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## A Sticky Situation: The Unconstitutional Qualification of the Right to Bear Arms by the Federal Government Against Law-Abiding Medical Marijuana Patients

Luke C. Waters

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A STICKY SITUATION: THE  
UNCONSTITUTIONAL QUALIFICATION OF THE  
RIGHT TO BEAR ARMS BY THE FEDERAL  
GOVERNMENT AGAINST LAW-ABIDING  
MEDICAL MARIJUANA PATIENTS

LUKE C. WATERS\*

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## INTRODUCTION

Medical marijuana law and policy is at a crossroads in America. On the one hand, it appears the field has achieved a level of legitimacy it so desperately sought, as more than 30 states, territories, and districts have enacted comprehensive medical marijuana<sup>1</sup> programs in the past two decades. Such programs currently employ thousands of Americans and are expected to generate thousands of additional jobs across the country in the coming years,<sup>2</sup> while also generating much-needed tax revenue for state economies ravaged by austerity politics.<sup>3</sup> Further, comprehensive medical marijuana programs create extensive legal protections for program participants, commonly known as “qualified patients,”<sup>4</sup> shielding them from government sanctions that would normally apply to marijuana users.

In spite of these gains, medical marijuana is often still characterized as little more than a joke or an excuse to lend drug abusers an unearned air of legitimacy.<sup>5</sup> Proponents of these views point to the supposedly-outsized

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1. This Article seeks only to describe the constitutional violations facing medical marijuana users, though many of the same arguments could be made for users of recreational marijuana in jurisdictions where it has been made legal as well. *See* Klieger, et al., *infra* notes 32–33 (describing the differences between comprehensive and non-comprehensive programs). This Article will describe all jurisdictions with medical marijuana programs as “states” for the sake of simplicity, unless otherwise noted.

2. Debra Borhardt, *Marijuana Industry Projected to Create More Jobs Than Manufacturing by 2020*, FORBES (Feb. 22, 2017, 10:51 AM), <https://perma.cc/M8ZJ-AY7T> (describing the positive effects that medical and recreational marijuana legalization has had and predicting large growth in the sector in the coming years).

3. The medical marijuana market was worth roughly \$4.7 billion in 2016 and is estimated to be worth \$13.2 billion in 2025. NEW FRONTIER DATA, *THE CANNABIS INDUSTRY ANNUAL REPORT: 2017 LEGAL MARIJUANA OUTLOOK EXECUTIVE SUMMARY 7* (2017).

4. Although this specific term is not used by every state, this Article will hereafter refer to all individuals registered under medical marijuana laws as “qualified patients,” unless noted otherwise. *See, e.g.*, ARIZ. REV. STAT. § 36-2801(13) (LexisNexis, LEXIS through 1st Reg. Sess. of 53d Leg. (2017)); 410 ILL. COMP. STAT. 130 / 10(t) (2016); N.M. STAT. ANN. § 26-2B-3(G) (2017).

5. *See* Paula Reid & Stephanie Condon, *DEA Chief Says Smoking Marijuana as Medicine “Is a Joke”*, CBS NEWS (Nov. 4, 2015, 3:10 PM), <https://perma.cc/W5AU-VJWY>. As will be further discussed, the question of medical marijuana’s scientific legitimacy is still being debated in some states. Mark Osborne, *Mormon Church Comes Out in Opposition to Utah’s Medical Marijuana Ballot Initiative*, ABC NEWS (May 12, 2018, 3:28 AM), <https://perma.cc/933C-962D>.

Media outlets frequently use the drug and the culture around marijuana use to craft headline puns. *See, e.g.*, David W. Clark, *Missouri House’s Medical Marijuana Bill is Nothing but a Smokescreen*, KANSAS CITY STAR (May 13, 2018, 8:30 PM) <https://perma.cc/E8C3-87FR>; Randy Tucker, *Ohio’s Medical Marijuana Program Could Be Blunted by Judge’s Ruling*, CINCINNATI ENQUIRER (May 14, 2018, 10:13 AM), <https://perma.cc/E8C3-87FR>.

number of registrants in any given state or deride the medical reasoning used for registration as illegitimate.<sup>6</sup> The other, more pressing issue facing comprehensive medical marijuana programs and participants is the federal government's near-complete ban on marijuana, regardless of form, which criminalizes possession, cultivation, and distribution as felony offenses punishable by numerous criminal and civil penalties.<sup>7</sup> Further, federal law utilizes a number of lesser-known, "soft" penalties against individuals found to have used marijuana, including forbidding marijuana users from obtaining government-backed student loans, making banking nearly impossible for dispensaries and cultivation centers,<sup>8</sup> and qualifying an individual's Second Amendment right to possess firearms.

Standing in stark contrast to medical marijuana, the right to bear arms, and firearms by virtue of the association, is afforded rarified status as one of the most cherished and protected rights afforded to Americans.<sup>9</sup> Firearms proponents have the backing of the National Rifle Association, one of, if not the most powerful lobbying organization in America,<sup>10</sup> and a Congress that is loath to tackle gun control under any circumstances, despite mounting evidence to the contrary.<sup>11</sup> If anything, the right appears to be expanding. Indeed, the landmark Supreme Court case, *District of Columbia v. Heller*,<sup>12</sup> overturned more than 200 years of Second Amendment precedent and recognized—for the first time—the personal right for law-abiding individuals to possess a firearm for any lawful purpose. This Article explores the rarely-discussed nexus where medical marijuana legalization, federal marijuana prohibition, and Second Amendment jurisprudence converge.

Part I begins by describing comprehensive medical marijuana laws and policies as a basis for the discussion to follow, before moving on to look at marijuana treatment at the federal level. In 1996, California passed the

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6. Gerald Caplan, *Medical Marijuana: A Study of Unintended Consequences*, 43 MCGEORGE L. REV. 127, 129–35 (2012) (collecting examples purporting to be proof of "implementation . . . problems"); *but see* PROCON.ORG, *infra* note 304.

7. *See generally* KARIN D. JONES & JAMES M. SHORE, MARIJUANA REGULATION § 2.04 (2018) (describing taxes on marijuana of up to \$100 per ounce and mandatory minimum sentences of two to ten years accompanied by up to a \$20,000 fine).

8. *See* LISA N. SACCO ET AL., CONG. RESEARCH SERV., R44782, THE MARIJUANA POLICY GAP AND THE PATH FORWARD 16–20 (2017).

9. U.S. CONST. amend. II.

10. *See* Alan Berlow & Gordon Witkin, *Gun Lobby's Money and Power Still Holds Sway over Congress*, CTR. FOR PUB. INTEGRITY (May 1, 2013, 9:00 AM), <https://perma.cc/EL6T-JZJK>.

11. *See* Matt Taylor, *Why Wasn't Sandy Hook the Mass Shooting that Changed Everything?*, VICE (Dec. 14, 2015, 5:00 PM), <https://perma.cc/EHQ3-D42J> (describing America's acceptance of mass shootings as a fact of life and congressional inaction following the deaths of 20 elementary school children and six adults); *see also* David Montero, *FBI Chief in Nevada Says Motive Behind Las Vegas Concert Massacre is Still a Mystery*, L.A. TIMES (Dec. 21, 2017, 3:00 AM), <https://perma.cc/Y3YF-HNLQ> (reporting, more than two months after the deadliest mass shooting in American history, that authorities are still in the dark regarding the shooter's motive).

12. 554 U.S. 570 (2008).

Compassionate Use Act,<sup>13</sup> becoming the first state to create a comprehensive medical marijuana program, making marijuana use, cultivation, distribution, and possession legal for medicinal purposes. In just over 21 years, the number of states with similar programs has swelled to more than 30,<sup>14</sup> each of which considers the use of marijuana to be a humanitarian medical act intended to alleviate the pain and suffering associated with certain debilitating medical conditions. These states provide expansive legal protections for qualified patients against criminal and civil sanctions by government citizens as well, with some providing similar protections against discrimination by private actors. Notably, in a seeming rebuke to Congress' rationale under the Gun Control Act, most of these states allow for qualified patients to possess firearms, providing exceptions to state law where possession by marijuana users is otherwise forbidden.<sup>15</sup>

Congress created the Controlled Substances Act ("CSA") in 1970, which classified marijuana as a Schedule I narcotic, thus making it illegal under federal law.<sup>16</sup> Since then, the Department of Justice ("DOJ") and the Drug Enforcement Agency ("DEA"), which is charged with administering the CSA, have resisted all calls to reschedule marijuana to the less-strict Schedule II,<sup>17</sup> citing a dearth of sufficient scientific research tending to show marijuana's efficacy as a medicinal treatment in spite of Schedule I's research restrictions.<sup>18</sup> Recent years have greatly confused federal marijuana policy and enforcement, however. Beginning in 2009, President Obama's DOJ released a series of three often confusing and seemingly-contradictory memos describing its shifting but relaxed enforcement policies against both medical and recreational marijuana programs and participants, though they have likely been repealed under the new administration.<sup>19</sup> Congress also had its say, successfully outmaneuvering all DOJ enforcement of medical marijuana programs in 2014 by passing the Rohrabacher-Farr Amendment, an appropriations rider that forbids the DOJ from using any funds made available by Congress to prevent states from implementing or furthering their programs.<sup>20</sup> Two subsequent Ninth Circuit rulings upheld the application of Rohrabacher-Farr against the DOJ and its subsidiary agencies.<sup>21</sup>

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13. CAL. HEALTH & SAFETY CODE § 11362.5 (Deering 2017) (Adopted by voters, Cal. Prop. 215 § 1, effective November 6, 1996).

14. See *infra* Appendix, Table 1.

15. See *infra* Appendix, Table 2.

16. Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. §§ 801–971 (2016)); see also § 812(b)(1)(A)–(C) (2016).

17. See sources cited *infra* notes 104–09.

18. But see *infra* note 45.

19. See memoranda cited *infra* notes 135–37, 161.

20. Consolidated and Further Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 § 538 (2014).

21. *United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2016); *United States v. Marin All.*, 139 F. Supp. 3d 1039, 1046 (N.D. Cal. 2015).

Part II gives a brief overview of Second Amendment and Gun Control Act jurisprudence, which has changed and expanded drastically since 2008. Similar to the CSA, the Gun Control Act contains numerous provisions qualifying the Second Amendment rights of individuals for illegal or seemingly-dangerous conduct, which this Article terms “individual category qualifications.” This Article will predominately focus on section 922(g)(3) of the Gun Control Act, which denies illegal drug users the right to possess firearms<sup>22</sup> under the auspices that such individuals are “presumptively risky people” and more dangerous to the general public.<sup>23</sup> Thus, in the eyes of the federal government, if a qualifying patient uses marijuana, she forfeits her right to possess a firearm under the Second Amendment for so long as she is considered a user.

Separately, though still critically linked, the Supreme Court’s aforementioned decision in *Heller* left federal courts with no manageable standard for assessing the constitutionality of federal firearms regulations found in the Gun Control Act. In order to fill this vacuum, the federal circuit courts created a two-part test, largely cribbed from the text of *Heller*, intended to determine (1) whether the rule or regulation in question burdens an individual’s Second Amendment rights, and if so, (2) whether the burden in question passes muster under the appropriate level of scrutiny.<sup>24</sup> Since its adoption, the test has been used successfully only once, in *Tyler v. Hillsdale County Sheriff’s Department*.<sup>25</sup> There, the Sixth Circuit described the appropriate application of the post-*Heller* two-step test, including the need to consider the length of the qualification’s temporal limitation against the individual, but more importantly, whether the individual is considered more violent than the general public and the manner by which federal courts should review and use longitudinal scientific evidence<sup>26</sup> to answer that question.

Part III attempts to bring together each of these loose ends, beginning with an examination of the Ninth Circuit’s decision in *Wilson v. Lynch*.<sup>27</sup> While the case differs slightly from what a “conventional” qualified patient

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22. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1220 (codified at 18 U.S.C. § 922(g)(4) (2017)).

23. *United States v. Yancey*, 621 F.3d 681, 683–84 (7th Cir. 2010) (citing S. Rep. No. 90-1501, at 22 (1968)).

