



2020

## Hemp, Kentucky, and the Law

Ryan Quarles

*Commonwealth of Kentucky*

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### Recommended Citation

Quarles, Ryan (2020) "Hemp, Kentucky, and the Law," *Kentucky Journal of Equine, Agriculture, & Natural Resources Law*. Vol. 12 : Iss. 2 , Article 4.

Available at: <https://uknowledge.uky.edu/kjeanrl/vol12/iss2/4>

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# Hemp, Kentucky, and the Law

Ryan Quarles\*

## INTRODUCTION

On March 26, 1810, fresh off of a bloody duel, Henry Clay, Kentucky's native son, hemp farmer, and future Speaker of the United States House of Representatives, stood on the floor of Congress for one of his very first speeches.<sup>1</sup> Clay vigorously advocated that the United States Navy give preference to American made hemp sails and rope.<sup>2</sup> Threatened by foreign markets, Clay sought to boost domestic hemp prices to provide a cash crop for the farmers of central Kentucky.<sup>3</sup> As fate would have it, precisely 208 years later *to the day* United States Senate Majority Leader Mitch McConnell stood on the grounds of the Kentucky Department of Agriculture (“KDA”) and made international headlines by announcing his plans to legalize hemp for the first time in over seventy years of dormancy.<sup>4</sup> Like Clay, he too sought to fight foreign hemp markets and give the farmers of his home state an alternative cash crop that once thrived in Kentucky.<sup>5</sup>

Rarely do two leaders of each chamber of Congress intersect on policy two centuries apart, much less on the exact same crop. But, that is the story of hemp: a crop full of contradictions, complexities, and myths which span from colonial times to the 21<sup>st</sup>

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<sup>1</sup> HENRY CLAY, THE PAPERS OF HENRY CLAY, VOLUME 1: THE RISING STATESMAN, 1797-1814 459 (James F. Hopkins et al. eds., 1959).

<sup>2</sup> *Id.*

<sup>3</sup> *See id.* at 460.

<sup>4</sup> Mike Debonis, *Mitch McConnell renews push to legalize industrial hemp*, THE WASH. POST (March 26, 2018, 2:30 PM), <https://www.washingtonpost.com/news/powerpost/wp/2018/03/26/mitch-mcconnell-renews-push-to-legalize-industrial-hemp/> [<https://perma.cc/TLK3-FYCR>].

<sup>5</sup> *See generally id.* (discussing Mitch McConnell's desire to help hemp cultivate in his home state of Kentucky).

century.<sup>6</sup> Since becoming a Commonwealth in 1792, Kentucky has been defined by its rich farming heritage and is known throughout the world for its agricultural products such as thoroughbred race horses, tobacco, Kentucky Fried Chicken, bourbon, and yes, hemp.<sup>7</sup>

Kentucky's history is entwined with the history of hemp.<sup>8</sup> When Archibald McNeill first recorded growing the crop outside of Danville in 1775, it was quickly determined that Kentucky's rich soil and climate made for perfect growing conditions, just as it had for tobacco.<sup>9</sup> Many Kentucky farmers, including my great-grandfather, grew hemp for rope during World War II.<sup>10</sup> In fact, the U.S. Department of Agriculture ("USDA") produced a promotional video in 1942 encouraging farmers to grow hemp.<sup>11</sup> In it, a patriotic narrator describes how "in Kentucky, much of the seed hemp acreage is on river bottom lands . . . along the Kentucky River gorge."<sup>12</sup> With more than 26,000 acres of hemp harvested in Kentucky in 2019,<sup>13</sup> it's clear that hemp is a crop that connects our past to our future.<sup>14</sup>

Hemp is frequently in the news, especially following the passage of the 2018 Farm Bill, which included *The Hemp Farming Act of 2018*.<sup>15</sup> As one can imagine, "legal issues abound when discussing the laws and regulations governing cannabis cultivation and marketing in the United States."<sup>16</sup> To give an overview of the laws, history, and future of Kentucky's hemp program, this Comment begins by legally defining hemp in Section

<sup>6</sup> See generally JAMES F. HOPKINS, A HISTORY OF THE HEMP INDUSTRY IN KENTUCKY (1998) (examining the long history of hemp starting in the colonial times up until the 21<sup>st</sup> century).

