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THE OHIO STATE UNIVERSITY
MORITZ COLLEGE OF LAW

DRUG ENFORCEMENT AND POLICY CENTER

BLOWING SMOKE AT THE SECOND AMENDMENT

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PART 1

INTRODUCTION

The federal government prohibits users of Schedule I drugs from purchasing or possessing a firearm. Despite that most states have enacted legal medical marijuana programs, marijuana is still federally illegal and designated as a Schedule I substance with no medical value. Individuals who use medical marijuana in accordance with their state's licensed programs are nevertheless prohibited from purchasing or possessing a firearm under federal law.¹ As such, the onus is placed on medical marijuana patients to either disclose their marijuana use, which disqualifies themselves from purchasing a firearm and requires they relinquish possession of all firearms, or misrepresent their status as a marijuana user, risking fines or imprisonment. The following discussion will address the problems inherent in the federal government's current regulatory framework for the right to keep and bear arms in the context of medical marijuana use, circumstances that implicate the privilege against self-incrimination, and how to revise the regulatory framework in accordance with the guarantees of the Constitution.

¹ See 18 U.S.C. § 922(g); § 924(a)(2).

PART 2

HOW THE GUN CONTROL ACT AND THE CONTROLLED SUBSTANCES ACT PROHIBIT MEDICAL MARIJUANA PATIENTS FROM PURCHASING OR POSSESSING A FIREARM

The federal government regulates the sale, distribution, and ownership of firearms through the Gun Control Act of 1968 (“Gun Control Act”).² The Gun Control Act regulates the sale of firearms, primarily “to prevent guns from falling into the wrong hands.”³ Under § 922(g) of the Act, the government identifies certain classes of individuals who are prohibited from owning or possessing a firearm, including felons, the mentally ill, and illegal aliens in the United States.⁴ They also identify individuals who are “an unlawful user of or addicted to any controlled substance” as a class of persons wholly prohibited from owning or possessing a firearm.⁵

Controlled substances are classified and defined in the Controlled Substances Act of 1970.⁶ Under the Controlled Substances Act, marijuana is designated as a Schedule I drug.⁷ This designation defines the plant as a “drug...with no currently accepted medical use and a

² See 18 U.S.C. § 922(g).

³ *Abramski v. United States*, 134 S. Ct. 2259, 2263 (2014).

⁴ 18 U.S.C. § 922(g).

⁵ 18 U.S.C. § 922(g)(3).

⁶ See 21 U.S.C. § 801.

⁷ 21 U.S.C. § 812.

high potential for abuse.”⁸ Since marijuana’s scheduling under the Controlled Substances Act, the federal government has gone on to define marijuana as a cannabis plant with an excess of 0.3% THC, whereas if a cannabis plant contains up to 0.3% THC it is considered a hemp cannabis plant, not marijuana, and is legal to possess and use.⁹ To add to this complexity, the federal government has also authorized the sale of Marinol, a lab-derived, synthetic form of THC, and has designated Marinol as a Schedule III drug. Schedule III drugs are defined as drugs or other substances that have less potential for abuse than substances in Schedules I and II and are currently accepted for medical use in the United States, with abuse of the drug possibly leading to only a moderate or low physical dependence or high psychological dependence.¹⁰ Despite Marinol being lab-derived instead of naturally derived from a marijuana plant, there are no differences between the chemical structures or psychological effects of THC in a marijuana plant and the THC in a Marinol capsule.¹¹ Therefore, the federal government has recognized some medical value associated with the use of THC, contrary to marijuana’s designation as a Schedule I drug.



Notwithstanding marijuana’s federal designation as lacking medical value, 36 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have legalized state-licensed medical marijuana programs.



Notwithstanding marijuana’s federal designation as lacking medical value, 36 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have legalized state-licensed medical marijuana programs.¹² Through these programs, individuals may be

⁸ Ibid.

⁹ Agricultural Improvement Act of 2018.

¹⁰ 21 U.S.C.S. § 812 (3).

¹¹ Solvay Pharmaceuticals, Inc., Marinol, Federal Drug Administration Medical Device Databases, (last visited August 3, 2021) https://www.accessdata.fda.gov/drugsatfda_docs/label/2005/018651s021lbl.pdf.

¹² National Conference of State Legislatures, State Medical Marijuana Laws, NCSL (Dec. 12, 2020 11:14 AM), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

recommended medical marijuana to aid or cure their ailments or illnesses.¹³ Further, under these programs individuals will not be criminally penalized for merely possessing or using medical marijuana in accordance with their state's program.¹⁴ However, even though the majority of states recognize medical value of the marijuana plant, the federal government's designation of marijuana as a Schedule I drug supersedes any state laws indicating otherwise.¹⁵ Consequently, legal state medical marijuana programs are still considered federally illegal, and medical marijuana use is still considered a violation of federal law.¹⁶



When a gun owner uses medical marijuana in accordance with their state's program, they are nevertheless in violation of the Gun Control Act.



When a gun owner uses medical marijuana in accordance with their state's program, they are nevertheless in violation of the Gun Control Act.¹⁷ Under § 924 of the Gun Control Act, violations of § 922(g) are punishable by a fine and a term of imprisonment up to 10 years.¹⁸ An individual who uses medical marijuana has two opportunities to violate § 922(g): when they purchase a firearm and when they own or possess a firearm. When purchasing a

¹³ See R.C. § 3796.01 (defining qualifying medical conditions to include “Acquired immune deficiency syndrome; Alzheimer’s disease; Amyotrophic lateral sclerosis; Cancer; Chronic traumatic encephalopathy; Crohn’s disease; Epilepsy or another seizure disorder; Fibromyalgia; Glaucoma; Hepatitis C; Inflammatory bowel disease; Multiple sclerosis; Pain that is either . . . Chronic and severe [or] Intractable; Parkinson’s disease; Positive status for HIV; Post-traumatic stress disorder; Sickle cell anemia; Spinal cord disease or injury; Tourette’s syndrome; Traumatic brain injury; Ulcerative colitis; [and] Any other disease or condition added by the state medical board under section 4731.302 of the Revised Code.”); Missouri Constitution, article XIV, § 1 (permitting patients with qualifying medical conditions, similar to those in Ohio, to lawfully use medical marijuana in the state.); P.S. § 10231.03 (defining serious medical conditions as conditions similar to those defined in Ohio).