24. *United States v. Chovan*, 735 F.3d 1127, 1136–37 (9th Cir. 2013) (citation omitted).

25. *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 699 (6th Cir. 2016).

26. *Id.* at 697–98. Longitudinal scientific evidence is produced by studies which “employ continuous or repeated measures to follow particular individuals over prolonged periods of time—often years or decades.” Edward Joseph Caruana et al., *Longitudinal Studies*, 7 J. THORACIC DISEASE E537, E537 (2015). Such studies are typically observational in nature, comprised of highly-controlled environments accounting for the numerous variables encountered in each study, and control groups with minimal outside influence being applied and as much data being collected as possible. Though such studies do present some drawbacks, the positives outweigh the negatives, especially for macro-level statistical analysis. *Id.* at E537–38.

27. *Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016).

can expect in the future, it is still instructive as it is the first federal circuit court decision to apply the Gun Control Act to qualified patients. This Article argues that the Ninth Circuit made three critical errors in reaching an inappropriate and unconstitutional conclusion under the two-step test. First, it held that qualified patients suffer only a limited temporal limitation under the qualification imposed by the Gun Control Act because they may give up their state marijuana registration and thereafter become eligible to again possess a firearm.<sup>28</sup> Second, the court found that marijuana users, including qualified patients, are more violent than the general population solely on the basis of conclusions arrived at by another federal circuit court, which were based both upon non-longitudinal government surveys and gross misreadings of the conclusions and analyses of the studies reviewed.<sup>29</sup> Third, the Ninth Circuit found that even if it was visiting constitutional violations upon qualified patients, precedent allows for such overreaches against a minority of individuals.<sup>30</sup> In addition to these incorrect conclusions, such arguments should have been ruled moot as this Article further argues that the Rohrabacher-Farr Amendment blocks the DOJ and any of its subsidiary agencies from enforcing the CSA or Gun Control Act against qualified patients as such actions impede the implementation of medical marijuana programs.

### I. MEDICAL MARIJUANA LAWS

This Part explores the confusing, contradictory, and competing laws governing medical marijuana across the United States. Section A looks to state medical marijuana regimes where laws are rapidly expanding, progressive, and protective of qualified patients. That Section also discusses the differences between legalization and decriminalization, a key distinction for qualified patients. Section B, conversely, brings the federal sector into focus and finds that the United States government maintains a near-total ban on marijuana in any form and stridently opposes rescheduling the drug or making exceptions for medical use. Section B further details the Rohrabacher-Farr Amendment, a congressional appropriations rider, which was enacted in December 2014, and has caused no small amount of confusion and widespread change at the federal level.<sup>31</sup>

To determine which laws govern medical marijuana, it is first helpful to define exactly what is meant by the term itself. Both within the context of this Article and in broader discussion in American policy, medical marijuana legalization typically refers to “comprehensive” medical marijuana programs that meet the four following criteria: (1) Provide legal protections from

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28. *Id.* at 1093.

29. *Id.*

30. *Id.* at 1098.

31. Consolidated and Further Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 § 538 (2014).

criminal and civil charges for individuals operating within state laws; (2) Provide access to marijuana either through private cultivation, dispensaries open to the public, or some other easily accessible outlet; (3) Allow for the cultivation and public distribution of a variety of strains of all strengths, not solely low-tetrahydrocannabinol (hereinafter, “THC”), high-cannabidiol (hereinafter “CBD”) products; and (4) Allow for the consumption of marijuana products in a variety of ways, including smoking, vaporization, or eating.<sup>32</sup> Low-THC, high-CBD products have been legalized in 16 additional states, but each state’s legalization program fails to include one or more of the four criteria above.<sup>33</sup> Federal law, conversely, makes no distinction between high- or low-THC marijuana and considers all such products to be Schedule I narcotics under the CSA.<sup>34</sup>

### A. Comprehensive Medical Marijuana Programs

In 1996, when California successfully implemented the country’s first state-run medical marijuana initiative, the prospects for widespread medical marijuana legalization—even at the state level—seemed grim, as Arizona voters had also approved a medical marijuana initiative, but it was scuttled before becoming law due to incorrect wording.<sup>35</sup> At the time, every state had criminalized the possession, cultivation, distribution, and use of

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32. See Sarah B. Klieger et al., *Mapping Medical Marijuana: State Laws Regulating Patients, Product Safety, Supply Chains and Dispensaries, 2017*, 112 ADDICTION 2206, 2207 (2017); *State Medical Marijuana Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES (last updated June 27, 2018), <https://perma.cc/N7E6-H6K7>. This Article will focus almost exclusively on states with comprehensive medical marijuana regimes, though non-comprehensive programs are considered by both federal law and the Rohrabacher-Farr Amendment.

Washington, D.C.’s medical marijuana program is, perhaps understandably, something of an outlier in that it does not protect qualified patients from either civil sanctions by government actors or the denial of any rights or privileges afforded to citizens otherwise, yet it is still considered comprehensive. See D.C. CODE § 7-1671.08(c), (d) (2018).

33. See Klieger et al., *supra* note 32, at 2207–08; *17 States with Laws Specifically About Legal Cannabidiol (CBD)*, PROCON.ORG (May 8, 2018, 11:13 AM), <https://perma.cc/4BGN-PBNU>; but see MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS: HOW TO REMOVE THE THREAT OF ARREST, 2015, at A-11 (2015 & Supp. 2016) (stating that Missouri may have a “workable” low-THC law).

34. John Hudak & Christine Stenglein, *DEA Guidance is Clear: Cannabidiol is Illegal and Always Has Been*, BROOKINGS INST. (Feb. 6, 2017), <https://perma.cc/4HMN-XGDJ>.

35. Prior to successfully legalizing marijuana in 2010, Arizonans twice voted in favor of medical marijuana initiatives only to see both ballot initiatives overturned prior to implementation as each contained fatally-flawed language. The aforementioned 1996 proposal failed when “federal authorities threatened to revoke the licenses of doctors who prescribed marijuana” while the 1998 version required the federal government to legalize the use of medical marijuana prior to state legalization. Michelle Ye Hee Lee, *Prop. 203: Legalization of Medical Marijuana*, ARIZ. REPUBLIC (Sept. 26, 2010, 1:07 PM), <https://perma.cc/HM5E-VWPR>.



marijuana since the 1930s,<sup>36</sup> nationwide efforts toward legalization by other states were still years away, and public approval for legalization was sitting at 25% in August 1995.<sup>37</sup> Nevertheless, California voters approved the measure and laid the groundwork for the future.

Since California made the first move, 29 other states, in addition to Washington, D.C., Guam, and Puerto Rico<sup>38</sup> have followed suit and created their own comprehensive medical marijuana programs, legalizing use, possession, cultivation, and distribution to varying degrees—bringing the total number to 33 states. Though all comprehensive medical marijuana programs differ to some degree, they share similar legislative framework and characteristics across a broad spectrum. Like California's Compassionate Use Act,<sup>39</sup> each state identifies a number of similar factors, including the following: who may participate, what medical conditions qualify participants, outlining the role of physicians in the program, and establishment of legal protections for qualified patients and distributors.

Within the context of these state laws, it is appropriate for this Article to address a question that is at once both critical to the information presented and oft-maligned as a joke: Is marijuana considered an accepted form of medicine?<sup>40</sup> In 1999, following a request from the Clinton White House, the Institute of Medicine ("IOM") compiled and published an extensive report that "summarizes and analyzes what is known about the medical use of marijuana," emphasizing the "evidence-based medicine . . . as opposed to belief-based medicine."<sup>41</sup> While the report notes that marijuana is considered controversial in many respects, the IOM was unequivocal in its assessment of marijuana's efficacy as a therapeutic form of medicine, stating that,

[c]ontroversies concerning nonmedical use of marijuana spill over onto the medical marijuana debate and tend to obscure the real state of scientific knowledge. In contrast with the many disagreements bearing on the social issues,

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36. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1427 n.14 (2009).

37. GALLUP, *Do You Think the Use of Marijuana Should be Made Legal, or Not?*, in ILLEGAL DRUGS, <https://perma.cc/9682-TCJK>.

38. See *infra* Appendix, Table 1.

39. CAL. HEALTH & SAFETY CODE § 11362.5 (Deering 2017).

40. Though some may scoff at the question, given the growing social and political acceptance of medical marijuana, it is notable that as of 2016, the U.S. government still did not consider marijuana to have proven medicinal value. Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,688, 53,700 (Aug. 12, 2016); see also Jennifer De Pinto et al., *Marijuana Legalization Support at All-Time High*, CBS NEWS (Apr. 20, 2017, 7:00 AM), <https://perma.cc/RZ54-YR9C> (reporting that polls show that 88% of Americans believe marijuana should be legalized for medicinal purposes).

41. INST. OF MED., MARIJUANA & MED.: ASSESSING THE SCIENCE BASE 1–2 (1999) (defining evidence-based medicine as "derived from knowledge and experience informed by rigorous scientific analysis" and belief-based medicine as "derived from judgment, intuition, and beliefs untested by rigorous science").

the study team *found substantial consensus*, among experts in the relevant disciplines, on the scientific evidence bearing on potential medical use.<sup>42</sup>

The IOM arrived at this consensus after finding more than 30 separate, individualized, medical uses for marijuana in addition to treatment of generalized symptoms like “pain, nausea and vomiting, and muscle spasms.”<sup>43</sup> In short, the IOM found that a consensus of available data and reporting showed that marijuana is not only widely considered to be a form of medicine that provides therapeutic relief for a wide range of conditions, but that its side effects, such as the psychoactive “high,” are “within acceptable risks associated with approved medications,” and such side effects are even useful to individuals treating certain conditions such as anxiety.<sup>44</sup> Marijuana as a form of therapeutic medicine is no longer a controversial question within the scientific and medical communities as evidenced by a follow-up report released in 2017 by the IOM’s parent organization, the National Academy of Sciences.<sup>45</sup> The 2017 study arrived at nearly 100 conclusions based on new studies and data finding conclusive evidence exists showing that marijuana is effective as a therapeutic form of medicine.<sup>46</sup>

Following this lead, states that have adopted comprehensive medical marijuana programs have endorsed the scientific consensus on the matter. Some states, such as Washington, Pennsylvania, and Rhode Island, are quite explicit in this regard, having codified references to medical marijuana as a humanitarian act meant to improve quality of life and forthrightly state that one of the bases for their laws is to accrue medical benefits to qualified patients.<sup>47</sup> Those states without a specific declaration to that effect have tacitly embraced the idea by the very wording of the laws and their requirements, such as mandating some proof of a qualifying condition.<sup>48</sup>

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42. *Id.* at 13–14 (emphasis added); *see also id.* at 34–35.

43. *Id.* at 138. The study was conducted utilizing a series of comprehensive workshops comprised of experts discussing the issue and a panel of nine experts on the subject reviewed the literature and studies presented, which heard comment from a “roughly equal number[] of persons and organizations opposed to and in favor of the medical use of marijuana.” *Id.* at 15–16.

44. *Id.* at 125–27, 137–38. The study additionally concluded that while some individuals who experience “contraindicated” effects from the use of marijuana, this is not uncommon to “many medications.” *Id.* at 127.

45. NAT’L ACADS. OF SCIS., ENG’G & MED., *THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH* 1–6 (2017).

46. *Id.* at 7–22.

47. *See, e.g.*, 35 PA. CONS. STAT. ANN. § 10231.102(1) (West Supp. 2018); 21 R.I. GEN. LAWS § 21-28.6-2(1) (Supp. 2017); WASH. REV. CODE ANN. § 69.51A.005 (LexisNexis, LEXIS through 2018 c 6).

48. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 94C § Appx. (West, Westlaw through Chapter 108 of 2018 2d Ann. Sess.) (entitled “Humanitarian Medical Use of Marijuana”).