<sup>7</sup> JAMES C. KLOTTER & FRED A. KLOTTER, A CONCISE HISTORY OF KENTUCKY 1-2 (2008).

<sup>8</sup> See Hopkins, *supra* note 6.

<sup>9</sup> *Id.* at 69.

<sup>10</sup> See generally *id.* (discussing the need for rope during World War II and how it was made from hemp grown by Kentucky farmers).

<sup>11</sup> HEMP FOR VICTORY (U.S. Dep't of Agric. 1942).

<sup>12</sup> *Id.*

<sup>13</sup> Katie Pratt, *Despite trade concerns, Kentucky agricultural receipts hold steady for third year, net incomes up*, Northern Kentucky Tribune (Dec. 8, 2019), <https://www.nkytribune.com/2019/12/despite-trade-concerns-kentucky-agricultural-receipts-hold-steady-for-third-year-net-incomes-up/> [<https://perma.cc/U7F5-3X6Y>].

<sup>14</sup> See KLOTTER & KLOTTER, *supra* note 7.

<sup>15</sup> Hemp Farming Act of 2018, H.R. 5485, 115th Cong. (2018).

<sup>16</sup> Ryan Quarles, *Hemp: Connecting Kentucky's Past with its Future*, 1 J. OF AGRIC. HEMP RES. 1, 2 (2019).

I. Section II examines the return of hemp to Kentucky through the Kentucky Department of Agriculture's hemp program and the federal government's regulatory oversight of the hemp industry. Section III discusses the response to the obstacles that resulted from the administrative transition in the Office of the Kentucky Agriculture Commissioner. Section IV explores Kentucky's progress in expanding the program to benefit farmers and businesses since 2016. Finally, Section V concludes by exploring what the future entails for hemp.

### I. HEMP'S LEGAL ORIGIN AND DEFINITION

Before diving into the laws and competing frameworks which guide hemp production, one must first know the single most important law concerning the crop: its definition. Unlike any other crop grown in the United States, hemp is defined through an act of Congress rather than by farmers, agronomists, crop researchers, or biologists.<sup>17</sup> This was not always the case. Hemp cultivation thrived in Kentucky from 1775 through 1937 untethered, untangled and unimpaired by federal law until the late 1930's.<sup>18</sup> During this golden age, production surged in the central Kentucky region for historical uses ranging from paper, clothing, textiles, rope making, and even livestock feed.<sup>19</sup> As steamboats replaced traditional sailing ships and the invention of competing fibers such as nylon, the demand for hemp waned during the Great Depression to historic lows.<sup>20</sup>

On the heels of dozens of states adopting the *Uniform State Narcotics Act*,<sup>21</sup> and, for reasons not entirely clear and still subject to cannabis folklore, Congress passed the *Marihuana Tax Act of 1937*,<sup>22</sup> effectively ending hemp production in America.<sup>23</sup> Without

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<sup>17</sup> RENÉE JOHNSON, CONG. RESEARCH SERV., DEFINING HEMP: A FACT SHEET 1 (2019).

<sup>18</sup> Hopkins, *supra* note 6.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 193.

<sup>21</sup> Uniform State Narcotic Drug Act, 21 U.S.C. §§ 1201–1204 (1934) *repealed by* Anti-Drug Abuse Act of 1988, 102 Stat. 4181.

<sup>22</sup> Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551, *overturned by* Leary v. United States 395 U.S. 6 (1969) and *repealed by* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1292 (1970).

<sup>23</sup> Hopkins, *supra* note 6.

distinguishing between hemp and marijuana, the new law's cost-prohibitive tax not only rendered hemp cultivation unprofitable, but it also gave federal prosecutors a right of action to prosecute those cultivating for illicit use.<sup>24</sup> It was not until an acute demand for rope by the United States Navy after the outbreak of World War II did the need for hemp cultivation necessitate a brief carve out exemption from the tax.<sup>25</sup> Administered by the USDA and spurred by the "Hemp For Victory" campaign, thousands of tax exempt licenses to grow hemp were given to increase production.<sup>26</sup> Many of these licenses went to Kentucky farmers.<sup>27</sup>