¹⁴ See e.g., R.C. § 3796.01; Missouri Constitution, article XIV, § 1; P.S. § 10231.03.

¹⁵ *California v. ARC America Corp.*, 490 U.S. 93, 100 (1989) (“when Congress intends that federal law occupy a given field, state law in that field is pre-empted.”)

¹⁶ See 21 U.S.C. § 812.

¹⁷ 18 U.S.C. § 922(g); § 924(a)(2).

¹⁸ 18 U.S.C. § 924(a)(2).

firearm, prospective gun purchasers are required to complete a Firearms Transaction Record – Form 4473 for the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”).¹⁹ Prospective gun purchasers are required to self-disclose whether they are “an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance[.]”²⁰ The form further warns that “[t]he use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside.”²¹ However, there is no similar mention of other specific prohibited drugs or substances, including heroin, 3,4-methylenedioxymethamphetamine (“ecstasy”), or lysergic acid diethylamide (“LSD”), which all are mind-altering substances and impact a person’s ability to safely use a firearm.²² Moreover, prospective gun purchasers who self-disclose that they use marijuana in accordance with their state’s legalized medical marijuana programs will be prohibited from purchasing a firearm.²³



... prospective gun purchasers who self-disclose that they use marijuana in accordance with their state’s legalized medical marijuana programs will be prohibited from purchasing a firearm.



¹⁹ Bureau of Alcohol, Tobacco, Firearms, and Explosives, Firearms Transaction Record, ATF, 1, 4 (December 11, 2020), <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>; Bureau of Alcohol, Tobacco, Firearms, and Explosives, Important Notice to All Federal Firearms Licensees, ATF, (Dec. 11, 2020, 1:00 PM), <https://www.atf.gov/firearms/atf-form-4473-firearms-transaction-record-revisions>.

²⁰ Bureau of Alcohol, Tobacco, Firearms, and Explosives, Firearms Transaction Record, ATF, 1, 4 (December 11, 2020), <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.

²¹ Ibid.

²² Ibid.

²³ See e.g., *Roman v. Whitaker et al.*, 2:2018cv04947, (Pa.D. 2018); *Wilson v. Lynch*, 835 F.3d 1083, 1089-99 (9th Cir., 2016) (“Prospective purchasers of firearms fill out Form 4473 when they seek to buy a firearm. Form 4473 includes Question 11.e., which asks “Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?” . . . If the answer is “yes,” the putative transaction is prohibited.”)

On the other hand, no similar warnings are given to current gun owners who become medical marijuana patients. When an individual is initially prescribed or recommended marijuana, there is no requirement for the treating physician to consider the potential legal impacts of their patients' marijuana use, much less the implications for their right to keep and bear arms. Rather, the onus is on the gun owner to know they are in violation of the law when consuming a federally scheduled drug and should cease their illegal conduct on their own accord.²⁴ Consequently, under the current federal regulations, if a prospective gun purchaser fails to self-disclose their medical marijuana use while seeking treatment in accordance with their state's program, or if a current gun owner begins using medical marijuana, they may be subjected to fines or imprisonment imposed under § 924.²⁵



... the onus is on the gun owner to know they are in violation of the law when consuming a federally scheduled drug and should cease their illegal conduct on their own accord.



This confusion is amplified for Marinol patients who are either purchasing or possessing a firearm. While nothing in the Gun Control Act prohibits Marinol patients from owning or possessing a firearm, Marinol patients will still produce positive drug tests for marijuana. Therefore, even if a person is legally using Marinol in accordance with their prescription, they nevertheless may be required to demonstrate that they have acted in accordance with federal law.

²⁴ See *United States v. Bowers*, 938 F.3d 790, 792 (6th Cir. 2019) (holding “[t]here was also ample evidence showing that the defendants knew they used marijuana, such that it was not plain error that the jury was never asked if the defendants were “knowingly” unlawful users of a controlled substance, notwithstanding the Supreme Court’s recent decision in *Rehaif v. United States*[.]”)

²⁵ 18 U.S.C. § 924(a)(2).



... marijuana users have a duty to know they are in violation of § 924 and this duty is distinct from other classes of persons defined under § 922(g).



Moreover, marijuana users have a duty to know they are in violation of § 924 and this duty is distinct from other classes of persons defined under § 922(g). In *Rehaif*, the Supreme Court considered the scope of the word “knowingly” under § 924(a)(2)—the section that defines the punishments for all categories of persons described in § 922(g).²⁶ The court held that the defendant’s conviction for possession of a firearm as an alien unlawfully in the United States, in violation of § 922(g)(5) and § 922(a)(2), was rendered in error because the government failed to prove both that the defendant knew he possessed a firearm and that he knew he belonged to a relevant category under the Gun Control Act.²⁷ The court recognized that while typically “ignorance of the law is no excuse,” that maxim only applies in circumstances where the defendant has the requisite mental state with respect to the elements of the crime but is unaware of a statute prohibiting their conduct. But, the maxim does not apply where the defendant “has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct,” thereby negating an element of the offense.”²⁸ Thus, the Supreme Court held “the word ‘knowingly’ [in § 924(a)(2)] applies both to the defendant’s conduct and to the defendant’s status.”²⁹ So, to convict a defendant under § 924(a)(2), “the

²⁶ *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019); § 924(a)(2) (“Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.”)

²⁷ *Rehaif*, 139 S. Ct. at 2194.

²⁸ *Rehaif*, 139 S. Ct. at 2198 (2019) (citing Model Penal Code §2.04, at 27 (“Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.”)) (internal citations omitted).

²⁹ *Rehaif*, 139 S. Ct. at 2194.