While all medical marijuana regimes differ to some degree, as the remainder of this Part will no doubt illustrate, they each share a few common elements. One such example requires that all qualified patients suffer from a “debilitating”<sup>49</sup> or “serious” medical condition,<sup>50</sup> usually termed a “qualifying condition.” A prospective registrant<sup>51</sup> thus becomes a qualified patient in the eyes of her state provided she suffers from a qualifying condition and can show proof of that malady.<sup>52</sup> Typically, the patient is diagnosed with the qualifying condition by a physician or specialist and later sees a separate licensed physician who may recommend medical marijuana after reviewing copies of the patient’s diagnosis.<sup>53</sup> In order to qualify under state laws, the attending physician must determine that the patient’s qualifying condition “may be alleviated”<sup>54</sup> by the use of marijuana or the patient may “benefit” from its use in order to make a recommendation.<sup>55</sup>

The use of “recommendation” as opposed to “prescription,” both here and in legislation, is purposeful. It is a carefully-used term of legal art, employed to keep medical marijuana programs free from at least one form of federal encroachment.<sup>56</sup> Indeed, it is likely that this act of foresight in the Compassionate Use Act<sup>57</sup> is what kept California’s medical marijuana regime operating initially, and thereafter allowed the trend to continue.<sup>58</sup> At the time California’s medical marijuana regime was created, the federal government was keen to end it, but did not seek to do so via lawsuit against the state directly.

Instead, the federal government announced a new policy: the DEA would revoke the registration of any physician who recommended medical marijuana, effectively ending their ability to write prescriptions or otherwise

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49. COLO. CONST. art. XVIII, § 14(1)(a).

50. CAL. HEALTH & SAFETY CODE § 11362.7(a), (h) (Deering 2017).

51. Minors are usually allowed to become qualified patients, though the requirements are typically much stricter than those for adults. *See* COLO. CONST. art. XVIII, § 14(6) (requiring individuals under the age of 18 to obtain multiple physician diagnoses and a parent to serve as primary caregiver); HAW. REV. STAT. ANN. § 329-122(b) (LexisNexis, LEXIS through Act 51 of 2018 Sess.) (requiring parental consent and monitoring).

52. Each state’s list of qualifying conditions varies, but usually includes cancer, AIDS and HIV, glaucoma, Cachexia, multiple sclerosis, and other conditions or disorders that cause severe or chronic pain, nausea, seizures, and /or muscle spasms. Klieger et al., *supra* note 32, at 2211–12 tbl.3.

53. *See* COLO. CONST. art. XVIII, § 14(1)(a), (j); CAL. HEALTH & SAFETY CODE § 11362.7(h), (i) (Deering 2017).

54. COLO. CONST. art. XVIII, § 14(1)(a)(II).

55. WASH. REV. CODE ANN. § 69.51A.005(1)(a) (LexisNexis, LEXIS through 2018 c 6). Other states, such as Hawaii, have stricter requirements for recommendations and require that the benefits outweigh the risks to the patient. HAW. REV. STAT. ANN. § 329-122(a)(2) (LexisNexis, LEXIS through Act 51 of 2018 Sess.).

56. *See* Conant v. Walters, 309 F.3d 629, 635–36 (9th Cir. 2002).

57. CAL. HEALTH & SAFETY CODE § 11362.5 (Deering 2017).

58. *See* Conant, 309 F.3d at 639; *see also* Mikos, *supra* note 36, at 1465–69. Incorrect terminology of this type doomed Arizona’s initial efforts to pass medical marijuana laws. *See* Lee, *supra* note 35.

dispense medication and thus killing the market for medical marijuana in California.<sup>59</sup> This strategy insured many physicians would stop recommending marijuana, but it also ran afoul of the United States Constitution. The Ninth Circuit stated as much when it found the government's policy to be an unconstitutional violation of the doctors' First Amendment rights.<sup>60</sup> The government argued that to recommend medical marijuana is to encourage criminal behavior.<sup>61</sup> The court, however, was unmoved, believing that the violations of free speech were too great and the "potential harms were too attenuated from the proscribed speech."<sup>62</sup> The government unsuccessfully appealed and eventually accepted the outcome.<sup>63</sup>

Following a physician's recommendation, all states require the patient to register with the state and obtain an identification card before she can purchase, possess, or use marijuana legally.<sup>64</sup> Due to the amount of patient information being shared between doctors and agencies, many states have also created laws which make it unlawful to either access or disseminate qualifying patient information.<sup>65</sup> A small number of states eschew mandatory registration schemes and have adopted programs that allow for compliance via different methods. California, for example, only began a voluntary registration program in 2003.<sup>66</sup> The State of Washington created its registration program in 2016, though it is voluntary and state law explicitly allows non-registered medical marijuana users to raise their medical condition as an affirmative defense to marijuana-related charges by law enforcement if they have not registered with the State.<sup>67</sup> Once registered, the

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59. Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164, 6164 (Feb. 11, 1997); *Conant*, 309 F.3d at 639–40 (Kozinski, J., concurring) (arguing that revoking a doctor's ability to write a prescription is akin to destroying her ability to practice medicine in America).

60. *Conant*, 309 F.3d at 637 (finding the policy unconstitutional as it sought "to punish physicians on the basis of the content of doctor-patient communications," that only the "discussions of the medical use of marijuana trigger the policy," and "the policy does not merely prohibit the discussion of marijuana; it condemns expression of a particular viewpoint").

61. *Id.* at 638.

62. *Id.* (citing *Ashcroft v. Free Speech Coal., Inc.*, 535 U.S. 234, 251–52 (2002)).

63. *Walters v. Conant*, 540 U.S. 946, 946 (2003) (denying certiorari); *Conant v. McCaffrey*, No. 00-17222, 2003 U.S. App LEXIS 3932, at \*2 (9th Cir. Feb. 6, 2003) (denying en banc rehearing).

64. See ARK. CONST. amend. 98, § 5; COLO. CONST. art. XVIII, § 14(3)(b). The State of Washington did not require registration as part of its medical marijuana program from initiation in 1998 until 2016. WASH. REV. CODE ANN. § 69.51A.010(19)(a)(vi)(B) (LexisNexis, LEXIS through 2018 c 6).

65. COLO. CONST. art. XVIII, § 14(3)(a); CAL. HEALTH & SAFETY CODE § 11362.713 (Deering 2017).

66. CAL. HEALTH & SAFETY CODE § 11362.71 (Deering 2017).

67. WASH. REV. CODE ANN. § 69.51A.043 (LexisNexis, LEXIS through 2018 c 6). Maine had a similar statute repealed in 2009. ME. REV. STAT. ANN. tit. 22, § 2427 (Supp. 2016).

individual becomes a qualifying patient, subject to all the protections afforded by her state's laws.<sup>68</sup>

The final piece of legislative framework discussed by this Article is the scope of the legal protections afforded to qualified patients. While decriminalization became a popular method to alleviate some minor criminal consequences and decrease unnecessary arrests,<sup>69</sup> comprehensive medical marijuana programs go much farther. They legalize possession, purchase, consumption, cultivation, and distribution within statutory confines, usually placing these actions under the term "use."<sup>70</sup>

Comprehensive legalization removes criminal and civil penalties associated with state prosecution for the use of marijuana. Such protections are important to qualified patients and states alike, as more than 99% of all marijuana arrests are affected by state, not federal, law enforcement officers.<sup>71</sup> When a state creates a medical marijuana program and legalizes marijuana, it no longer stands in line with either the CSA or the federal government and is instead in conflict.<sup>72</sup> Qualified patients are, in the eyes of their local law enforcement,<sup>73</sup> law-abiding individuals seeking a form of medical attention.<sup>74</sup> States enshrine legal protections into their medical marijuana statutes, providing explicit protection to qualified patients from criminal and civil consequences—including civil forfeiture<sup>75</sup>—enforced by state actors, either via providing the qualified patient with an affirmative

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68. See ALASKA STAT. § 17.37.010(c) (LexisNexis, LEXIS through 2017 legislation.); CAL. HEALTH & SAFETY CODE § 11362.712 (Deering 2017).

69. See LISA N. SACCO ET AL., CONG. RESEARCH SERV., R44782, THE MARIJUANA POLICY GAP AND THE PATH FORWARD 7–9 (2017).

70. See COLO. CONST. art. XVIII, § 14(1)(b) (defining "medical use" as "acquisition, possession, production, use, or transportation of marijuana or paraphernalia related to the administration of such marijuana"); see also WASH. REV. CODE ANN. § 69.51A.050(2) (LexisNexis, LEXIS through 2018 c 6).

71. See Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise?*, 91 OR. L. REV. 1029, 1036–37 (2013) (stating that marijuana cases disposed of in federal court made only 0.8% of all marijuana arrests in the United States in 2010); see also *Beek v. City of Wyo.*, 846 N.W.2d 531, 538 (Mich. 2014) (citing MICH. COMP. LAWS SERV. § 333.26422 (LexisNexis 2017)) (finding that data provided by the Federal Bureau of Investigation bears out these statistics).

72. 21 U.S.C. §§ 841–844 (2016) (creating harsh criminal penalties for possession and distribution of Schedule I substances, including marijuana).

73. This should not be read to imply that law enforcement agencies in states with comprehensive medical marijuana programs—or both medical and recreational legalization—are more concerned with the civil rights of their citizens. For example, Colorado, which legalized medical and recreational marijuana in 2000 and 2013, respectively, now arrests more minority youths for marijuana-based offenses than it did prior to 2013. Ben Markus, *As Adults Legally Smoke Pot in Colorado, More Minority Kids Arrested for It*, NPR (June 29, 2016, 4:50 AM), <https://perma.cc/7GT9-JZK4>.

74. See sources cited *supra* notes 41–48.

75. See, e.g., COLO. CONST. art. XVIII, § 14(2)(e); N.M. STAT. ANN. § 26-2B-4(G) (2017); WASH. REV. CODE ANN. § 69.51A.050(1) (LexisNexis, LEXIS through 2018 c 6).

defense to charges stemming from marijuana use under the statute<sup>76</sup> or by exempting such individuals from sanctions altogether.<sup>77</sup> Increasingly, however, some states have become aware that these legal protections, while necessary, do not adequately protect qualified patients from the full spectrum of consequences they may suffer and are now adding language to protect them from private discrimination and violations of civil rights, where possible.<sup>78</sup>

Seeing the need for expanded protections outside the realm of criminal and civil sanctions by state actors, states have begun to craft their medical marijuana laws with language intended to expand civil rights and anti-discrimination protections for qualified patients. The activities and rights that are protected vary from state-to-state, but some examples include protections against discrimination on the basis of an individual's status as a qualified patient in employment decisions,<sup>79</sup> custody hearings or family law matters,<sup>80</sup> leasing and housing decisions,<sup>81</sup> medical care including organ

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76. See, e.g., COLO. CONST. art. XVIII, § 14(2)(a); NEV. REV. STAT. ANN. § 453A.310 (LexisNexis 2017); OR. REV. STAT. § 475B.913 (2017); *but see* D.C. CODE § 7-1671.08(d) (2018) (allowing “[c]ivil fines, penalties, and fees” to be imposed in addition to criminal penalties for individuals operating outside of or fraudulently representing their participation in the medical marijuana program).

77. See, e.g., 35 PA. CONS. STAT. ANN. § 10231.2103 (West Supp. 2018); VT. STAT. ANN. tit. 18 § 4474b(a) (2017).

78. Qualified patients cannot sue in federal court for violations under the Americans with Disabilities Act of 1990 (“ADA”) as the act specifically excludes individuals who use illegal drugs from coverage. 42 U.S.C. § 12114(a) (2016). See also *James v. City of Costa Mesa*, 700 F.3d 394, 397 n.3 (9th Cir. 2012) (holding “that the ADA does not protect medical marijuana users who claim to face discrimination *on the basis of* their marijuana use”).

Though federal ADA application appears settled, debate regarding state-level application abounds when a state has legalized medical marijuana and certain other conditions exist. Conflict arises when the medical marijuana law also requires non-discrimination against qualified patients, but the state maintains anti-discrimination statutes akin to the ADA and state law requires interpretation consistent with federal anti-discrimination law. See *Coats v. Dish Network, LLC*, 303 P.3d 147, 149–52 (Colo. App. 2013) (finding that use of marijuana legally under Colorado’s medical marijuana law still violated the CSA, which consequently also violated Colorado’s anti-discrimination statute originally based upon the ADA); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 533 (Or. 2010) (holding that Oregon’s ADA-equivalent must be interpreted consistently with federal law and any state law that would define it otherwise is preempted); *but see* cases cited *infra* notes 84, 87.