Congress did not revisit the legal definition of hemp again until 1970, after the striking down of the *Marihuana Tax Act of 1937* through *Leary v. United States*.<sup>28</sup> In response, Congress passed the *Comprehensive Drug Abuse Prevention and Control Act of 1970*, which officially classified hemp as a Schedule 1 narcotic, indistinguishable from marijuana.<sup>29</sup> However, hemp research did not cease internationally and by August 1976, the first known modern definition of hemp emerged as "a concentration of 0.3 [percent] Delta-9-THC (dry weight basis) in young, vigorous leaves of relatively mature plants as a guide to discriminating two classes of plants."<sup>30</sup> Admittedly an arbitrary distinction, the 0.3 percent THC (Tetrahydrocannabinol, the psychoactive compound found in cannabis) threshold soon became an internationally adopted measurement separating hemp from its illicit cousin.<sup>31</sup> In the 2014 Farm Bill,<sup>32</sup> Congress adopted a very similar definition of hemp to mean "the plant *Cannabis sativa* L.

<sup>24</sup> Marihuana Tax Act of 1937, Pub. L. No. 75-238, §§ 4–6, 50 Stat. 551, *overturned* by *Leary v. United States* 395 U.S. 6 (1969) and *repealed by* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1292 (1970).

<sup>25</sup> Hopkins, *supra* note 6.

<sup>26</sup> Hemp History, HEMP INDUSTRIES ASS'N, <https://www.thehia.org/hisotry> [<https://perma.cc/E4FJ-VBZZ>].

<sup>27</sup> *Id.*

<sup>28</sup> *Leary v. United States*, 395 U.S. 6 (1969).

<sup>29</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 (1970).

<sup>30</sup> Ernest Small & Arthur Cronquist, *A Practical and Natural Taxonomy for Cannabis*, 25 TAXON 405, 408 (1976).

<sup>31</sup> Johnson, *supra* note 17.

<sup>32</sup> Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (codified at 7 U.S.C § 5940).

and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”<sup>33</sup> No other crop is known to have such a complicated history and legally constructed definition, which both adds to the lure and complexity of hemp’s reintroduction.<sup>34</sup>

## II. THE HEMP COMEBACK BEGINS: 2013–2014

### A. *Kentucky Senate Bill 50*

The modern hemp revitalization journey began with various state legislative bills which sought to reintroduce the crop through a state regulatory framework, pending approval from the federal government.<sup>35</sup> After several attempts, the 2013 General Assembly enacted KY Senate Bill 50, the product of considerable negotiations between the two legislative chambers.<sup>36</sup> The Senate’s initial version of the bill would have vested primary responsibility for the hemp program’s design and development in the Kentucky Department of Agriculture with oversight from the Commissioner of Agriculture.<sup>37</sup>

After securing Senate passage by a vote of 31-6 on February 14, 2013, the bill went to the House of Representatives.<sup>38</sup> By means of a House floor amendment, the House of Representatives changed SB 50 to remove much of the Department of Agriculture’s discretionary authority envisioned in the Senate’s version.<sup>39</sup> Instead, greater powers were placed in the hands of the Kentucky Industrial Hemp Commission and the Kentucky State Police.<sup>40</sup> The House’s amendment placed the authority to promulgate administrative regulations (i.e., to design the hemp program’s structure), and to issue grower’s licenses, in the hands

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<sup>33</sup> *Id.* at § 7606.

<sup>34</sup> *See* Johnson, *supra* note 17.

<sup>35</sup> Rich Mundell & D.W. Williams, *An Introduction to Industrial Hemp & Hemp Agronomy*, KY. COLL. OF AGRIC., FOOD, & ENV’T, July 2018), at 1, <http://www2.ca.uky.edu/agcomm/pubs/ID/ID250/ID250.pdf> [<https://perma.cc/ZAN7-AA5D>].

<sup>36</sup> S.B. 50, 2013 Gen. Assemb., Reg. Sess. (Ky. 2013).

<sup>37</sup> *See* S.B. 50, 2013 Gen. Assemb., Reg. Sess. (2013).