Government . . . must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.”³⁰

However, the standard set forth in *Rehaif* for evaluating knowing violations of § 924 by a person identified in § 922(g) has not been applied to individuals who are “unlawful user[s] of or addicted to any controlled substance,” as defined in § 922(g)(3).³¹ Instead, the Sixth Circuit has held to prosecute under § 922(g)(3), “the Government . . . must prove that defendants knew they were unlawful users of a controlled substance, but not, . . . that they knew unlawful users of controlled substances were prohibited from possessing firearms under federal law.”³² Consequently, failure to instruct the jury that defendants must have known they were users of a controlled substance in order to be guilty of violating § 922(g)(3) was not in error.³³



If a person violates the act by using medical marijuana while purchasing or possessing a firearm, they could face fines and a term of imprisonment up to 10 years.



In sum, the Gun Control Act prohibits individuals who are “unlawful user[s] of or addicted to any controlled substance,” from owning or possessing a firearm.³⁴ These unlawful users include medical marijuana patients who use marijuana as recommended by their treating physicians, in accordance with their state’s program, which constitutes knowingly using a

³⁰ *Greer v. U.S.*, 593 U.S. ___ (2021) (citing *Rehaif*, 139 S. Ct. at 2194.)

³¹ See *Bowens*, 938 F.3d at 792 (holding that although the Supreme Court in *Rehaif* held that a person only knowingly violates § 924 when they knowingly possess a firearm and know they belong to a relevant category under § 922(g), marijuana users merely need to know the drug they are using is federally illegal to be in violation. The prosecution need not prove that the marijuana user knew they belonged to a relevant category under § 922(g)).

³² *Bowens*, 938 F.3d at 797.

³³ *Bowens*, 938 F.3d at 796.

³⁴ 18 U.S.C. § 922(g).

federally unlawful substance.³⁵ If a person violates the act by using medical marijuana while purchasing or possessing a firearm, they could face fines and a term of imprisonment up to 10 years.³⁶

³⁵ 18 U.S.C. § 922(g); Bureau of Alcohol, Tobacco, Firearms, and Explosives, Firearms Transaction Record, ATF, 1, 4 (December 11, 2020), <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.

³⁶ 18 U.S.C. § 924(a)(2).

PART 3

DESIGNATING MEDICAL MARIJUANA PATIENTS AS UNLAWFUL DRUG USERS INFRINGES UPON THEIR SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS

The Second Amendment to the United States Constitution guarantees “the right of the people to keep and bear Arms,” providing that this right “shall not be infringed.”³⁷ Construing this language, the Supreme Court has interpreted the Second Amendment to confer an individual right to possess and carry weapons for confrontations.³⁸ But, like most rights, the scope of the right to keep and bear arms is not unlimited.³⁹ Rather, when enacted, the Second Amendment codified the pre-existing right to keep and bear arms, enshrining the right “with the scope it was understood to have when the people adopted it.”⁴⁰ This means that courts are to consider what the right was understood to mean, at the time of enactment, to the public.⁴¹

Since the Second Amendment was ratified in 1791, courts look to the public understanding of the right at that time to determine if a regulation as applied to a class of persons would fall outside the scope of its protection.⁴² Although the text of the Amendment itself does

³⁷ U.S. Constitution, Second Amendment.

³⁸ *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

³⁹ *Ibid* at 626.

⁴⁰ *Ibid* at 634-35 (internal citations omitted).

⁴¹ *Young v. Hawaii*, 896 F.3d 1044, 1051 (9th Cir. 2018).

⁴² *Medina v. Whitaker*, 439 U.S. App. D.C. 294, 300, 913 F.3d 152, 158 (D.C. App., 2019).

not limit the scope of the right, courts have generally accepted limitations to lawful gun ownership that were present when the right was enacted.⁴³ Moreover, restrictions outside the scope of historical regulations are typically rejected because the “enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”⁴⁴



Since the Second Amendment was ratified in 1791, courts look to the public understanding of the right at that time to determine if a regulation as applied to a class of persons would fall outside the scope of its protection.



To determine whether a particular regulation unconstitutionally infringes upon an individual’s right to bear arms, courts will generally conduct a two-step inquiry to determine the constitutionality of a particular regulation.⁴⁵ The court will first determine whether the challenged regulation impinges upon rights protected by the Second Amendment.⁴⁶ If so, the court will determine how significantly the rule burdens the core right of self-defense, applying either intermediate or strict scrutiny.⁴⁷ The court will apply strict scrutiny when the regulation substantially burdens an individual’s right to keep and bear arms.⁴⁸

⁴³ *Heller*, 554 U.S. at 626-27.

⁴⁴ *Ibid* at 634.

⁴⁵ See *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (2011) (citing *Ezell v. City of Chicago*, No. 10-3525, 2011 U.S. App. LEXIS 14108, 2011 WL 2623511, at *12-13 (7th Cir., 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir., 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)).

⁴⁶ *Heller*, 670 F.3d at 1252 (2011).

⁴⁷ See *Heller*, 554 U.S. at 628-29.

⁴⁸ *Heller*, 670 F.3d at 1252 (citing *Nordyke v. King*, 644 F.3d 776, 786 (9th Cir. 2011)).

3.1

FEDERAL LAW IMPINGES ON THE RIGHT TO KEEP AND BEAR ARMS BY CREATING A NEW CLASS OF PERSONS PROHIBITED FROM POSSESSING FIREARMS, CONTRARY TO LONGSTANDING PRACTICES

Generally, regulations that impinge upon rights protected by the Second Amendment are unconstitutional; however, longstanding regulations in place at the time of the Amendment's enactment are presumptively lawful.⁴⁹ When enacted, the right to keep and bear arms was restricted for certain classes of people, such as the mentally ill or felons, in certain sensitive locations like government buildings and schools, and for dangerous or unusual weapons.⁵⁰ Consequently, limitations for these classes of people, specified sensitive locations, and dangerous or unusual weapons are presumptively lawful given their historic presence.⁵¹ This presumption is reasonable because longstanding regulations indicate public support due to the regulation's longevity, and thus it is not likely to burden the constitutional right.⁵² Nonetheless, there is no longstanding support for restricting the right to bear arms based on possession or use of the cannabis plant.⁵³ A historical analysis of early gun laws in American history demonstrates that there were no gun laws prohibiting gun ownership based on cannabis possession or production.⁵⁴ While historically there were prohibitions against felons possessing firearms, possession and use of marijuana did not become a felony until the passage of the Controlled Substances Act in 1970.