79. See, e.g., ARK. CONST. amend. 98, § 3(f)(3); 35 PA. CONS. STAT. ANN. § 10231.2103(b) (West Supp. 2018); 21 R.I. GEN. LAWS § 21-28.6-4(d) (Supp. 2017).

80. See, e.g., ARIZ. REV. STAT. § 36-2813(D) (LexisNexis, LEXIS through 1st Reg. Sess. of 53d Leg. (2017)); N.H. REV. STAT. ANN. § 126:X2(VI) (Supp. 2014); N.Y. PUB. HEALTH LAW § 3369(3) (LexisNexis, LEXIS through 2018 Chapters 1–72).

81. See ARIZ. REV. STAT. § 36-2813(A) (LexisNexis, LEXIS through 1st Reg. Sess. of 53d Leg. (2017)); DEL. CODE ANN. tit. 16 § 4905A(a)(1), (c) (2017).

transplants,<sup>82</sup> and education.<sup>83</sup> Though few states have gone so far as providing employment protection to qualified patients,<sup>84</sup> nearly all states that enact comprehensive medical marijuana programs contain language similar to that of New Mexico, which states, “[a] qualified patient shall not be subject to arrest, prosecution or penalty *in any manner* for the possession of or the medical use of cannabis”<sup>85</sup> (emphasis added). Broadly-worded statutory protections of this ilk would logically mean that—absent language or precedent to the contrary<sup>86</sup>—qualified patients are legally able to possess firearms in those states.<sup>87</sup> Personal property protections are also commonplace, as police are to confiscate private property in raids or busts.<sup>88</sup>

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82. State laws consider marijuana to be similar to other medication prescribed by a physician and not an illicit narcotic for these purposes. *See, e.g.*, DEL. CODE ANN. tit. 16 § 4905A(a)(2) (2017); N.H. REV. STAT. ANN. § 126:X2(VII) (Supp. 2014); 21 R.I. GEN. LAWS § 21-28.6-4(r) (Supp. 2017).

83. *See, e.g.*, ARIZ. REV. STAT. § 36-2813(A) (LexisNexis, LEXIS through 1st Reg. Sess. of 53d Leg. (2017)); DEL. CODE ANN. tit. 16 § 4905A(c) (2017); 21 R.I. GEN. LAWS § 21-28.6-4(d) (Supp. 2017).

84. Both California’s and Oregon’s state supreme courts have ruled that their medical marijuana programs do not protect employees who are qualified patients from being fired for marijuana use under preemption principles as applied to the ADA. *See* *Ross v. RagingWire Telecomm., Inc.*, 174 P.3d 200, 208–09 (Cal. 2008); *Emerald Steel Fabricators*, 230 P.3d at 524–25. These decisions have been openly questioned, however. The Michigan Supreme Court stated it had “misgivings, mildly put” regarding the logic used in *Emerald Steel*, where the Oregon Supreme Court misstated and misapplied Supreme Court of the United States precedent regarding preemption and the CSA; though the Michigan court expressed approval of the analysis in *Willis v. Winters*, 253 P.3d 1058 (Or. 2011), a decision issued subsequent to *Emerald Steel* by the Oregon Supreme Court, which appeared to walk back much of the earlier holding’s language. *Beek v. City of Wyo.*, 846 N.W.2d 531, 540 n.6 (Mich. 2014) (citation omitted); *see also* Vikram David Amar, *The California Supreme Court’s Decision on Whether an Employee Can be Fired for Testing Positive for Off-the-Job, Doctor-Suggested Medical Use of Marijuana*, FINDLAW (Feb. 1, 2008), <https://perma.cc/VWU4-UF4K>.

85. N.M. STAT. ANN. § 26-2B-4(A) (Supp. 2017); *see also* WASH. REV. CODE ANN. § 69.51A.040 (LexisNexis, LEXIS through 2018 c 6). (“may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences”).

86. It is plausible that a state could interpret its firearm laws to require that they be interpreted consistently with federal Second Amendment jurisprudence, which currently qualifies the right to bear arms by qualified patients, and therefore a qualified patient would be banned from possessing a firearm at the state level as well. *See* cases cited *supra* note 78.

87. *See Willis*, 253 P.3d at 1061–68 (holding that an Oregon qualified patient may possess firearm according to Oregon law, that Oregon sheriffs are required to issue concealed handgun license to qualified applicants who are also qualified patients, and that the Supremacy Clause does not require states to enforce federal firearms statutes); *People v. Leal*, 210 Cal. App. 4th 829, 842 (1st Dist. Ct. App. 2012) (noting that defendant had the right to use medical marijuana and possess firearm simultaneously while on probation prior to stripping him of these rights for using them to mask illegal activities); *Corey Hutchins, Can You Own a Gun in Colorado if You Smoke Pot?*, COLO. INDEP. (Sept. 2, 2016), <https://perma.cc/PSZ6-FSNF> (quoting former director of state police chief’s association stating that there is no issue open-carrying a handgun while also legally using marijuana under Colorado law); *see also infra* Appendix, Table 2.

88. *See* DICK M. CARPENTER II ET AL., INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 5 (2d ed. 2015); *see also* Christopher Ingraham, *Law*

Specifically, states provide that any marijuana or drug paraphernalia unlawfully seized by law enforcement agents must be returned to the owner, though such protections have been called into question due to possible violations of the Constitution and federal law.<sup>89</sup>

## B. Federal Laws & Policies

In stark contrast to the constantly-expanding, progressive treatment of marijuana at the state level, the United States government operates a rigid system that essentially bans marijuana in any respect. Federal policy is based, not on currently-available scientific or medical understanding, but on a prohibitionist<sup>90</sup> approach that rejects findings and conclusions about the efficacy and use of marijuana, even its own.<sup>91</sup> To accomplish the goal of stamping out marijuana usage in America, the federal government uses two primary mechanisms: the CSA, which provides the legal mechanisms for prohibition, and the DOJ and its subsidiary agencies, which provide enforcement and prosecution of the CSA and any collateral laws.

In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, more commonly known as the Controlled Substances Act.<sup>92</sup> The CSA gathered numerous federal programs under one umbrella and became an all-encompassing control mechanism that, among

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*Enforcement Took More Stuff from People Than Burglars Did Last Year*, WASH. POST (Nov. 23, 2015), <https://perma.cc/MR43-WCWG>.

89. *Compare* N.M. STAT. ANN. § 26-2B-4(G) (Supp. 2017) and Mikos, *supra* note 36, at 1459–60 (arguing that returning illegally-seized marijuana and paraphernalia “merely restores the state of nature” and should not be subject to the doctrine of preemption, though he does admit that there are as yet “no satisfactory answers”) with *People v. Crouse*, 388 P.3d 39, 42–43 (Colo. 2017) (en banc) (holding that section 14(2)(e) of Colorado’s medical marijuana code is unconstitutional as enacted as it requires state officials to return a federally-controlled substance in violation of the CSA, even where state law deems the substance to be legal); *see also Crouse*, 388 P.3d at 45–46 (Gabriel, J., dissenting) (arguing that a literal reading of the majority’s holding means that any officer distributing narcotics in a sting operation would be actively and knowingly violating the CSA and therefore subject to punishment).

90. Prohibition of all illegal narcotics has been America’s publicly-stated drug policy goal since the early 1970’s. Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INST. POL’Y ANALYSIS, no. 811, Apr. 12, 2017, at 2–4; *see also Medical Marijuana Referenda Movement in America: Hearing Before Subcomm. on Crime of the Comm. on the Judiciary*, 105th Cong. (1997) (statement of Gen. Barry R. McCaffrey, Director, Office of Nat’l Drug Control Pol’y, submitted for the Record).

91. Congress has made numerous inquiries on the subject, even as early as the Senate hearings debating the CSA, where some members called for a study to examine the effects of marijuana and possible rescheduling. *See* S. REP. NO. 91-613, at 1–2, 10 (1969). The study was performed in the early 1970’s and concluded that marijuana should be legalized for personal, recreational use, but was never implemented. NAT’L COMMISSION ON MARIHUANA & DRUG ABUSE, *DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE* 466–67 (2d Rep. 1973).

92. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. §§ 801–971 (2016)).



many others, regulates narcotics scheduling, penalties and sentencing, approved scientific and medical research, and the war on drugs.<sup>93</sup> Congress created the CSA as the centerpiece to all federal actions for marijuana enforcement.<sup>94</sup> In July 1973, nine precursor agencies were combined to form the DEA,<sup>95</sup> which was placed under the DOJ<sup>96</sup> and subsequently tasked with administration and enforcement of the whole of the CSA.<sup>97</sup>

The CSA regulates the scheduling of all narcotics—legal or illegal.<sup>98</sup> Since its creation, the CSA has classified marijuana as a Schedule I narcotic, meaning that it has “high potential for abuse,” has “no currently accepted medical use in treatment,” and exhibits a “lack of accepted safety for use . . . under medical supervision.”<sup>99</sup> Physicians may not legally dispense or prescribe Schedule I substances, but may do so for those on schedules II-V.<sup>100</sup> Other substances listed on Schedule I include heroin, LSD, and peyote,<sup>101</sup> while Schedule II—considered safer and acceptable for medical treatment in the United States—includes opium, cocaine, and methamphetamines.<sup>102</sup>

The authority to reschedule marijuana lies with the DEA,<sup>103</sup> though Congress may reschedule a drug via legislation in the absence of action by the DEA or Attorney General.<sup>104</sup> Since the CSA was enacted, marijuana legalization proponents have been making continuous requests and filing lawsuits attempting to force the federal government to reschedule marijuana, though these have so far been unsuccessful.<sup>105</sup> The DEA has responded

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93. *Id.*

94. DRUG ENF'T ADMIN., HISTORY OF THE DEA: 1970-1975, at 31, <https://perma.cc/HG4P-T527>.

95. Exec. Order 11,727, Drug Law Enforcement, 38 Fed. Reg. 18,357 (July 10, 1973).

96. The DEA Administrator reports directly to the Attorney General. Drug Enforcement Policy Coordination, 28 C.F.R. § 0.102 (2017).

97. 21 U.S.C. § 823 (2016). The Attorney General has formally delegated the authority granted to that position by the CSA to the DEA Administrator. Drug Enforcement Administration: General Functions, 28 C.F.R. § 0.100(b) (2017).

98. The CSA divides hundreds of drugs, plants, chemicals, and even structural compounds into one of five schedules, with tighter regulations on each schedule descending from five-to-one, with Schedule I being the most tightly regulated. 21 U.S.C. § 812 (2016).

99. *Id.* § 812(b)(1)(A)–(C).

100. *Id.* § 823(f).

101. *Id.* § 812(c), Sch. I(b)(10), (c)(9), (12).

102. *Id.* § 812(c), Sch. II(a)(1), (4), (c).

103. *Id.* § 811(a); *see also* All. for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1133 (D.C. Cir. 1994).

104. Recent years have seen U.S. senators introduce bills which would reschedule marijuana, though neither has passed, or is likely to, given the current makeup of the Senate. *See* Marijuana Justice Act of 2017, S. 1689, 115th Cong. § 2 (2017) (introduced by Sen. Cory Booker (D-NJ)); Ending Federal Marijuana Prohibition Act of 2015, S. 2237, 114th Cong. § 3 (2015) (introduced by Sen. Bernie Sanders (I-VT)).