<sup>38</sup> *Id.*

<sup>39</sup> *See id.*

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

of the Commission.<sup>41</sup> Criminal background checks would be performed by the Kentucky State Police; any applicant with a felony drug conviction within the previous ten years would not be eligible for licensure.<sup>42</sup> The House floor amendment also created a state-law definition of “hemp” that was expressly pegged to whatever tetrahydrocannabinol (“THC”) levels Congress relied upon in its definition of “marijuana” in the federal Controlled Substances Act, 21 U.S.C. 801 *et seq.*<sup>43</sup>

On March 26, 2013 (203 years to the day after Henry Clay’s speech), SB 50, as amended by the House, was approved by a vote of 88 to 4, including my vote of support as a former legislator.<sup>44</sup> Twelve days later, on April 7, 2013 the bill became law.<sup>45</sup> In so doing, the Kentucky Legislature had exercised the extent of its authority to facilitate hemp farming experimentation.<sup>46</sup> Without action from Congress, however, the longstanding federal prohibition against the cultivation of cannabis would keep things at a standstill.

### *B. Federal Oversight Issues*

In early 2014, Congress included within the Agricultural Improvement Act (the “Farm Bill”) a two-page section that created an opportunity for state-level “agricultural pilot programs” to study the “growth, cultivation, or marketing” of hemp.<sup>47</sup> Led by Senator McConnell and Kentucky’s Congressional delegation, the 2014 Farm Bill allowed farmers to cultivate hemp, “a crop whose history was as old as the Commonwealth itself.”<sup>48</sup>

The “pilot program” concept Congress adopted with the 2014 Farm Bill had important implications for how Kentucky’s hemp program would develop.<sup>49</sup> There were at least two notable components. The first was Congress’s new definition of hemp as

<sup>41</sup> *See id.*

<sup>42</sup> *See id.*

<sup>43</sup> *See id.*

<sup>44</sup> KY. GENERAL S.B 50, 2013 Gen. Assemb., Regular Session (Reg. Sess. (Ky. 2013).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See 7 U.S.C.S. § 5940 (LexisNexis 2014).

<sup>48</sup> Quarles, *supra* note 16, at 1.

<sup>49</sup> See 7 U.S.C.S. § 5940. (LexisNexis 2014).

“the plant *Cannabis sativa L.* and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”<sup>50</sup>

Second, unlike the “program of licensure” for individual farmers that the 2013 General Assembly had authorized with SB 50, Congress did not create a federal system of licensure for private citizens.<sup>51</sup> Indeed, Congress authorized only “agricultural pilot programs” conducted by a state department of agriculture and institutions of higher education.<sup>52</sup>

Soon after President Obama signed the 2014 Farm Bill into law, the most urgent challenge was seed acquisition. Where would KDA and its program participants obtain the planting materials they needed? In early May, KDA learned that a quantity of hemp seeds were being detained by U.S. Customs and Border Protection agents at the United Parcel Service cargo facility in Louisville.<sup>53</sup> With the planting season already underway, KDA swiftly filed suit in U.S. District Court for the Western District to obtain the seeds.<sup>54</sup> The dispute ended with an agreement that the hemp seeds would be allowed entry by a DEA import permit.<sup>55</sup>

By the end of May 2014, KDA had signed a “memorandum of understanding” with a number of farmers wishing to grow hemp within a principal-agent relationship with KDA. KDA also coordinated with representatives of several public universities in Kentucky.

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<sup>50</sup> *Id.* at § 5940(a)(2).

<sup>51</sup> *See id.* at § 5940.

<sup>52</sup> *See id.* at § 5940(a)(1).

<sup>53</sup> Press Release, Ky. Dep’t of Agric., Industrial Hemp Seeds Arrive in Frankfort, Ready for Pilot Research Programs (May 23, 2014), <https://www.kyagr.com/Kentucky-AGNEWS/press-releases/Industrial-hemp-seeds-arrive-in-Frankfort-ready-for-pilot-research-programs.html> [<https://perma.cc/LB8R-YARJ>].

<sup>54</sup> *See* Janet Patton, *Kentucky Agriculture Department, DEA reach deal on Hemp Seeds; Planting Could Come hemp seeds; planting could come soon*, HERALD LEADER (May 21, 2014, 1:40 PM), <https://www.kentucky.com/news/business/article44489994.html> [<https://perma.cc/J538-QLP6>].

<sup>55</sup> *See* Press Release, Ky. Dep’t of Agric., State Ag. Department, Federal Government Reach Accord on Importation of Hemp Seeds (Aug. 14, 2014), <https://www.kyagr.com/Kentucky-AGNEWS/press-releases/State-ag-department-federal-government-reach-accord-on-importation-of-hemp-seeds.html> [<https://perma.cc/DDK6-94Y3>].

