners take legal action because they want to preserve their properties without being subjected to a state-

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299. *See supra* Part IV.

300. Order Re: Summary Judgment Motions at 8, *Safe Sts. All. v. Alt. Holistic Healing, LLC*, No. 1:15-cv-00349-REB-SKC (D. Colo. Aug. 1, 2018) (“Because the cultivation and sale of marijuana remain illegal under the CSA, there can be no genuine dispute of material fact that defendants’ activities meet the statutory definition of racketeering activity.”).

301. *Safe Sts. All. v. Hickenlooper*, 859 F.3d 965, 884 (10th Cir. 2017).

302. *See Safe Sts. All. v. Alt. Holistic Healing, LLC*, No. 15-CV-00349-REB-SKC, 2018 WL 3861156, at \*1 (D. Colo. Aug. 14, 2018).

303. *Hickenlooper*, 859 F.3d at 888–89.

304. First Amended Complaint at 1, *Crimson Galeria Ltd. P’ship v. Healthy Pharms, Inc.*, No. 1:17-cv-11696-ADB (D. Mass. Nov. 9, 2018); *Alt. Holistic Healing, LLC*, 2018 WL 3861156, at \*1.

sanctioned marijuana operation, which means they are unlikely to want to sell the property.

Proving injury to business will also be difficult because such losses are often speculative. *Quillinan* and *Crimson Galeria* illustrate these challenges.<sup>305</sup> In *Quillinan*, the dispossession of a rented storage space was insufficient to allege injury to business because the injury was of the type that could have occurred with any change in building ownership.<sup>306</sup> The Harvard Square property owners in *Crimson Galeria* had a stronger claim based on banks reducing lines of credit.<sup>307</sup> However, even the Harvard Square property owners in *Crimson Galeria* ultimately determined that pursuing the case was not worthwhile.<sup>308</sup> The fact that legalized marijuana—especially recreational use—often results in increased property values for land suitable for producing or selling marijuana also makes injury to property difficult to prove.<sup>309</sup>

A simplistic reading of RICO creates the impression that proving the elements of a RICO claim only requires proving that the marijuana operation violated the statute by engaging in racketeering activity and that activity injured property. However, *Holmes* stated otherwise by requiring proximate cause as an additional element of a § 1964 RICO claim by a private actor.<sup>310</sup> As a result, property owners must prove both an injury to property or business and that the criminal activity caused the injury.<sup>311</sup> The property owners in *Safe Streets Alliance v. Alternative Holistic Healing, LLC* failed to show proximate cause, and the property owners in *McCart* likely would have failed had the case not been settled—as was illustrated by the court’s dismissal in *Bokaie*.<sup>312</sup> *Ainsworth*, which is closely related to

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305. *Crimson Galeria Ltd. P’ship v. Healthy Pharms, Inc.*, 337 F. Supp. 3d 20, 32 (D. Mass. 2018); *Quillinan v. Ainsworth*, No. 4:17-cv-00077-KAW, 2018 WL 2151936, at \*1 (N.D. Cal. May 10, 2018).

306. *Quillinan*, 2018 WL 2151936, at \*5.

307. *Crimson Galeria*, 337 F. Supp. 3d at 29.

308. Stipulation of Voluntary Dismissal with Prejudice at 1, *Crimson Galeria*, No. 1:17-cv-11696-ADB (D. Mass. Nov. 9, 2018).

309. See, e.g., Art Carden, *Legalizing Pot Sales Means . . . Higher Home Values?*, FORBES (July 17, 2018, 7:11 AM), <https://www.forbes.com/sites/artcarden/2018/07/17/legalizing-pot-sales-means-higher-home-values/#13d5326b7e8f>.

310. *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 268 (1992).

311. *Id.*

312. See *supra* Section IV.B; *Bokaie v. Green Earth Coffee, L.L.C.*, No. 18-cv-0524-JST, 2018 WL 6813212, at \*7 (N.D. Cal. Dec. 27, 2018). See Final Judgment at 1, *Reilly v. 6480 Pickney, LLC*, No. 1:15-cv-00349-REB-SKC (D. Colo. Nov. 8, 2018).