⁴⁹ Ibid at 1253 (citing *Heller*, 554 U.S. at 626-27, n.26).

⁵⁰ *Heller*, 554 U.S. at 626-27.

⁵¹ Ibid.

⁵² *Heller*, 670 F.3d at 1253 (2011).

⁵³ See generally Robert J. Spitzer, *Gun Law History In The United States And Second Amendment Rights*, Duke Law, (last visited July 23, 2021), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4825&context=lcp> (analyzing all categories of early gun laws in America, which did not include any categories for users of marijuana or controlled substances.)

⁵⁴ See *ibid* (describing categories of early gun laws including brandishing laws, gun carrying restrictions, and firing location restrictions, but no categories of early gun laws as applied to users, possessors, or growers of cannabis.)

In fact, many of the Founding Fathers cultivated cannabis in the form of hemp for industrial uses.

Consequently, when the Second Amendment was enacted, codifying the preexisting right to keep and bear arms, the right was not limited by cannabis use or possession. In fact, many of the Founding Fathers cultivated cannabis in the form of hemp for industrial uses. George Washington grew hemp on his estate, using the fibers to create a variety of products including rope, sail canvas, clothing, and fishing nets.⁵⁵ He even considered advocating for a national policy encouraging the growth of hemp and cotton for monetary gains.⁵⁶ Similarly, Thomas Jefferson grew hemp at both Monticello and Poplar Forest in the 1770s, which he used primarily for clothing production.⁵⁷ He regarded hemp as a staple commodity during the Revolutionary War, among tobacco, flax, and cotton.⁵⁸ Likewise, Benjamin Franklin owned a hemp paper mill,⁵⁹ James Madison cultivated hemp,⁶⁰ and Henry Clay, who was a strong advocate for American hemp production, cultivated and manufactured hemp and advocated for hemp as a primary product of the U.S. marketplace.⁶¹ Consequently, there is no longstanding support for prohibiting the right to keep and bear arms based on marijuana use or possession. Rather, marijuana-based limitations on the

⁵⁵ Mount Vernon, “Did George Washington Grow Hemp?” George Washington’s Mount Vernon, (last visited Sep. 23, 2020), <https://www.mountvernon.org/george-washington/farming/washingtons-crops/george-washington-grew-hemp/>.

⁵⁶ George Washington, To Alexander Hamilton from George Washington, 14 October 1791, National Archives, (Oct. 14, 1791), <https://founders.archives.gov/documents/Hamilton/01-09-02-0278>.

⁵⁷ Thomas Jefferson Encyclopedia, Hemp, Thomas Jefferson’s Monticello, (last visited Sep. 24, 2020), <https://www.monticello.org/site/research-and-collections/hemp>.

⁵⁸ Ibid.

⁵⁹ Rita LeBleu, “Hemp, Hemp, Hooray! Beaugard’s Ideal Hemp Farm Will Soon be Harvesting Inaugural Crop,” American Press, (last updated Jun. 15, 2020), https://www.americanpress.com/news/local/beaugard-s-ideal-hemp-farm-will-soon-be-harvesting-inaugural-crop/article_8796a44e-fb4a-51b2-a979-6754a37c69a8.html.

⁶⁰ Thomas Jefferson Encyclopedia, “Hemp,” Thomas Jefferson’s Monticello, (last visited Sep. 24, 2020), <https://www.monticello.org/site/research-and-collections/hemp>.

⁶¹ The Henry Clay Estate, “Henry Clay and Hemp, Ashland the Henry Estate,” (last visited Sep. 24, 2020), <https://henryclay.org/the-farmer/hemp-at-ashland/>.

right to keep and bear arms did not arise until the scheduling of marijuana in the Controlled Substances Act of 1970, which was incorporated into the Gun Control Act.⁶² Thus, by its incorporation, the Gun Control Act was the first federal regulation prohibiting marijuana users from shipping or transporting firearms or ammunition in interstate or foreign commerce.⁶³



Benjamin Franklin owned a hemp paper mill, James Madison cultivated hemp, and Henry Clay, who was a strong advocate for American hemp production, cultivated and manufactured hemp and advocated for hemp as a primary product of the U.S. marketplace.



Therefore, the current federal regulations create a new class of persons prohibited from owning or possessing firearms, for which there is no longstanding support. Moreover, the regulations fall outside of the scope the right was understood to have when the people adopted it. To the contrary, there is historic evidence indicating marijuana-based restrictions to the right to keep and bear arms would not have been supported. While the Founding Fathers were cultivating cannabis in the form of hemp for production, not marijuana for medicinal purposes, they nevertheless possessed cannabis and did not punish any cannabis possession as do modern federal laws. Further, the majority of states who have legalized state-licensed medical marijuana programs, coupled with the lack of longstanding marijuana-based restrictions, indicate the public does not support such an infringement. Consequently, the prohibition against medical marijuana patients from owning or possessing a firearm impinges on their right to keep and bear arms.

⁶² Gun Control Act of 1968, 18 U.S.C. § 922(g)(3) (“It shall be unlawful for any person . . . who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954)[.]”)

⁶³ Ibid.



While the Founding Fathers were cultivating cannabis in the form of hemp for production, not marijuana for medicinal purposes, they nevertheless possessed cannabis and did not punish any cannabis possession as do modern federal laws.

**3.2**

PROHIBITING MEDICAL MARIJUANA PATIENTS FROM POSSESSING A FIREARM BURDENS THE SECOND AMENDMENT'S CORE RIGHT OF SELF-DEFENSE

Further, the federal government's prohibition against medical marijuana patients from owning or possessing firearms unduly burdens their right to self-defense. A regulation is said to burden the core right of self-defense when it is impossible for citizens to defend themselves.⁶⁴ In *Heller*, the Supreme Court ruled that the District of Columbia's prohibition against carrying a handgun without a license, and the requirement that all handguns be "unloaded and disassembled or bound by a trigger lock or similar device" in the home, was unconstitutional.⁶⁵ The court held such requirements made it impossible for citizens to defend themselves, including in their own homes, and unconstitutionally threatened citizens with imprisonment for violations.⁶⁶ But, in *Heller II*, the United States Court of Appeals for the District of Columbia held that the District's requirement for gun owners to register their firearms was constitutional because such regulations did not substantially burden the rights guaranteed by the Second Amendment, and were presumptively lawful as indicated by longstanding registration requirements.⁶⁷

⁶⁴ See *Heller*, 554 U.S. at 630.