### *C. The Success of Hemp*

The first planting season was limited in scope because of delays in seed acquisition and the challenges inherent in working with a new crop.<sup>56</sup> Of the 33 acres that were planted in 2014, there was moderate success.<sup>57</sup>

The second year saw more success. In 2015, 922 acres were planted, with more than 500 acres harvested.<sup>58</sup> One notable development from the 2015 growing season was the emergence of a new application of the plant—extracting certain chemical compounds, known as cannabinoids, from the floral part of the plant—alongside the traditional components of fiber and grain.<sup>59</sup> One of those cannabinoids was cannabidiol (“CBD”), a chemical compound that was said to hold great promise in health and wellness products.<sup>60</sup> To the surprise of many, almost half of the acreage planted in 2015 was attributed to farmers growing hemp for CBD rather than grain or fiber.<sup>61</sup> Whether CBD and other cannabinoids would prove commercially viable—and what CBD’s legal status was under federal law—remained unclear.

### III. CHALLENGES AT THE START OF A NEW ADMINISTRATION

When I took office as Agriculture Commissioner in 2016, Kentucky’s hemp program remained in its infancy.<sup>62</sup> Even then, it was evident that changes were needed.<sup>63</sup> Although SB 50 placed responsibility for hemp program oversight and management on the Industrial Hemp Commission, its 26-member board had not convened for a meeting since May 2014.<sup>64</sup> With no staff support, the Commission was unable to carry out its duties, which meant that responsibility fell to KDA and its employees to keep the

<sup>56</sup> See *Industrial Hemp Research Pilot Program Overview*, KY. DEP’T OF AGRIC., <https://www.kyagr.com/marketing/hemp-overview.html#> [https://perma.cc/73ZR-PVD4].

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See U. KY. C. AGRIC., UK Industrial Hemp Research Progressing in Second Year, Ky. Dep’t of Agric., <https://www.kyagr.com/Kentucky-AGNEWS/2015/UK-industrial-hemp-research-progressing-in-second-year.html> [https://perma.cc/M4PU-SMCV].

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Quarles, *supra* note 16, at 2.

<sup>63</sup> *Id.*

<sup>64</sup> See 2013 Ky. Acts 14, §3.

program running throughout the latter half of 2014 and all of 2015.<sup>65</sup>

Kentucky's hemp program needed change to operate effectively and to better serve the growing number of farmers and entrepreneurs interested in hemp.<sup>66</sup> In 2016, the Kentucky Department of Agriculture reviewed the hemp program and worked with staff to refine methods already in place.<sup>67</sup>

As Commissioner of Agriculture, the goal was to create a healthy and productive hemp program that would make Kentucky the center of hemp production.<sup>68</sup> While other states were reluctant to adopt hemp, the KDA aimed to “use the first-mover advantage” to better serve farmers and researchers in the state.<sup>69</sup> The idea was to prepare the state for future federal approval of hemp, allowing Kentucky to be more attractive to commercial investments around the world and give Kentucky farmers a potential alternative crop.<sup>70</sup>

#### *A. A Plan for Kentucky*

Three principles guided the KDA team's work. First, it was imperative to build a strong, trusting, and mutually supportive relationship with the Kentucky State Police and other law enforcement agencies. Second, the KDA needed to find ways to reduce the paperwork and administrative burdens that were required of program participants and KDA's own employees. Third, the KDA needed to empower our growers and processors. Above all, I wanted the organization to commit to a mindset of continuous process-improvement as we aspired to be the best program in America.

The first step was to create a clear written document that farmers and entrepreneurs could read to understand the “rules of the road.” Because SB 50 had vested authority to promulgate administrative regulations in the now-dormant Industrial Hemp Commission, which had not met in years, KDA itself could not

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<sup>65</sup> *See id.*

<sup>66</sup> Quarles, *supra* note 16, at 2.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

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

<sup>70</sup> *Id.*

promulgate regulations without first seeking a change in law from the General Assembly.<sup>71</sup> In anticipation of that step, KDA's staff dedicated hundreds of hours to hammering out a detailed policy guide that could fill the gap in the meantime. The product of the deliberations was a 25-page *2017 Policy Guide*, which set the parameters for the upcoming year's growing season and served as a transparent prototype for future administrative regulations.<sup>72</sup> For the first time, a member of the public could read, in black-and-white text, what the rules of the road would be.<sup>73</sup>