105. *See* Caroline Herman, United States v. Oakland Cannabis Buyers' Cooperative: *Whatever Happened to Federalism?*, 93 J. CRIM. L. & CRIMINOLOGY 121, 124–25, n.27 (2002) (compiling cases dating back to 1974 and noting numerous unsuccessful efforts to lobby Congress).

unfavorably to requests to reschedule marijuana, describing the evidence presented by proponents as inconclusive, anecdotal, or biased.<sup>106</sup> One such response is particularly telling. Following a two-year congressional hearing on marijuana rescheduling held during the 1980s, the presiding administrative law judge agreed with the “testimony of a number of physicians and patients” that “marijuana has a currently accepted medical use” and recommended that it be rescheduled to Schedule II.<sup>107</sup> The DEA Administrator, however, rejected the recommendation and, after a lengthy court battle, settled on a new five-part test that is still used to determine whether marijuana is “currently accepted for medical use.”<sup>108</sup> Although this went against the presiding judge’s recommendation, the D.C. Circuit found it to be an acceptable action within the DEA Administrator’s prerogative and discretion.<sup>109</sup>

Rescheduling marijuana is further hindered by strict federal guidelines affecting medical and scientific research, including restrictions on who may participate, supply available to researchers, and quality of that supply. The federal government greatly restricts research using marijuana and requires researchers, or “practitioners,” to register with the DEA in order to “dispense, or conduct research with respect to, controlled substances.”<sup>110</sup> Registration to perform research using marijuana or any Schedule I substance is separate from the registration a practitioner might have for substances under Schedules II-V.<sup>111</sup> Practitioners must also adhere to strict quota limitations, determined not by practitioners, research guidelines, or scientific consensus, but by the discretion of the Attorney General.<sup>112</sup> Even participation is made more difficult as all applications are sent to the Department of Health and Human Services to review the “competency” of all applicants and the “merits” of each research protocol.<sup>113</sup>

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106. *See, e.g.*, Marijuana Scheduling Petition: Denial of Petition, 54 Fed. Reg. 53,767, 53,767-68 (Dec. 29, 1989); Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40,552, 40,552 (July 8, 2011); Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,688, 53,688 (Aug. 12, 2016).

107. Marijuana Scheduling Petition: Denial of Petition, 54 Fed. Reg. 53,767, 53,772 (Dec. 29, 1989); *see also* All. for Cannabis Therapeutics v. DEA, 930 F.2d 936, 938, 940-41 (D.C. Cir. 1991). The DEA Administrator, however, rejected this recommendation and instead substituted an eight-factor test to determine “currently accepted medical use” for marijuana. *Id.* at 938. The D.C. Circuit found that two of the factors were impossible or unreasonable as imposed and questioned a third that was eventually removed as well and remanded the case. *Id.* at 940-41.

108. All. for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1135 (D.C. Cir. 1994); *see also* Marijuana Rescheduling Petition: Denial of Petition, Remand, 57 Fed. Reg. 10,499, 10,499 (Mar. 26, 1992).

109. All. for Cannabis Therapeutics, 15 F.3d at 1135.

110. 21 U.S.C. § 823(f) (2016).

111. *Id.*

112. *Id.* § 826. The Attorney General may arbitrarily decrease quota amounts for individuals. *Id.* § 826(b).

113. *Id.* § 823(f); 21 C.F.R. § 1301.32(a) (2018). These procedures are not required for research of substances listed on Schedules II-V.

Supply is also strictly controlled, with all marijuana produced for research purposes in the United States cultivated at a federal facility at the University of Mississippi.<sup>114</sup> In 2016, the DEA stated that it would work to expand access to supply, though it is too early to tell whether that has occurred.<sup>115</sup> Additionally, the supply from the University of Mississippi facility is of lower potency than the product typically available from a dispensary in a state with a comprehensive medical marijuana program, and the facility does not produce certain types of products widely available to the public, such as edibles and concentrates, among others.<sup>116</sup> Once researchers have obtained supply, it must be safeguarded under lock-and-key or other increased security measures by both practitioners *and* applicants throughout the trial.<sup>117</sup> Though research currently shows that marijuana has therapeutic effects for numerous debilitating or life-threatening conditions,<sup>118</sup> the extent of such effects is not fully known in most cases, and CSA-mandated research barriers “markedly affect the ability to conduct comprehensive basic, clinical, and public health research.”<sup>119</sup> Research restrictions imposed by the CSA also impede simple tests for purity, contaminants, and chemical composition.<sup>120</sup> This causes additional concerns, because while most states require some level of product safety testing, these measures are not required to meet federal standards and vary greatly between each state.<sup>121</sup>

Aside from criminal sanctions, probably the most well-known aspect of the CSA is America’s five-decade-old policy known colloquially as the “war on drugs.” The federal government has long viewed drug use as a systemic, societal problem that will “steal . . . children’s lives”<sup>122</sup> which has

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114. NAT’L ACADS. OF SCIS., ENG’G & MED., *supra* note 45, at 382–83. The authors note the difficulty of any single cultivation center or facility to provide the “array and potency of products available in dispensaries across the country.” *Id.* at 383.

115. Applications to Become Registered Under the Controlled Substances Act to Manufacture Marijuana to Supply Researchers in the United States, 81 Fed. Reg. 53846 (2016); NAT’L ACADS. OF SCIS., ENG’G & MED., *supra* note 45, at 384.

116. NAT’L ACADS. OF SCIS., ENG’G & MED., *supra* note 45, at 382–83.

117. 21 C.F.R. § 1301.71 (2018).

118. *See* sources cited *supra* notes 41–48.

119. NAT’L ACADS. OF SCIS., ENG’G & MED., *supra* note 45, at 390; *see id.* at 378–90, 400–01 (citing federal CSA research policies as the main impediment to research). The National Academies note that they were “specifically directed” in their statement of task to avoid calling for rescheduling of marijuana, though that is the general consensus from all conclusions. *Id.* at 382 n.15.

120. *Id.* at 380, box 15-1.

121. State-mandated testing only tests the product itself and does not test the interaction of medical marijuana with other medicines or how it interacts with certain patients. Klieger et al., *supra* note 32, at 2209 tbl.1.

122. Aviva Shen, *The Disastrous Legacy of Nancy Reagan’s ‘Just Say No’ Campaign*, THINK PROGRESS, (Mar. 6, 2016, 9:45 PM), <https://perma.cc/FV86-RKH3> (quoting Nancy Reagan’s famous “Just Say No” speech, which kick-started a new education campaign aimed at school-age children in the 1980’s).

caused a public health crisis, promoted crime, and hurt the economy.<sup>123</sup> In response, the DEA has historically used the war on drugs to increase incarceration via mandatory minimum sentences for drugs offenses,<sup>124</sup> increase militarization of state and local law enforcement agencies against civilians,<sup>125</sup> and allow an exponential increase in the use of civil forfeiture.<sup>126</sup> Though the Obama Administration backed away from some of the uglier aspects of the war on drugs such as mandatory minimum sentencing,<sup>127</sup> it left much of the policy intact.

A number of soft punishments are also collaterally attached to the CSA. This presents numerous adverse, life-altering criminal and civil sanctions for any individual who uses marijuana or is convicted of a marijuana offense. The individual may lose employment opportunities, unless employment protections are specifically listed in the state's medical marijuana laws, and such laws cannot protect within the context of federal employment.<sup>128</sup>

Public-housing agencies that receive federal assistance are also legally required to turn down or remove users of illegal drugs, including marijuana.<sup>129</sup> The housing agency or owner has wide latitude to investigate possible drug activity and need only have "reasonable cause to believe" that

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123. *See, e.g.*, OFFICE OF NAT'L DRUG CONTROL POL'Y, NATIONAL DRUG CONTROL STRATEGY iii, 74 (2015).

124. In 2014 alone, 1,561,231 people were arrested for drug-related charges, nearly half of them involving marijuana. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES, 2014 2 (2015). As of 2015, 49.5% of all federal prisoners and 15.7% of all state prisoners were serving sentences for drug offenses. E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2015 14 tbl.9, 15 tbl.10 (Dec. 2016). The U.S. prison population has risen from roughly 300,000 in 1978 to more than 1,500,000 in 2015, an increase of 500% during that time. *Id.* at 3 fig.2.

125. The Military Cooperation with Civilian Agencies Act of 1981 has been used heavily to allow for militarization of local police. Military Cooperation with Civilian Agencies Act of 1981, Pub. L. No. 97-86, 95 Stat. 1099 (codified at 10 U.S.C. §§ 271–84 (2016)). The act allows the Department of Defense to provide "any equipment" without exception to law enforcement personnel for "counter-drug" activities. 10 U.S.C. §§ 272, 281(a)(1) (2016).

126. Ford, Matt, *The Bipartisan Opposition to Sessions's New Civil-Forfeiture Rules*, ATLANTIC, (July 19, 2017), <https://perma.cc/G2VW-PVZ7>. Attorney General Sessions has been a vocal proponent of the policy's use, despite widespread, bipartisan condemnation of the program for constitutional and policy reasons. *Id.* According to a study by The Washington Post in 2015, civil forfeiture proceedings by federal and state law enforcement agencies accounted for more property losses nationwide than all burglaries during the same year. Ingraham *supra* note 88.

127. Memorandum from Eric Holder, Att'y Gen., U.S. Dep't of Justice, to U.S. Att'y's & Assistant Att'y Gen. for Crim. Div. (Aug. 12, 2013) (available at <https://perma.cc/JL6N-PTCP>). (relaxing mandatory minimum sentencing guidelines for U.S. attorneys prosecuting drug cases).

128. *See* sources cited *supra* note 84. Federal employees in certain categories and federal contractors may also be subject to random drug testing, which may subject them to loss of employment, or, in the case of a contractor, federal funding and grants. 50 U.S.C. § 3343(b) (2015); 41 U.S.C. § 8102 (2016).

129. 42 U.S.C. §§ 13661–13662 (2016).

illegal use is occurring and that such abuse “may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.”<sup>130</sup> Additionally, individuals convicted of misdemeanors under the CSA “become ineligible” to receive federally-backed student loans.<sup>131</sup> Finally, the individual is also subject to the qualification of their Second Amendment rights, as discussed in much greater depth in parts II and III.

As the DEA’s parent agency, the DOJ is the main enforcement and prosecution mechanism for the CSA and sets policy regarding marijuana throughout the federal government. The Supreme Court has ruled that the DOJ retains “broad discretion” in determining whom to prosecute and that such decisions are “particularly ill-suited to judicial review.”<sup>132</sup> Until recently, the DOJ used its broad discretion to prosecute all marijuana offenders and attempt to obtain the maximum sentence possible, even when marijuana had been legalized by the state.<sup>133</sup> President Obama’s first term in office, however, brought changes in the form of an administration, which was, initially, much more sympathetic toward medical marijuana than its predecessor.<sup>134</sup> Beginning in 2009, the DOJ utilized its prosecutorial discretion to issue new policies for states with comprehensive medical marijuana and full legalization programs, releasing three memoranda to publicly announce its enforcement priorities: the Ogden Memo,<sup>135</sup> the Cole Memo,<sup>136</sup> and the Cole Recreational Memo.<sup>137</sup>

### 1. The Ogden Memo

Bringing sweeping changes to federal marijuana policy, the Ogden Memo also brought to light a fundamental, and lightly-discussed, flaw in the federal government’s anti-drug strategy, stating that the DOJ had to make “efficient and rational use of its limited investigative and prosecutorial

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130. *Id.* § 13661(b)(1)(B).

131. U.S. GOV’T ACCOUNTABILITY OFF., GAO-05-238, DRUG OFFENDERS: VARIOUS FACTORS MAY LIMIT THE IMPACTS OF FEDERAL LAWS THAT PROVIDE FOR DENIAL OF SELECTED BENEFITS 6 (2005).

132. *Wayte v. United States*, 470 U.S. 598, 607 (1985).

133. *See* Memorandum from Eric Holder, *supra* note 127.

134. KATHERINE VAN WORMER & DIANE RAE DAVIS, ADDICTION TREATMENT 66 (Cengage Learning, 4th ed., 2014) (describing the anti-marijuana efforts of President George W. Bush’s administration, including both “extravagant” prohibitionist propaganda and a fight against medical marijuana dispensaries).