*McCart*, also failed to prove the marijuana operation reduced property values and caused injury to property.<sup>313</sup>

RICO gives litigants access to federal courts under federal question jurisdiction;<sup>314</sup> however, RICO does not protect a plaintiff from facing a potentially pro-marijuana jury. Marijuana legalization is becoming increasingly popular among the public,<sup>315</sup> and states that have legalized marijuana have often done so in response to populist efforts. Convincing a jury that a state-sanctioned marijuana operation creates such a nuisance that it damages one's ability to enjoy property or reduces its value is a daunting task—especially in areas like Colorado where property values have increased dramatically following legalization.<sup>316</sup> The property owners in *Safe Streets Alliance v. Alternative Holistic Healing, LLC* could not convince a jury that the marijuana producers caused the injury.<sup>317</sup> Moreover, *Safe Streets Alliance v. Alternative Holistic Healing, LLC* may have led the Harvard Square property owners in *Crimson Galeria* to dismiss their complaint because they would have faced similar issues in Massachusetts, which began permitting recreational marijuana sales in November 2018.<sup>318</sup> The jury verdict in *Safe Streets Alliance v. Alternative Holistic Healing, LLC* will likely reduce the number of RICO-based claims targeting state-sanctioned marijuana operations.

*Safe Streets Alliance v. Hickenlooper* also demonstrates that RICO is not a useful tool to prevent states or local governments from legalizing marijuana.<sup>319</sup> *Safe Streets Alliance v. Hickenlooper* initially included equity claims against the State of Colorado and a county government that alleged injury to property by licensing the marijuana operation.<sup>320</sup> The Tenth

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313. *Ainsworth v. Owenby*, No. 617-cv-01935-MC, 2019 WL 1387681, at \*2 (D. Or. Mar. 27, 2019).

314. 18 U.S.C. § 1964(c) (2012).

315. Hannah Hartig & A.W. Geiger, *About Six-in-Ten Americans Support Marijuana Legalization*, PEW RES. CTR. (Oct. 8, 2018), <http://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/> (“The share of U.S. adults who support marijuana legalization is little changed from about a year ago—when 61% favored it—but it is double what it was in 2000 (31%).”).

316. Carden, *supra* note 309.

317. Final Judgment at 1, *Reilly*, No. 1:15-cv-00349-REB-SKC (D. Colo. Nov. 8, 2018).

318. Nik DeCosta-Klipa, *What to Know Before Visiting the New Recreational Marijuana Dispensaries in Massachusetts*, BOSTON.COM (Nov. 16, 2018), <https://www.boston.com/news/local-news/2018/09/21/massachusetts-marijuana-dispensaries-how-to-buy> (reporting an increase of six percent per home in Colorado since legalization); *see also* Elias, *supra* note 194.

319. *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 877 (10th Cir. 2017).

320. *Id.*

Circuit concluded that the plaintiffs lacked “any *federal substantive rights*” as to the state and county and upheld dismissal of the claims.<sup>321</sup> Efforts to use RICO against the state and local government also failed in *Crimson Galeria* with the dismissal of a preemption claim.<sup>322</sup>

However, the RICO cases demonstrate yet another reason why the federal government needs to address marijuana’s inclusion in the Controlled Substances Act. As more states legalize marijuana for either medical or recreational use, problems related to banking, taxation, employment, and criminal law continue to escalate. Landowners’ ability to utilize federal racketeering laws to attack what some states consider a legitimate business adds another layer of complication. The availability of RICO as a tool for landowners may needlessly create dissension between neighbors, expenses in the form of legal fees, and time-wasting federal litigation. Allowing state and local governments to regulate marijuana production based on local needs would best resolve these issues.

#### *VI. Conclusion*

In the wake of *Safe Streets Alliance v. Alternative Holistic Healing, LLC*, Oklahoma property owners face a daunting challenge when using RICO to pursue claims based on odor-related nuisances or decreased property value due to proximity to a criminal enterprise. Most property owners are likely limited to private nuisance claims in state court and working with state and local governments to establish sufficiently protective regulatory schemes. However, a perfect storm of injury and proximate cause could make RICO an incredibly effective tool for an aggrieved property owner in Oklahoma. Imagine, perhaps, a marijuana operation’s waste disposal processes damage a neighbor’s crops or livestock. If the aggrieved property owner could prove that the marijuana operation proximately caused “clear and definite” injury to his property or business, she could recover treble damages and attorney’s fees under RICO.

*Marci J. Gracey*

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321. *Id.*

322. *Crimson Galeria Ltd. P’ship v. Healthy Pharms, Inc.*, 337 F. Supp. 3d 20, 32 (D. Mass. 2018).