The next step was to ask the General Assembly for some help in revising Kentucky's legislative framework. Senate Bill 50 was not working for at least three major reasons.<sup>74</sup> The first reason was the structural misalignment between state law and federal law.<sup>75</sup> While the 2013 General Assembly had enacted SB 50 with the expectation that Congress would adopt a system of individualized licensure of farmers,<sup>76</sup> the 2014 Farm Bill's "agricultural pilot programs" had restricted participation to state departments of agriculture and universities.<sup>77</sup>

The second reason arose from structural deficiencies within Senate Bill 50.<sup>78</sup> For instance, that the Industrial Hemp Commission had not held a meeting since May 2014, in part because it was a major undertaking simply to achieve a simple-majority quorum of its 26 members.<sup>79</sup> Additionally, because the Commission had no full-time staff support, it had proven almost impossible for that body to maintain any continuity of effort over time. Responsibilities that should have been assigned to an executive-branch agency with full-time employees, such as the

<sup>71</sup> See 2013 Ky. Acts 134.

<sup>72</sup> 302 KY. ADMIN. REGS. § 50:030 (Ky. Dep't of Agric., 2018) (the 2017 Policy Guide was subsequently promulgated as a regulation).

<sup>73</sup> See *id.*

<sup>74</sup> See S.B. 50, 2013 Gen. Assemb., Reg. Sess. (Ky. 2013).

<sup>75</sup> See *id.*; see also Quarles, *supra* note 16, at 2.

<sup>76</sup> See S.B. 50, 2013 Gen. Assemb., Reg. Sess. (Ky. 2013).

<sup>77</sup> See 7 U.S.C.S. § 5940 (LexisNexis 2014).

<sup>78</sup> See S.B. 50, 2013 Gen. Assemb., Reg. Sess. (Ky. 2013); see also Quarles, *supra* note 16, at 2.

<sup>79</sup> Quarles, *supra* note 16, at 2.

promulgation of administrative regulations, had instead been placed in the Commission's hands.<sup>80</sup>

The third reason SB 50 was deficient was that it did not answer important public-policy questions.<sup>81</sup> These included concerns about the handling of hemp after harvest, the retention of floral materials by the public, and possession of products, especially live plants and seeds, by those not included in the pilot program.<sup>82</sup> None of these questions were answered by SB 50.

#### IV. LEGISLATIVE CHANGES LEAD TO EXPLOSIVE GROWTH

At the KDA's request, the 2017 General Assembly passed Senate Bill 218 which resulted in widespread changes to the hemp program.<sup>83</sup> The enactment of SB 218 allowed the hemp program to grow in ways that would not have been possible without legislative support.<sup>84</sup> The bill contained several important features that emerged from the 2016 review, including the transfer of powers from the Industrial Hemp Commission to the KDA.<sup>85</sup> This change allowed the KDA to create administrative regulations and brought about a new advisory board, the Industrial Hemp Advisory Board.<sup>86</sup> The board was purely advisory in nature and allowed KDA to receive input from those in the industry.<sup>87</sup> The bill created a clear distinction between those needing licensing.<sup>88</sup> This separates those who grow, handle, or process the plants, seeds, leaf materials and floral material from those that buy a finished product or own an already harvested material.<sup>89</sup>

Soon after the Governor signed SB 218 into law, KDA went to work to formulate the administrative regulations that would give program participants an even clearer view of how the licensure program would work.<sup>90</sup> This work culminated in the

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<sup>80</sup> *Id.* at 2–3.

<sup>81</sup> *See* S.B. 50, 2013 Gen. Assemb., Reg. Sess. (Ky. 2013); *see also id.* at 3.

<sup>82</sup> Quarles, *supra* note 16, at 3.

<sup>83</sup> *See* 2017 Ky. Acts 45, §§ 1–14.

<sup>84</sup> Quarles, *supra* note 16, at 3.

<sup>85</sup> *See* KY. REV. STAT. § 260.862 (2017).

<sup>86</sup> *See id.*; *see* KY. REV. STAT. § 260.860 (2017).

<sup>87</sup> *See* KY. REV. STAT. § 260.860 (2017).

<sup>88</sup> *See* KY. REV. STAT. § 260.858(3) (2017).