135. Memorandum from David Ogden, Deputy Att’y Gen., U.S. Dep’t of Just., to selected U.S. Att’ys (Oct. 19, 2009) (available at <https://perma.cc/SFD9-GS57>) [hereinafter Ogden Memo].

136. Memorandum from James Cole, Deputy Att’y Gen., U.S. Dep’t of Just., to U.S. Att’ys (June 29, 2011) (available at <https://perma.cc/MS9C-VP3M>) [hereinafter Cole Memo].

137. Memorandum from James Cole, Deputy Att’y Gen., U.S. Dep’t of Just., to all U.S. Att’ys (August 29, 2013) (available at <https://perma.cc/DKX7-NC7Y>) [hereinafter Cole Recreational Memo].

resources.”<sup>138</sup> The DOJ indicated that while it would still prosecute “significant” drug traffickers as a “core priority,” the agency’s limited resources should not be expended on “individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”<sup>139</sup> The Ogden Memo did however note that seven types of conduct were federal enforcement priorities and would continue to be prosecuted, including the “unlawful possession or use of firearms.”<sup>140</sup><sup>141</sup>

The medical marijuana industry viewed the Ogden Memo as an about-face from prior DOJ policy and it was interpreted as a “green light to the open sale of marijuana” in states with medical regimes.<sup>142</sup> This opinion extended to the press and general public as well. Following its publication, a front-page story about the Ogden Memo graced the New York Times reporting that “people who use marijuana for medical purposes and those who distribute it to them should not face federal prosecution, provided they act according to state law.”<sup>143</sup> Suddenly, an influx of new qualified patients and dispensaries caused a backlash from critics of medical marijuana programs<sup>144</sup> and led the DOJ to amend its guidance just two years later.

## 2. The Cole Memo

It appears the DOJ viewed the public and industry reaction to the Ogden Memo as an overreaction and unintended consequence that it attempted to rectify with publication of the Cole Memo.<sup>145</sup> Principally, the Cole Memo reiterated the seven activities of interest detailed in the Ogden Memo and introduced a new distinction between qualified patients and “[p]ersons who are in the business” of producing and selling marijuana or

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138. Ogden Memo, *supra* note 135, at 1.

139. *Id.* at 1–2.

140. *Id.* at 2. This indicates conduct illegal under section 922(g)(3) of the Gun Control Act.

141. The other six types of conduct are “violence; sales to minors; financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law; amounts of marijuana inconsistent with purported compliance with state or local law; illegal possession or sale of other controlled substances; or ties to other criminal enterprises.” *Id.* at 2.

142. Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 881 (2013). Following publication of the Ogden Memo, National Public Radio reported that more medical marijuana dispensaries were open in California than Starbucks, and a Colorado-based magazine reported that the number of medical marijuana applicants increased by more than 1,000 per week. *Id.* at 881 n.51.

143. David Stout & Solomon Moore, *U.S. Won’t Prosecute in States that Allow Medical Marijuana*, N.Y. TIMES (Oct. 19, 2009), <https://perma.cc/TJY6-LMZL>.

144. See Caplan, *supra* note 6, at 127, 129–38 (describing both the influx of qualified patients and dispensaries to states with legalized medical marijuana regimes and critical responses both by local individuals and the author).

145. Cole Memo, *supra* note 136, at 1.

who “facilitate such activities.”<sup>146</sup> Oddly, the Cole Memo stated that the Ogden Memo “was never intended to shield such activities from federal enforcement action or prosecution, even where those activities purport to comply with state law.”<sup>147</sup>

It has been argued that the DOJ’s reasoning and response in the Cole Memo was justified<sup>148</sup> because the Ogden Memo did contain caveats relating to enforcement against private businesses.<sup>149</sup> While it is true that the Ogden Memo did state that commercial enterprises could be prosecuted even if working legally within state laws,<sup>150</sup> this language was not clearly conveyed to the public, the media, or even within the legal system. To the contrary, public commentary about the memo by the Obama Administration created a “difficult ethical problem” for the DOJ.<sup>151</sup> Following the enthusiastic response to the Ogden Memo, the Obama Administration made no attempts to rectify what it apparently considered a common misconception, with the DOJ even dismissing one case against a California dispensary as moot due to the memo’s guidance.<sup>152</sup> This sentiment was echoed by numerous defendants who were arrested and prosecuted<sup>153</sup> as enforcement ramped up surrounding the publication of the Cole Memo.<sup>154</sup> To confuse matters further, the DOJ amended its guidance again with the publication of a third memo.

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146. *Id.* at 2.

147. *Id.* This would appear to contradict both the wording and implication of the prior memo. Ogen Memo, *supra* note 135, at 1-2.

148. See Kamin & Wald, *supra* note 142, at 882 (stating that a “close reading of the Ogden Memo shows that the optimistic interpretation of those who rushed into the marijuana business in 2009 was either careless or delusional” and that there were “clear warnings about the continued viability of the CSA”).

149. Ogen Memo, *supra* note 135, at 1–2. Specifically, the memo stated that the “disruption of illegal drug manufacturing and trafficking networks” and “prosecution of commercial enterprises that unlawfully market and sell marijuana” were still prosecutorial priorities for the agency. *Id.*

150. *Id.* at 2.

151. Alex Kreit, *Reflections on Medical Marijuana Prosecutions and the Duty to Seek Justice*, 89 DENV. U. L. REV. 1027, 1036 (2012).

152. Kreit notes that the Obama Administration never made any public attempt to delineate between qualified patients and dispensaries because Obama, while campaigning for president in 2008, promised that, under his administration, the DOJ would leave the issue of medical marijuana to the states and Attorney General Eric Holder reiterated this position on numerous occasions, going so far as stating that “the policy is to go after those people who violate both federal and state law.” *Id.* at 1036–37. Further, after seeing the public and industry interpretation of the Ogden Memo, the Obama Administration made no efforts to contest this interpretation publicly. *Id.* at 1037–38.

153. See Mont. Caregivers Ass’n, LLC v. United States, 841 F. Supp. 2d 1147, 1148 (D. Mont. 2012); United States v. Washington, 887 F. Supp. 2d 1077, 1090–91 (D. Mont. 2012); United States v. Stacy, 696 F. Supp. 2d 1141, 1143 (S.D. Cal. 2010).

154. Kamin & Wald, *supra* note 142, at 883–84 (stating that DOJ enforcement increased in 2011 in comprehensive medical marijuana state including California, Washington, Colorado, and Montana as a result of the Cole Memo). Following the publication of the Cole Memo, the Obama DOJ appears to have taken a harsher stance on medical marijuana raids than even George W. Bush’s DOJ, which became an issue of contention during his 2012 re-election campaign. Kreit, *supra* note 151, at 1039; see Tim

### 3. The Cole Recreational Memo

In 2012, Colorado and Washington became the first states to legalize the recreational use of marijuana. Though the Cole Recreational Memo largely addresses issues outside the scope of this Article, it does contain notable and crucial policy changes from its predecessors. At the outset, the DOJ reiterated the seven activities it considered to be its highest enforcement priorities and stated that it would step in to prosecute individuals if it felt that “state enforcement efforts [were] not sufficiently robust.”<sup>155</sup> The Cole Recreational Memo also set out two new pieces of guidance. First, the DOJ instructed federal agencies and authorities to avoid consideration of the “size or commercial nature of the marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the [DOJ’s] enforcement priorities.”<sup>156</sup> Second, it appeared to carve out an exception for states with well-regulated marijuana programs, stating “the existence of a strong and effective state regulatory system, and an operation’s compliance . . . may allay the threat that an operation’s size poses to federal enforcement interests.”<sup>157</sup>

The Cole Recreational Memo appears to have been the DOJ’s attempt to find a middle-ground between the Ogden and Cole memos and resolve the conflicts created by their conflicting policies.<sup>158</sup> Essentially, the DOJ stated that if individual conduct did not fall within the seven enforcement priorities it previously reiterated, it would leave enforcement as a state matter.<sup>159</sup> The DOJ also inserted caveats regarding dispensaries and cultivation centers, stating that they could still run afoul of federal law, thus being subject to prosecution.<sup>160</sup> The status of these three memos is now in question due to new enforcement guidelines recently issued under President Donald Trump.

### 4. The Sessions Enforcement Memo

In early 2018, Attorney General Jeff Sessions published a new memo containing guidance outlining the drastically-altered marijuana enforcement priorities of the Trump Administration.<sup>161</sup> Sessions, a long-time anti-

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Dickinson, *Obama’s War on Pot*, ROLLING STONE, (Feb. 16, 2012), <https://perma.cc/9LEJ-JF9K>.

155. Cole Recreational Memo, *supra* note 137, at 1–3.

156. *Id.* at 3.

157. *Id.*

158. Melanie Reid, *The Quagmire that Nobody in the Federal Government Wants to Talk About: Marijuana*, 44 N.M.L. Rev. 169, 179 (2014).

159. Cole Recreational Memo, *supra* note 137, at 3.

160. *Id.* at 3–4.

161. Memorandum from Jefferson B. Sessions, Att’y Gen., U.S. Dep’t of Just., to all U.S. Att’ys (Jan. 4, 2018) (<https://perma.cc/G2VK-37TR>) [hereinafter Sessions Enforcement Memo].



marijuana crusader, has long sought methods to end marijuana legalization so that users and providers may be jailed under federal law, even going so far as to personally ask that members of Congress repeal the Rohrabacher-Farr Amendment.<sup>162</sup> Specifically, the Sessions Enforcement Memo rescinds “previous nationwide guidance specific to marijuana enforcement” prepared by the DOJ under the Obama Administration, which includes the Ogden, Cole, and Cole Recreational memos.<sup>163</sup> Further, Sessions reiterated that the DOJ maintains that “marijuana is a dangerous drug and that marijuana activity is a serious crime.”<sup>164</sup> In statements accompanying its publication, Sessions indicated that, contrary to previous DOJ guidance that created certain safe harbors, this memo “does not have safe harbors in it.”<sup>165</sup> However, the memo does not currently have the force that Sessions implies.

Within the context of recreational legalization, the Sessions Enforcement Memo is being viewed as a means of cracking down on existing recreational programs, participants, and future legalization efforts,<sup>166</sup> though it is too early to know if this guidance will have the desired effect. In medical marijuana states however, the Rohrabacher-Farr Amendment largely prevents the DOJ from taking action against qualified patients or suppliers.<sup>167</sup> Further, it may be argued that by publishing the memo, the DOJ has violated Rohrabacher-Farr under even the most strident interpretations offered by federal courts.<sup>168</sup>

## 5. The Rohrabacher-Farr Amendment

On December 16, 2014, the Consolidated and Further Continuing Appropriation Act of 2015, which included the Rohrabacher-Farr

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162. Christopher Ingraham, *Jeff Sessions Personally Asked Congress to Let Him Prosecute Medical-Marijuana Providers*, WASH. POST (June 13, 2017), <https://perma.cc/W3DP-NJ4W>; see also Rachel Revesz, *Jeff Sessions, Donald Trump’s New Attorney General, Said the Ku Klux Klan ‘Was OK Until I Found Out They Smoked Pot,’* INDEPENDENT (Nov. 18, 2016, 6:12 PM), <https://perma.cc/27TC-ZY8M>.

163. Sessions Enforcement Memo, *supra* note 161, at 1 & n.1.

164. *Id.* at 1.

165. *Jeff Sessions Ends Policy That Let Legal Pot Flourish*, CBS NEWS (Jan. 4, 2018, 2:47 PM), <https://perma.cc/4PKN-KZFM>.

166. Matt Zapotsky, Sari Horwitz & Joel Achenbach, *Use of Legalized Marijuana Threatened as Sessions Rescinds Obama-era Directive That Eased Federal Enforcement*, WASH. POST (Jan. 4, 2018), <https://perma.cc/H4G6-VUDW>.

167. See sources cited and accompanying text *infra* notes 169, 183–89.

168. The Sessions Enforcement Memo will result in less participation in recreational and medical marijuana programs—that was part of the overall point behind its publication. But, because the purpose and effect of the memo were to halt the implementation of medical marijuana programs in existing and future states, without evidence that the action was undertaken using no congressional funding, it appears that the DOJ may have violated Rohrabacher-Farr by releasing the memo. See *supra* notes 162, 166; see also *infra* notes 382–84.