⁶⁵ *Ibid* at 575, 629-30.

⁶⁶ *Ibid* at 629-30, 634 ("The District law, by contrast, far from imposing a minor fine, threatens citizens with a year in prison (five years for a second violation) for even obtaining a gun in the first place.")

⁶⁷ *Heller*, 670 F.3d at 1253, 1262.



Under the current federal framework, medical marijuana users are prohibited from purchasing or possessing a firearm for self-defense in any context, including in their home.



Under the current federal framework, medical marijuana users are prohibited from purchasing or possessing a firearm for self-defense in any context, including in their home. This not only places a blanket prohibition of a medical marijuana user's ability to own or operate a firearm for their defense, but it also prevents those operating medical marijuana programs in accordance with their state's programs from hiring armed guards for their protection.⁶⁸ Such protection is especially necessary where medical marijuana businesses have marijuana product on hand and primarily deal in cash as federal laws also prevent access to banking services because their business is related to a controlled substance.⁶⁹ Consequently, the owners and employees of medical marijuana operations and distributions centers are left to choose between being vulnerable to intrusions and robberies, or running afoul with federal drug trafficking laws.⁷⁰

Further, the federal laws issue a blanket prohibition of marijuana use and do not distinguish between the amount or consistency of use. In fact, the ATF has indicated that it is permissible to presume that an individual is an unlawful user of marijuana simply because they are in possession of a valid medical marijuana prescription card, regardless of whether the card has been used to obtain marijuana.⁷¹ Thus, a gun purchaser who has never

⁶⁸ *Standing Akimbo, LLC v. United States*, 594 U.S. ___ at 4 (2021).

⁶⁹ *Ibid.*

⁷⁰ See *ibid.* ("But, if marijuana-related businesses . . . hire armed guards for protection, the owners and the guards might run afoul of a federal law that imposes harsh penalties for using a firearm in furtherance of a 'drug trafficking crime.'")

⁷¹ *Heller*, 670 F.3d at 1253, 1262; Arthur Herbert, "Open Letter to All Federal Firearms Licensees," U.S. Dept. of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives, (Sep. 21, 2011), <https://www.atf.gov/file/60211/download> (clarifying firearm dealers are prohibited from selling a firearm or ammunition to a person they know or have reasonable cause to believe is an unlawful user of a controlled substance. The Bureau further expressed that firearm dealers have reasonable cause to believe a person is an unlawful user of a controlled substance when the prospective gun purchaser possesses a medical marijuana card.)

used marijuana may nevertheless be presumed an unlawful user merely by having a medical marijuana prescription card and be denied the right to purchase a firearm. This presumption is especially troubling because possessing a medical marijuana prescription card does not automatically make the person a user of marijuana. Such cards are required for caregivers who purchase medical marijuana on behalf of others, like a sick child, or for the purpose of purchasing highly concentrated CBD products that do not contain illegal concentrations of THC. Neither circumstance involves an individual being an unlawful user of marijuana, but the presumption may nevertheless be applied to them.



Thus, a gun purchaser who has never used marijuana may nevertheless be presumed an unlawful user merely by having a medical marijuana prescription card and be denied the right to purchase a firearm. Such cards are required for caregivers who purchase medical marijuana on behalf of others, like a sick child...



The punishments for violations far exceed the terms of imprisonment at issue in *Heller*, ranging up to 10 years. Such violations do not require the individual to know they are in violation of § 922(g); they merely require the individual to knowingly use marijuana in violation of federal law, which may be missed by individuals who believe they are legally consuming marijuana when doing so in accordance with their state’s licensed program. As Justice Thomas pointed out in his statement respecting the Supreme Court’s denial of certiorari in *Standing Akimbo, LLC v. United States*, an ordinary person may reasonably believe that the federal government has retreated from its prior prohibition of marijuana.⁷² Although that case involved provisions of the Tax Code as applied to medical marijuana businesses, he expressed that, as a whole, the federal government’s “half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana” sends mixed

⁷² *Standing Akimbo, LLC*, 594 U.S. ___ at 3 (2021).

signals to marijuana users as to the legality of their conduct.⁷³ Thus, the current federal framework substantially burdens the right to keep and bear arms by placing a blanket prohibition to the right for medical marijuana users, and the federal government's mixed enforcement of their marijuana prohibitions further burdens the core right to self-defense.

⁷³ Ibid at 1.

PART 4

REQUIRING MEDICAL MARIJUANA PATIENTS TO DISCLOSE THEIR STATUS AS UNLAWFUL DRUG USERS VIOLATES THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The government's requirement for marijuana patients to self-disclose their use of medical marijuana when purchasing or possessing a firearm violates the Constitution's guarantee against self-incrimination. When a prospective gun owner goes to purchase a firearm, they are required to disclose their use of medical marijuana on ATF Form 4473.⁷⁴ If the individual identifies as a medical marijuana user, or does not complete the form, the individual will be denied the ability to purchase a firearm.⁷⁵ If the individual conceals their medical marijuana use, they could be subject to violations under § 924(a) and for the additional fraudulent misrepresentation of their status as a marijuana user.⁷⁶ Similarly, § 922(g) imposes a duty on current gun owners who begin using medical marijuana to voluntarily relinquish their possession of their firearms or be subject to fines and imprisonment.⁷⁷ But, the onus is on current gun owners to know of their unlawful status when they begin consuming medical marijuana, even though current gun owners are not

⁷⁴ 18 U.S.C. § 922(g); Bureau of Alcohol, Tobacco, Firearms, and Explosives, Firearms Transaction Record, ATF, 1, 4 (December 11, 2020), <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ 18 U.S.C. § 922(g); § 924(a)(2).

warned of the legal implications of their recommended medications.⁷⁸ Consequently, the reporting requirements imposed by ATF Form 4473 and inherent in § 922(g)(3) compels individuals to disclose their unlawful status in violation of the privilege against self-incrimination.