<sup>89</sup> *Id.*

<sup>90</sup> *See* S.B. 218, Regular Session (2017 Gen. Assemb., Reg. Sess. (Ky. 2017)).

promulgation of a separate guide for licensed growers, licensed processors, and affiliated university researchers.<sup>91</sup>

Thanks to the framework provided by statutory and regulatory guidelines, the state successfully increased hemp production. In 2018, Kentucky farmers planted 6,700 acres of hemp, more than double what was previously planted.<sup>92</sup> The number of licensed processors increased from 210 in 2018 to almost 1,000 in 2019, with the number of planted acreage also likely to double.<sup>93</sup>

The resulting economic impact numbers spoke volumes.<sup>94</sup> Gross product sales grew from \$16.7 million in 2017 to \$57.7 million in 2018.<sup>95</sup> Payments to farmers also increased to \$17.5 million in 2018, nearly double the \$7.5 million recorded in 2017.<sup>96</sup> Full time jobs more than tripled in that time frame as well, growing from eighty-one to 281 positions.<sup>97</sup> More than \$100 million has been invested by Kentucky processors.<sup>98</sup> Sales of Kentucky hemp products reached \$193.4 million in 2019.<sup>99</sup> Despite these economic numbers, there exists major growing pains in the

<sup>91</sup> See 302 KY. ADMIN. REGS. § 50:020 (Ky. Dep't of Agric., 2018); 302 KY. ADMIN. REGS. § 50:030 (Ky. Dep't of Agric., 2018); 302 KY. ADMIN. REGS. § 50:040 (Ky. Dep't of Agric., 2018).

<sup>92</sup> *Kentucky Hemp Industry's Economic Impact Showed Explosive hemp industry's economic impact showed explosive growth in 2018*, SENTINEL-ECHO (Mar. 22, 2019), [https://www.sentinel-echo.com/community/kentucky-hemp-industry-s-economic-impact-showed-explosive-growth-in/article\\_85ce450d-61e1-5c65-8d4a-fe3229362357.html](https://www.sentinel-echo.com/community/kentucky-hemp-industry-s-economic-impact-showed-explosive-growth-in/article_85ce450d-61e1-5c65-8d4a-fe3229362357.html) [<https://perma.cc/BTQ3-RH99>].

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

<sup>94</sup> Quarles, *supra* note 16, at 3.

<sup>95</sup> SENTINEL-ECHO, *supra* note 92.

<sup>96</sup> Quarles, *supra* note 16, at 3.

<sup>97</sup> *Industrial Hemp Research Pilot Program Overview*, *supra* note 56; Doris Hamilton, *Industrial Hemp Research Pilot Program*, KY. DEP'T OF AGRIC. (Oct. 11, 2018), [https://www.kyagr.com/marketing/program\\_id/70/documents/HEMP\\_2019HempApplicantMeeting10-11-18\\_000.pdf](https://www.kyagr.com/marketing/program_id/70/documents/HEMP_2019HempApplicantMeeting10-11-18_000.pdf) [<https://perma.cc/GT2U-Z8HS>].

<sup>98</sup> See *Kentucky Hemp Industry's Economic Impact*, *supra* note 92; see also *Hemp processing in U.S. state of Kentucky sees flurry of investment*, HEMP TODAY (Aug. 1, 2019), <https://hemptoday.net/kentucky-hemp-investment/> [<https://perma.cc/R6EL-M82T>].

<sup>99</sup> Grace Schneider, *More than 150 Kentucky Farmers Holding Last Year's Hemp Crop After Disastrous Last Season*, COURIER JOURNAL (June 1, 2020 7:04 a.m.), <https://www.courier-journal.com/story/news/local/2020/06/01/kentucky-hemp-farmers-steer-clear-after-2019-tumult/5282812002/> [<https://perma.cc/9JMG-8X5P>].

industry that could affect the stability of emerging hemp markets in the coming years.