Amendment was signed into law.<sup>169</sup> The amendment requires, without exception, that the DOJ is precluded from using any “funds made available in this Act,” meaning all funding available to the DOJ, “to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”<sup>170</sup> It should be noted that the “States” refers not only to those states that have enacted comprehensive medical marijuana programs, but also to others that allow only low-THC or CBD products, creating an even greater zone of exclusion for the DOJ.<sup>171</sup> On its face, the Rohrabacher-Farr Amendment<sup>172</sup> is a stunning piece of legislation, given the current political climate and the usual deference paid to law enforcement in America. It is an amendment that passed Congress with bipartisan support, forbidding the DOJ, and its subsidiary agencies, from enforcing *any laws*—not just the CSA—that would prevent states from implementing or furthering their medical marijuana regimes.<sup>173</sup>

Initial implementation of the Amendment would prove difficult, however. The DOJ’s response was to continue its business as usual, utilizing the guidance provided in the Ogden, Cole, and Cole Recreational memos.<sup>174</sup> The DOJ interpreted Rohrabacher-Farr to mean that it could still pursue qualified patients and private distributors, but not state actors who were off limits, because to arrest or prosecute those individuals would prevent state implementation.<sup>175</sup> The authors of the Amendment viewed this as a brazen attempt to skirt both the letter and the spirit the law and sent a demand letter

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169. Consolidated and Further Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 § 538 (2014).

170. *Id.* § 538, 128 Stat. at 2217. *See also id.* at Title II, 128 Stat. at 2182 (listing the operating budget of the DOJ). The Rohrabacher-Farr Amendment enumerated the 33 states where comprehensive and low-THC medical marijuana programs had been created at the time. *Id.* § 538, 128 Stat. at 2217.

171. *Id.* § 538, 128 Stat. at 2217; *see also supra* note 33; *see also infra* Appendix, Table 1.

172. The amendment was originally named for U.S. Representatives Dana Rohrabacher (Republican) and Sam Farr (Democrat). Following the retirement of Rep. Farr in January 2017, it was renamed the “Rohrabacher-Blumenauer Amendment” after new co-sponsor Rep. Earl Blumenauer (Dem.). Alicia Wallace, 44 in *Congress Support Effort to Keep DOJ Handcuffed in Medical Cannabis States*, THE CANNABIST, Apr. 10, 2017, <https://perma.cc/HM4R-7TXU>.

173. *See* Voting Record for Rohrabacher-Farr Amendment, <https://perma.cc/2CCA-3YH5> (last visited July 8, 2018); Pub. L. No. 113-235 § 538, 128 Stat. at 2217 (prohibiting the use of any funds to prevent the enumerated states from “implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana”).

174. Health Center from Dana Rohrabacher, United States House of Representatives (May 5, 2016) (available at <https://perma.cc/8CFJ-73SP>; Jacob Sullum, *Would The Rohrabacher-Farr Amendment Actually Stop Medical Marijuana Raids?*, FORBES (June 3, 2014, 6:52 PM), <https://perma.cc/GT7B-EADL> (noting that a hypothetical DEA arrest of a medical marijuana patient would not technically prohibit a state from implementing its own laws regarding medical marijuana use).

175. David Downs, *Updated: War on California Medical Marijuana Will Continue*, *Justice Department Says*, EAST BAY EXPRESS (April 3, 2015), <https://perma.cc/D48W-PUDN>.

to the DOJ, informing the agency that its interpretation was “emphatically wrong.”<sup>176</sup> The demand letter further alleged that the DOJ, tasked with prosecuting federal laws, was itself violating federal law by undertaking an action against a dispensary or qualified patient “acting in accordance with state medical marijuana laws.”<sup>177</sup> This did not sway the DOJ, which continued to operate much as it had previously, essentially ignoring the demand letter and subsequent request for investigation until federal courts stepped in.

The first court to have a say in the matter was the Northern District of California in *United States v. Marin Alliance*.<sup>178</sup> The DOJ argued that the funds described in the Amendment are not the same as those used by the agency for “CSA enforcement actions against individuals or private businesses because such actions do not prevent a State from implementing its own laws.”<sup>179</sup> The agency additionally argued that its prosecutions were a mere “drop-in-the-bucket” that did not present any real impediment to California’s implementation of its program.<sup>180</sup> The district court was unimpressed, holding that an “impermissible government intrusion” is not rendered acceptable simply because “any one defendant is a small piece of the legal landscape.”<sup>181</sup> The district court went on to hold that all forms of statutory interpretation argued against the DOJ’s position and was frank in its assessment of the Rohrabacher-Farr Amendment, stating,

Section 538 either allows the DOJ to shut down medical marijuana dispensaries for violating the CSA, or it does not. It contains no limitation that requires a State to implement its medical marijuana laws in one way or not another—via centralized state dispensary, for example, or through highly regulated local private dispensaries—before Section 538’s prohibition is triggered. Rather, Section 538 takes as a given that States implement their medical marijuana laws in the way they see fit.<sup>182</sup>

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176. Letter from Dana Rohrabacher & Sam Farr, Members of Cong., to Eric Holder, Att’y Gen., U.S. Dep’t of Just. 1 (April 8, 2015) (available at <https://perma.cc/4E86-RUKC>).

177. *Id.* at 2. After the DOJ failed to comply with the initial letter sent on April 8, 2015, representatives Rohrabacher and Farr called for a formal investigation of the DOJ by the Inspector General for admitted, flagrant violations of federal law. Letter from Sam Farr & Dana Rohrabacher, Members of Cong., to Inspector Gen. Michael Horowitz (July 30, 2015), <https://perma.cc/D72D-R96Z>.

178. *United States v. Marin All.*, 139 F. Supp. 3d 1039, 1046–1047 (N.D. Cal. 2015).

179. *Id.* at 1044 (quoting Gov’t Supp. Brief at 6 & n.2 (dkt.272)).

180. *See id.*

181. *Id.*

182. *Id.* at 1044–45.

The district court did note that the scope of each state's laws imposed limits on Rohrabacher-Farr, but any individual or private enterprise acting within those parameters was outside the DOJ's reach.<sup>183</sup>

Following *Marin Alliance*, the DOJ received another loss, this time before the Ninth Circuit in *United States v. McIntosh*.<sup>184</sup> In a sweeping ruling that affects every enforcement action the DOJ undertakes with regard to medical marijuana laws, the Ninth Circuit concluded that the Rohrabacher-Farr Amendment "prohibits DOJ from spending money on actions that prevent the Medical Marijuana States' giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana."<sup>185</sup> The court then turned its analysis to individuals acting under state medical marijuana laws. The court acknowledged that the DOJ may prosecute individuals for violations of the CSA, but doing so prevents "the state from giving practical effect to its law," regardless of whether state officials are the targets of prosecution, because "state law provides for non-prosecution of individuals who engage in such conduct."<sup>186</sup>

The court then moved to the more difficult question of scope, though the difficulty arises from the variable nature of state laws, not federal.<sup>187</sup> Due to the wording of the Amendment, the Ninth Circuit concluded that the DOJ is prohibited from "preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana" but may prosecute those individuals who "do not *strictly comply* with all state-law conditions."<sup>188</sup> The Ninth Circuit's opinion made it clear that the DOJ was faced with a choice in forming its CSA enforcement strategy. Although Congress stripped the DOJ of funding to impede medical marijuana regimes, the DOJ could, theoretically, enforce federal marijuana laws, provided the agency could also furnish some form of proof showing that *none of its congressional funding* was expended therein.<sup>189</sup>

A plain reading of the Rohrabacher-Farr Amendment along with the holdings of both *Marin Alliance* and *McIntosh* makes it apparent that the DOJ and its subsidiary agencies, such as the DEA and the Bureau of Alcohol, Tobacco and Firearms ("ATF"), are currently precluded from investigating, arresting, or prosecuting any participant that is acting in strict compliance

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183. *See id.* at 1047 (gathering cases).

184. *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016).

185. *Id.* at 1176.

186. *Id.* at 1176–77.

187. *Id.* at 1177–78. The court demurred at adopting the defendants' expansive reading of the Amendment, which would have required DOJ to "refrain from prosecuting 'unless a person's activities are so clearly outside the scope of a state's medical marijuana laws that reasonable debate is not possible.'" *Id.* at 1177.

188. *Id.* at 1178 (emphasis added).

189. *Id.* at 1179. Of course, such a showing would be difficult, if not impossible to make in good faith, and, assuming it, would require the agency to run a deficit and likely lead to slower prosecution, thus to possible Sixth Amendment constitutional violations. Conversely, the DOJ could comply with federal law as it now stands.

with state medical marijuana laws. Thus it seems that qualified patients have won a monumental victory against the federal government, though it may be transitory in nature for two reasons. First, Attorney General Sessions has actively attempted to have Rohrabacher-Farr repealed in future spending measures as part of his ongoing crusade against marijuana.<sup>190</sup> Second, because Rohrabacher-Farr was implemented as a rider, it must be reauthorized by Congress or it will become ineffective and thus cease to protect medical marijuana regimes and participants, effectively granting Sessions the enforcement latitude he seeks.<sup>191</sup> Currently, the Rohrabacher-Farr Amendment has been reauthorized through September 30, 2018, though its long-term prospects are being hotly debated.<sup>192</sup><sup>193</sup> Thus the reality for any qualified patient is that, while she may be protected by medical marijuana laws, she is still violating federal law and subject to the actions of a DOJ keen to enforce the CSA.

## II. SECOND AMENDMENT RIGHTS

This Part addresses the current state of Second Amendment jurisprudence in America, its application in a post-*Heller* world, and its intersection with the qualified patient. Section A describes the confusing and somewhat unhelpful text of the majority's decision in *Heller* as a necessary prerequisite for further discussion of individual category qualification. Section B discusses the two-part qualification analysis that federal circuit courts created to fill the void left by *Heller*. Section B also briefly describes application of the qualification analysis as applied to individuals adjudicated as mentally-ill and users of illegal drugs as well as recent policy provided by the ATF to federal firearms dealers.

Although it was not the first piece of legislation to qualify the right to bear arms at the federal level,<sup>194</sup> the Gun Control Act, enacted in 1968, is the federal government's predominant means of qualification today and

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190. See Ingraham, *supra* note 162.

191. See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 § 542, 129 Stat. 2242, 2332–33 (2015).

192. The Amendment was subsequently extended via a spending stopgap bill that extended all funding levels until January 19, 2018 but did not resolve issues between the parties. Alex Pasquariello, *Trump Signs Stopgap Spending Bill Extending Federal Medical Marijuana Protections a Few More Weeks*, CANNABIST, (Dec. 22, 2017, 11:07 AM), <https://perma.cc/Q8WK-SLWH>. Rohrabacher-Farr's future is undecided, however, as the House Rules Committee removed it from consideration for the 2018 funding bill, but the Senate Appropriations Committee had previously included the language. Alicia Wallace, *Rohrabacher-Blumenauer Medical Marijuana Protections Extended by Debt Limit Deal*, CANNABIST (Sept. 8, 2017, 3:34 PM), <https://perma.cc/2FVC-QPYB>.

193. As of this writing, the Rohrabacher-Farr Amendment has been extended to September 30, 2018. *Senators Introduce Bipartisan Legislation to Protect State Marijuana Laws*, MARIJUANA POLICY PROJECT (last updated June 8, 2018), <https://perma.cc/67DF-UTSU>.

194. See sources cited *infra* notes 310, 319.

made firearms possession unlawful for individuals convicted of any felony, unlawful aliens, any user of or person addicted to “marihuana,”<sup>195</sup> and any person who had been “adjudicated as a mental defective.”<sup>196</sup>

### A. An Awkward Landmark Decision

*District of Columbia v. Heller* is a momentous case that radically changed the reading of the Second Amendment for federal courts.<sup>197</sup> It is well beyond the scope of this Article to discuss the factual background of the case, as we are instead much more concerned with its consequences, both intended and otherwise.