... the onus is on current gun owners to know of their unlawful status when they begin consuming medical marijuana, even though current gun owners are not warned of the legal implications of their recommended medications.



The Fifth Amendment to the United States Constitution guarantees that no individual “shall be compelled in any criminal case to be a witness against himself[.]” conferring a right against compelled self-incrimination.⁷⁹ Historically, this privilege against self-incrimination was intended to “prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him.”⁸⁰ In practice, the privilege reflects a judgment that “the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused[.]”⁸¹ Thus, the privilege is asserted where necessary to spare the accused from being forced to reveal, directly or indirectly, their knowledge of facts relating them to the offense, or otherwise requiring the accused to share their thoughts and beliefs with the government.⁸²

⁷⁸ See 18 U.S.C. § 924(a)(2).

⁷⁹ U.S. Constitution, Fifth Amendment; see also, *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S. Ct. 1602, 1624 (1966); *Malloy v. Hogan* 378 U.S. 1 (1964).

⁸⁰ *Doe v. United States*, 487 U.S. 201, 212, 108 S. Ct. 2341, 2348 (1988).

⁸¹ *Doe*, 487 U.S. at 212 (citing *Ullmann v. United States*, 350 U.S. 422, 427 (1956)).

⁸² *Ibid* at 213.

Given the privilege against self-incrimination, the government cannot compel a person to incriminate themselves in a crime by being a witness against themselves.⁸³ A person is said to be compelled to be a witness against themselves when required to provide testimonial evidence that, explicitly or implicitly, relates to a factual assertion or discloses information.⁸⁴ Whether a particular compelled communication is testimonial depends on the facts and circumstances of the case, considering whether the individual was required “to disclose any knowledge he might have, or to speak his guilt.”⁸⁵ It is this “extortion of information from the accused” and the attempt to force him to “disclose the contents of his own mind” which implicates the privileges of the Fifth Amendment.⁸⁶ Additionally, the privilege protects individuals from being compelled to make any disclosures that the witness reasonably believes could be used in criminal proceedings or could lead to other incriminating evidence.⁸⁷ The Fifth Amendment also applies to the states through the Fourteenth Amendment’s Due Process Clause.⁸⁸



Generally, laws that require an individual to disclose their unlawful status to the government through record-keeping functions has been held unconstitutional.



⁸³ *United States v. Jones*, 703 F.2d 473, 475 (10th Cir.1983) (citing *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951)).

⁸⁴ *Doe*, 487 U.S. at 209-10 (“An examination of the Court’s application of these principles in other cases indicates the Court’s recognition that, in order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.”)

⁸⁵ *Doe*, 487 U.S. at 211 (citing *United States v. Wade*, 388 U.S. 218, 222-23 (1967)) (internal citations omitted).

⁸⁶ *Ibid* (citing *Couch v. United States*, 409 U.S., at 328 and *Curcio v. United States*, 354 U.S. 118, 128 (1957)).

⁸⁷ *Ibid* (citing *Kastigar v. United States*, 406 U.S. 441, 445 (1972)).

⁸⁸ *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (“We hold today that the Fifth Amendment’s exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States.”)

Generally, laws that require an individual to disclose their unlawful status to the government through record-keeping functions has been held unconstitutional.⁸⁹ To determine whether the record-keeper's right against self-incrimination has been violated, the court will look to whether the filings at issue were neutral on their face and directed to the public at large.⁹⁰ If so, the court will look to whether they were directed at a highly selective group inherently suspected of criminal activities to determine if the inquiries are in an area permeated with criminal statutes, where response to any of the questions in context might involve an admission of a crucial element of a crime.⁹¹



When a filing or registration law requires an individual to disclose such incriminating information, it is unconstitutional.



When a filing or registration law requires an individual to disclose such incriminating information, it is unconstitutional. In *Albertson*, the court held that requiring members of the Communist Party to complete Form IS-52a, which required the individual to admit to their membership in the Communist Party, violated the member's privilege against self-incrimination.⁹² Further, the *Albertson* court held that compelled written admissions are the same as compelled oral testimonies for constitutional purposes.⁹³ Thus, the court held that the requirement to register by completing and filing Form IS-52a was inconsistent with the protections inherent in the self-incrimination clause.⁹⁴ Similarly, in *Marchetti* and *Grosso*, the Supreme Court held that tax provisions directed almost exclusively to individuals inherently suspected of criminal activities violated the privilege against self-incrimination.

⁸⁹ *Leary v. United States*, 395 U.S. 6, 12 (1969); *Haynes v. United States*, 390 U.S. 85, 95 (1968).

⁹⁰ *California v. Byers*, 402 U.S. 424, 429 (1971).

⁹¹ *Ibid* (citing *Albertson v. SACB*, 382 U.S. 70 (1965); *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); and *Haynes v. United States*, 390 U.S. 85 (1968)).

⁹² *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 75, 77-78 (1965) ("It follows that the requirement to accomplish registration by completing and filing Form IS-52a is inconsistent with the protection of the Self-Incrimination Clause.")

⁹³ *Ibid*.

⁹⁴ *Ibid*.

At issue in *Marchetti* was an individual's failure to register and pay the proscribed tax under the federal wagering tax statutes could not be employed to criminally punish the individual without violating the privilege against self-incrimination.⁹⁵ The Court held that the criminal punishments for an individual's failure to comply with the statute's requirements implicated the privilege against self-incrimination.⁹⁶ Likewise, in *Leary v. United States*, the Supreme Court struck down the federal government's Marihuana Tax Act as unconstitutional infringement on the privilege against self-incrimination.⁹⁷ Under the Act, individuals transporting marijuana into the United States were required to pay a tax and register their home or business address with the Internal Revenue Service ("IRS").⁹⁸ The petitioner was charged under the Act after border patrol agents located marijuana on the petitioner's daughter's person.⁹⁹ The officers alleged the petitioner knowingly participated in the transportation of marijuana, concealed, without adhering to the tax or registration requirements of the Act.¹⁰⁰ The Supreme Court declared that the Marihuana Tax Act was an unconstitutional infringement on the petitioner's Fifth Amendment right against self-incrimination.¹⁰¹



... the Supreme Court has rejected regulations that require gun owners to self-disclose when they are in possession of an unlawful firearm.