## V. ANOTHER BIG STEP FORWARD

In March 2018, Senate Majority Leader Mitch McConnell, in a joint press conference with KDA, introduced the Hemp Farming Act of 2018.<sup>100</sup> This bill was later included in the 2018 Farm Bill.<sup>101</sup>

### A. *The 2018 Farm Bill*

The 2018 Farm Bill, championed by Leader McConnell, allows Kentucky's hemp industry to expand because it makes important changes to federal law.<sup>102</sup> First, the bill removes hemp from the Controlled Substances Act of 1970.<sup>103</sup> Second, it allows hemp farmers to participate in USDA research programs and to receive federal crop insurance.<sup>104</sup> Third, states may not interfere with interstate shipments.<sup>105</sup>

The Farm Bill took a “cooperative federalism” approach and allowed individual state's departments of agriculture to regulate hemp in their jurisdictions.<sup>106</sup> States submitted a focused plan specially focused on each state's needs.<sup>107</sup> The state must meet a federally mandated minimal criteria, including sampling and testing programs, but can otherwise regulate hemp to serve the state's best interest.<sup>108</sup>

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<sup>100</sup> See *Senator McConnell and Commissioner Quarles Announce Hemp Legislation*, KY. DEP'T OF AGRIC. (Mar. 26, 2018), <https://www.kyagr.com/KY-AgNews/2018/Senator-McConnell-and-Commissioner-Quarles-Announce-Hemp-Legislation.html> [<https://perma.cc/67MA-NNCT>].

<sup>101</sup> Harold B. Hilborn, *2018 Farm Bill Legalizes Hemp, but Obstacles to Sale of CBD Products Remain*, NAT'L L. REV. (Mar. 5, 2019), <https://www.natlawreview.com/article/2018-farm-bill-legalizes-hemp-obstacles-to-sale-cbd-products-remain> [<https://perma.cc/PTR8-5XKG>].

<sup>102</sup> See Agriculture Improvement Act of 2018, Pub. L. No. 115-334 § 12619 (2018).

<sup>103</sup> See *id.* § 12619.

<sup>104</sup> See *id.* §§ 7129, 7501, 11102 at 4795, 4819, 4919-20.

<sup>105</sup> See *id.* § 10114 at 4920.

<sup>106</sup> See *id.* § 297(B), at 4909-12.

<sup>107</sup> See *id.*

<sup>108</sup> See *id.* § 10113 at 4908 (creating a new Section 297B, “State and Tribal Plans”).

## CONCLUSION

Fortunately for Kentucky's farmers and processors, the existing hemp program already meets the federal requirements, which means that our program can continue without significant disruptions. It also meant that I was able to attend the White House signing ceremony in December 2019 and present Kentucky's State Plan, the very first in the nation, to USDA Secretary Sonny Perdue just moments after President Trump signed the bill into law.<sup>109</sup> To date, numerous states have modeled their hemp programs on the framework we have built here in Kentucky.<sup>110</sup>

Recently, even more legal complexities have emerged as the USDA published an interim final rule ("IFR") to guide the implementation of the hemp provisions of the 2018 Farm Bill.<sup>111</sup> As state departments of agriculture navigate this rule, challenges still exist within the hemp industry: inevitable FDA oversight, EPA crop technology approvals, hesitation by banks to lend with legal hemp companies, variations in THC testing protocols, and even confusion about interstate commerce of hemp. It seems as though just as much work is left to be done now as did the 70-year effort to legalize hemp. It is my vision that one day hemp will be treated much the same way other agricultural commodities are in the United States. Regardless, Kentucky will develop a long-term hemp market once the dust settles on the legalese which has impeded its growth for almost a century.

Despite these growing pains, "Kentucky continues to lead the way with hemp, just as it did when my great-grandfather grew it generations ago on the banks of the Kentucky River."<sup>112</sup>

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<sup>109</sup> Tom Latek, *KY leaders join Trump at Farm Bill signing, legalizing industrial hemp*, KENTUCKY TODAY (Dec. 20, 2018, 6:19 PM), <http://kentuckytoday.com/stories/ky-leaders-join-trump-at-farm-bill-signing-legalizing-industrial-hemp,16857> [<https://perma.cc/ZNP6-4W9U>].

<sup>110</sup> Tanner Hesterberg, *State officials burn nearly \$20,000 in hemp that failed standard*, WKYT (Apr 13, 2017 3:20 PM) <https://www.wkyt.com/content/news/State-officials-to-burn-nearly-20000-in-hemp-that-barely-failed-standard-419334524.html> [<https://perma.cc/D4VA-PKSH>], <https://www.wkyt.com/content/news/State-officials-to-burn-nearly-20000-in-hemp-that-barely-failed-standard-419334524.html>.

<sup>111</sup> *See* 7 C.F.R. § 990 (2020).

<sup>112</sup> Quarles, *supra* note 16, at 4.