Further, the Supreme Court has rejected regulations that require gun owners to self-disclose when they are in possession of an unlawful firearm. In *Haynes v. United States*, the petitioner was charged with violating the National Firearms Act, legislation designed to

⁹⁵ *Marchetti v. United States*, 390 U.S. 39, 40-41 (1968).

⁹⁶ *Ibid* at 42.

⁹⁷ *Leary*, 395 U.S. at 37.

⁹⁸ *Ibid* at 14.

⁹⁹ *Ibid* at 9-10.

¹⁰⁰ *Ibid* at 10-11.

¹⁰¹ *Ibid* at 14.

target weapons used by persons engaged in unlawful activities, when he failed to register his sawed-off shotgun as required by the Act.¹⁰² The Supreme Court held the requirement to register unlawful weapons, or be subject to criminal penalties, constituted self-incrimination in violation of the Fifth Amendment.¹⁰³ Thus, as the requirement to self-disclose possession of an unlawful firearm is an unconstitutional violation of the privilege against self-incrimination, the requirement to self-disclose possession of a firearm as an unlawful owner should similarly be deemed unconstitutional.



... as the requirement to self-disclose possession of an unlawful firearm is an unconstitutional violation of the privilege against self-incrimination, the requirement to self-disclose possession of a firearm as an unlawful owner should similarly be deemed unconstitutional.



Nevertheless, individuals who are unlawful users of marijuana, including medical marijuana patients in states with medical programs, are required to self-disclose their use of medical marijuana while purchasing a firearm, as required by question “11e.”¹⁰⁴ Generally, ATF is restricted from accessing a state’s marijuana registry, therefore the agency is not able to confirm whether a prospective purchaser accurately reported their marijuana use.¹⁰⁵ In Ohio, the state’s medical marijuana program’s Patient Registry system is not accessible when conducting background checks for concealed weapons permits. Similarly, in

¹⁰² *Haynes*, 390 U.S. at 88; and see *United States v. D’Amato*, 436 F.2d 52, 53 (3d Cir. 1970).

¹⁰³ *Haynes*, 390 U.S. at 95-97.

¹⁰⁴ 18 U.S.C. § 922(g); Bureau of Alcohol, Tobacco, Firearms, and Explosives, Firearms Transaction Record, ATF, 1, 4 (December 11, 2020), <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.

¹⁰⁵ Ohio Marijuana Card, *Ohio Marijuana Frequently Asked Questions*, Ohio Marijuana Card, (last visited Sep. 20, 2020), <https://www.ohiomarijuanacard.com/frequently-asked-questions>.

Pennsylvania the state's Department of Health announced that it would no longer be providing the names of medical marijuana patients to law enforcement agencies.¹⁰⁶

Consequently, the burden is entirely on the prospective gun purchaser to be truthful about their status as a medical marijuana user.¹⁰⁷ Because there is little accountability by the ATF, the motivations to misrepresent one's status as a medical marijuana user are high. This motivation to misrepresent is only amplified by the state's seemingly supporting citizens in keeping information from the ATF. However, if a fraudulent response is given, the offender may be fined, subjected to a term of imprisonment not to exceed five years, or both, in addition to the punishments for the underlying violation.¹⁰⁸



Prospective gun purchasers are frequently denied the ability to purchase a firearm when they self-disclose their status as a marijuana user.



Prospective gun purchasers are frequently denied the ability to purchase a firearm when they self-disclose their status as a marijuana user. In *Roman*, Dr. Matthew Roman's application for a firearm was denied due to his medical use of marijuana.¹⁰⁹ The doctor filed a lawsuit against the acting attorney general for allegedly violating his Second Amendment right to keep and bear arms, and his Fifth Amendment privilege against self-incrimination.¹¹⁰ Ultimately, the doctor's suit has been unsuccessful, and he has since lost

¹⁰⁶ Sam Wood, "Pa. Regulators Reverse Course; Medical Marijuana Won't Stop Patient Gun Purchases," *The Philadelphia Inquirer*, (Aug 3, 2021), <https://www.inquirer.com/philly/business/cannabis/pa-medical-marijuana-law-enforcement-stop-patient-gun-purchases-feds-legalize-20180112.html>

¹⁰⁷ 18 U.S.C. § 922(g); Bureau of Alcohol, Tobacco, Firearms, and Explosives, Firearms Transaction Record, ATF, 1, 4 (December 11, 2020), <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.

¹⁰⁸ 18 U.S.C. § 924(a)(1).

¹⁰⁹ See *Roman v. Whitaker et al.*, 2:2018cv04947, (Pa.D. 2018).

¹¹⁰ *Ibid.*

his medical license.¹¹¹ Similarly, in *Wilson v. Lynch*, a woman was prohibited from purchasing a firearm because she had a medical marijuana license.¹¹² The court held that the empirical data and legislative determinations supported a strong link between drug use and violence, permitting Congress to prohibit marijuana use by gun owners altogether.¹¹³ The court recognized that “[i]t may be argued that medical marijuana users are less likely to commit violent crimes, as they often suffer from debilitating illnesses, for which marijuana may be an effective palliative,” or that “[t]hey also may be less likely than other illegal drug users to interact with law enforcement officers or make purchases through illicit channels,” but nevertheless ruled such hypotheses were insufficient to overrule Congress’ conclusions.¹¹⁴



If an individual does self-disclose their status as an unlawful user, they will be prohibited from purchasing a firearm. Given this burden imposed on their right to keep and bear arms, a person may be motivated to misrepresent their status as an unlawful user in order to obtain a firearm or in fear of future prosecution based on a truthful answer.



Collectively, the Gun Control Act and ATF Form 4473 require medical marijuana users to self-disclose their status as federally unlawful users when purchasing a firearm. If an individual does self-disclose their status as an unlawful user, they will be prohibited from

¹¹¹ Carey Wedler, “Pennsylvania Doctor Denied Handgun over Legal Medical Marijuana Use Sues FBI, ATF, FEE,” (December 14, 2020 10:10 AM), <https://fee.org/articles/pennsylvania-doctor-denied-handgun-over-legal-medical-marijuana-use-sues-fbi-atf/>.

¹¹² *Wilson*, 835 F.3d at 1093.

¹¹³ *Ibid* at 1093-94.

¹¹⁴ *Ibid* at 1094 (“But those hypotheses are not sufficient to overcome Congress’s reasonable conclusion that the use of such drugs raises the risk of irrational or unpredictable behavior with which gun use should not be associated.”)

purchasing a firearm. Given this burden imposed on their right to keep and bear arms, a person may be motivated to misrepresent their status as an unlawful user in order to obtain a firearm or in fear of future prosecution based on a truthful answer. Additionally, current gun owners may be unaware of their unlawful status, but they are nevertheless required to know they are in violation of the law and voluntarily relinquish possession of their firearms. In all, requiring medical marijuana users to self-disclose their status as unlawful users violates the Fifth Amendment privileges against self-incrimination. Thus, this requirement must be abolished to prevent ongoing constitutional violations.

PART 5

CONCLUSIONS AND RECOMMENDATIONS

Federal law unconstitutionally prohibits medical marijuana users from purchasing or possessing a firearm. The Gun Control Act impinges on the Second Amendment by imposing a blanket prohibition for marijuana users, contrary to longstanding historic practices, and in turn substantially burdens the core right of self-defense. Further, the Act's requirement for individuals to self-disclose their status as unlawful users violates the Fifth Amendment privilege against self-incrimination.

“

To prevent violations of the Second and Fifth Amendment, Congress should amend the Gun Control Act of 1968 to permit an exception for legal medical marijuana use.

”

To prevent violations of the Second and Fifth Amendment, Congress should amend the Gun Control Act of 1968 to permit an exception for legal medical marijuana use. The federal government's current “half-in, half-out” approach to marijuana regulation is confusing at

best. As such, it is necessary to remove marijuana's inclusion under § 922(g)(3) of the Gun Control Act. In the alternative, the Controlled Substances Act could be amended to change marijuana's designation as a Schedule I drug, since the Controlled Substances Act's definition is employed in the Gun Control Act and represents an outdated understanding of marijuana's medical value. However, rescheduling or descheduling marijuana would go beyond medical marijuana patients and also permit recreational users to possess firearms, which states may be less inclined to allow.



Regardless of the federal approach taken, it is clear that state action alone is insufficient.



Regardless of the federal approach taken, it is clear that state action alone is insufficient. In the face of federal inaction by Congress, some states have indicated they will not prosecute medical marijuana patients who own or possess a firearm; however, such assurances are insufficient in the face of federal penalties.¹¹⁵ Recently, the Missouri Legislature passed House Bill 85, which is designed to limit the scope of the federal government's authority over rights afforded in the Second Amendment.¹¹⁶ Specifically, the Missouri law declares that federal supremacy does not apply to federal laws that restrict the manufacturing, ownership, and use of firearms or ammunition within the state, arguing such laws exceed the scope of the federal government's authority. While the law does not explicitly permit Missouri's medical marijuana patients from possessing firearms or ammunition, it would have such an effect but for federal supremacy on the issue. Similarly, in Illinois, the state legislature passed the Illinois Cannabis Regulation and Tax Act, which distinguishes between lawful and unlawful users of marijuana.¹¹⁷ The Act states that "a person shall not be considered an unlawful user or addicted to narcotics solely as a result of his or her possession or use of cannabis or cannabis paraphernalia in accordance with this Act."¹¹⁸ By

¹¹⁵ 18 U.S.C. § 924(a)(2).

¹¹⁶ Missouri Second Amendment Preservation Act, HB Nos. 85 & 310 (101 General Assembly).

¹¹⁷ Illinois Cannabis Regulation and Tax Act, ILCS CH 410 705/1-7.

¹¹⁸ Ibid.

distinguishing between lawful and unlawful users, the state legislature intended to clarify the legislative findings for the lawful use of cannabis.¹¹⁹ Despite Illinois' Cannabis Regulation and Tax Act's enactment, the federal government still considers all marijuana as an unlawful controlled substance because federal law supersedes state law in the face of direct conflict in this area, rendering Illinois' distinction between lawful and unlawful users futile.¹²⁰ If challenged, federal law would surely prevail.

Just last year, the ATF wrote a Public Safety Advisory to all Michigan firearm licensees reminding them that marijuana was still a controlled substance under federal law, despite the state's legalization of marijuana for recreational purposes, and that persons using marijuana were still prohibited from possessing or transporting a firearm under § 922(g)(3).¹²¹



... the designation of medical marijuana users as lawful users under state law is symbolic at best, and at worst may present confusion for prospective and current gun owners. This confusion is further exacerbated by the federal government's mixed approach to marijuana regulation which simultaneously tolerates and forbids local use of marijuana.



Thus, the designation of medical marijuana users as lawful users under state law is symbolic at best, and at worst may present confusion for prospective and current gun owners. This confusion is further exacerbated by the federal government's mixed approach

¹¹⁹ Ibid.

¹²⁰ *California v. ARC America Corp.*, 490 U.S. 93, 100 (1989) (“when Congress intends that federal law occupy a given field, state law in that field is pre-empted.”)

¹²¹ Bureau of Alcohol, Tobacco, Firearms and Explosives, Public Safety Advisory to All Michigan Federal Firearm Licensees, U.S. Justice Department, (last visited on Aug., 3, 2021) <https://www.atf.gov/firearms/docs/open-letter/public-advisory-all-michigan-ffls-03-03-20/download>

to marijuana regulation which simultaneously tolerates and forbids local use of marijuana. Consequently, it is imperative for the federal government to amend the law for citizens to be adequately reassured they are considered lawful gun owners, not just lawful by state law alone.

ABOUT THE AUTHOR

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