For the purpose of this Article’s analysis, *Heller* can be divided into two unequal sections, with only the second being applicable. The first, consisting of the decision’s initial 56 pages is a textual analysis of the Second Amendment’s prefatory and operative clauses, and its post-ratification commentaries.<sup>198</sup> The second, comprising the final nine pages, provides the only guidance for a ruling that would completely alter one of, if not the most, contentious constitutional and political questions of recent times.<sup>199</sup>

The ruling’s second section also contains its only discussion of qualification of the newly-expanded right to bear arms where the majority noted that “[l]ike most rights, the right secured by Second Amendment is not unlimited.”<sup>200</sup> Justice Scalia, writing for the majority, would cause no small amount of discussion and disagreement for federal courts in the years following the decision, in stating that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill,” which the Court described as “presumptively lawful.”<sup>201</sup> These two specifically-named individual category qualifications form the so-called constitutional safe harbor.<sup>202</sup>

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195. Spelling “marijuana” with an “h” instead of a “j” is now commonly viewed as both “archaic” and racially insensitive in academic circles as it hearkens back to early 20th century attempts by prohibitionists to tie marijuana to “despised minority groups” such as Mexican immigrants by virtue of a spelling that would “sound Mexican.” Christopher Ingraham, *‘Marijuana’ or ‘Marihuana’? It’s All Weed to the DEA*, WASH. POST (Dec. 16, 2016), <https://perma.cc/LK6N-R9JL>. Despite these connotations, the DEA continues to use the outmoded spelling, even as recently as December 2016. *Id.*

196. Gun Control Act of 1968, Pub. L. No. 90-618, § 922(d)(4), 82 Stat. 1213, 1220 (codified at 18 U.S.C. § 922(g)(4) (2017)).

197. *See Parker v. District of Columbia*, 311 F. Supp. 2d 103, 104–07 (D.D.C. 2004) (noting that every federal circuit court save one rejected the notion that an individual right to bear arms existed untied to military or militia service, with the Fifth Circuit being the lone exception).

198. *See District of Columbia v. Heller*, 554 U.S. 570, 570–626 (2008).

199. *See id.* at 626–36.

200. *Id.* at 626.

201. *Id.* at 626–27 & n.26.

202. *See* sources cited *infra* notes 218, 220–21.

Before closing, Justice Scalia noted his disdain for Justice Breyer's dissent, particularly the suggestion that the Court should "establish a level of scrutiny for evaluating Second Amendment restrictions" either via the traditional scrutiny tests or an "'interest-balancing' approach."<sup>203</sup> Justice Breyer's interest-balancing approach, perhaps, rather presciently, would have required courts to evaluate "the interests protected by the Second Amendment on one side and government public-safety concerns on the other" with the sole issue being "whether the regulation at issue impermissibly burdens the former in the course of advancing the latter."<sup>204</sup> Justice Scalia viewed any such approach as a blatant constitutional end-around, meant to avoid his originalist interpretation of the Second Amendment.<sup>205</sup> This majority admitted, however, that it left "so many applications of the right to keep and bears arms in doubt."<sup>206</sup>

Justice Breyer would lose the day, as his argument was relegated to a dissent,<sup>207</sup> but history appears to have proven him the most prescient of the justices from the *Heller* decision, at least in the short-term.<sup>208</sup> The interest-balancing approach described in his dissent is quite similar to that which is used by federal courts to rule on Second Amendment cases today, and he correctly surmised that the majority's decision would "encourage legal challenges to gun regulation throughout the Nation."<sup>209</sup>

## B. The Post-*Heller* Two-Step Qualification Analysis

Following *Heller*, Americans have, for the first time, a fundamental right to possess firearms for the "core lawful purpose of self-defense."<sup>210</sup> Yet, the decision failed to create a test to decide the "who, what, where, when, and why"<sup>211</sup> of qualification under the Gun Control Act. Indeed, the Seventh Circuit would later hold that the Supreme Court "resolved the Second Amendment challenge in *Heller* without specifying any doctrinal 'test' for resolving future claims."<sup>212</sup> By failing to enunciate any standard of review, the Supreme Court left gaps to be filled by the various judicially-imposed approaches the majority had sought to avoid.

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203. *Heller*, 554 U.S. at 634.

204. *Id.* at 689 (Breyer, J., dissenting); see *infra* Part II.B.

205. *Id.* at 634–35 (citing *Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977)).

206. *Id.* at 635.

207. *Id.* at 681–723 (Breyer, J., dissenting).

208. See, e.g., Violence Policy Ctr., *U.S. Gun Death Rate Jumps 17 Percent Since 2008 Supreme Court District of Columbia v. Heller Decision Affirming Right to Own a Handgun for Self-Defense* (Jan. 17, 2018), <https://perma.cc/AT8V-B4Q2>.

209. *Heller*, 554 U.S. at 718 (Breyer, J., dissenting).

210. *Id.* at 630.

211. *United States v. Huitron-Guizar*, 678 F.3d 1164, 1166 (10th Cir. 2012) (internal quotation marks omitted).

212. *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011).

In the absence of specific direction, the Third Circuit created a patchwork two-part test,<sup>213</sup> which was subsequently adopted by all federal circuit courts, though its application varies to some degree.<sup>214</sup> When a federal firearms qualification is challenged, the court will analyze the regulation by asking two questions. First, the court asks “whether the challenged law burdens conduct protected by the Second Amendment.”<sup>215</sup> If the court answers in the affirmative, it will then proceed to the second step and ask: Does the regulation in question pass “muster under any appropriate level of scrutiny?”<sup>216</sup> The circuits do differ in their treatment if the answer to the first question is not an unequivocal “yes.” Many will end the inquiry there, allowing the qualification to stand, though others appear to view such an action as incautious and allow the inquiry to proceed to the second step.<sup>217</sup>

Initially, the first step appears to be a simple proposition involving a brief restatement of the statutory context for the regulation in question. The difficulty is multiplied, however, when the analysis attempts to compare the qualification in question with the possible constitutional safe harbor named in *Heller*<sup>218</sup> or measure whether a regulation is “longstanding” and “presumptively lawful.”<sup>219</sup> Federal circuit courts are split in regard to the existence of a constitutional safe harbor, or initial presumption of validity, for the two individual category qualifications named in *Heller*: those restricting firearm ownership by felons and individuals adjudicated as

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213. *United States v. Marzzarella*, 614 F.3d 85, 89 (3d. Cir. 2010).

214. *See Powell v. Tompkins*, 783 F.3d 332, 347–48 n.9 (1st. Cir. 2015) (gathering cases from every other federal circuit court, save the Eleventh Circuit, utilizing the post-*Heller* two-step process). The Eleventh Circuit has since adopted this framework as well. *See GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng’rs*, 788 F.3d 1318, 1324 (11th Cir. 2015).

215. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013) (citing *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)). Some circuits alter the first question to add “as historically understood” or a similar modifier, thus requiring a review of the historical context for the qualification. *See Jackson v. City & Cty. Of S.F.*, 746 F.3d 953, 960 (9th Cir. 2014) (amending the language in *Chovan* to add “based on a ‘historical understanding of the scope of the [Second Amendment] right,’ or whether the challenged law falls within a ‘well-defined and narrowly limited’ category of prohibitions ‘that have been historically protected’”) (citations omitted); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (citing *Chester*, 628 F.3d at 680).

216. *GeorgiaCarry.Org*, 788 F.3d at 1324.

217. *See Woollard v. Gallagher*, 712 F.3d 865, 875 (4th Cir. 2013) (noting that the court is not “obliged to impart a definitive ruling at the first step” and may proceed to the second step when such a move is deemed “prudent” (citing *Nat’l Rifle Ass’n. of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 204 (5th Cir. 2012)); *United States v. Mahin*, 668 F.3d 119, 123–24 (4th Cir. 2012).

218. *See Stephen Kiehl, In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1142–44 (2011) (discussing the safe harbor question in greater depth).

219. Jordan E. Pratt, *A First Amendment-Inspired Approach to Heller’s “Schools” and “Government Buildings,”* 92 NEB. L. REV. 537, 562–64 (2014) (describing the varying approaches and opinions, even amongst federal courts, to such regulations).



mentally-ill.<sup>220</sup> The Ninth Circuit, for instance, has ruled that qualifications against felons are presumptively valid and fall within a constitutional safe harbor, meaning challenges to the qualification are almost certain to fail.<sup>221</sup> Conversely, the Seventh Circuit has found that no safe harbor exists and has instead used the two-step process to find felon-in-possession statutes constitutional after applying intermediate scrutiny analysis.<sup>222</sup> The Sixth Circuit goes further still, holding that the use of the Supreme Court's list to find a safe harbor too closely approximates rational-basis review, which was expressly rejected as a means of review for Second Amendment cases by *Heller*.<sup>223</sup>

Prior to venturing beyond step one, federal courts may make another inquiry, taken from the text of *Heller*, which asks whether the individual category qualification is “longstanding”<sup>224</sup> and “presumptively lawful.”<sup>225</sup> An affirmative answer will end the two-step test altogether in some courts,<sup>226</sup> while others consider the question to be useful, though not dispositive.<sup>227</sup> Again, much of the confusion appears to have been caused by the text of *Heller*. Though Justice Scalia stated that the individual category qualifications against both felons and those adjudicated as mentally-ill were “longstanding,” such regulations were not codified federally in their current form until 1968.<sup>228</sup> Even if we assume that these two qualifications are unquestionably valid, this raises an additional question: Why did the Court single out these two as longstanding and not the others? Further, the phrase “presumptively lawful” is taken from a footnote,<sup>229</sup> which has led some defendants and even federal courts to argue it is dicta,<sup>230</sup> creating more confusion. Finally, it may also be argued that questions regarding

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220. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

221. *See* *United States v. Phillips*, 827 F.3d 1171, 1174 (9th Cir. 2016); *Chovan*, 735 F.3d at 1144–45; *United States v. Vongxay*, 594 F.3d 1111, 1116–18 (9th Cir. 2010).

222. *United States v. Williams*, 616 F.3d 685, 691–94 (7th Cir. 2010).

223. *United States v. Greeno*, 679 F.3d 510, 517–18 (6th Cir. 2012).

224. *Heller*, 554 U.S. at 626.

225. *Id.* at 627 n.26.

226. *See* *Pratt*, *supra* note 219, at 562 & n.130.

227. *See id.* at 562 & n.131.

228. Though some evidence does exist that shows felons were banned from possessing firearms during the common law era, this evidence is inconclusive, and both scholars and federal courts are divided as to the import of such historical context. *See* *United States v. Phillips*, 827 F.3d 1171, 1174 & n.2 (9th Cir. 2016) (describing both sides of the “longstanding” argument and finding no consensus). The same argument applies to individuals adjudicated as mentally ill, where historical records are again inconclusive. *See* *Tyler v. Hillsdale Cty. Sheriff's Dep't* 837 F.3d 678, 688–90 (6th Cir. 2016).

229. *Heller*, 554 U.S. at 626 n.26.

230. *See* *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015); *United States v. Rozier*, 598 F.3d 768, 771 n.6 (11th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010). Conversely, the Fifth Circuit Court has specifically described the phrase as dicta, though it still upheld the felon-in-possession qualification as previously precedential within the circuit. *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010) (citing *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009)).

longstanding and presumptive validity or constitutional safe harbors only apply to facial challenges to the Gun Control Act because as-applied challenges are based on the individual's particular set of circumstances, thus rendering such distinctions inappropriate where situations warrant.<sup>231</sup>

Based on these numerous questions, each with no good or final answers, it is probably best to approach the first step utilizing the Seventh Circuit's observation that it is not "profitable to parse these passages of *Heller* as if they contained an answer to the question."<sup>232</sup> If the court finds the first step has been met, or it defers, the test moves on.

The second step requires the court to analyze the qualification in question using one of the three constitutional standards of review: rational basis, intermediate scrutiny, or strict scrutiny.<sup>233</sup> While this Article does note some shortcomings of the *Heller* decision, the Court did limit review by rejecting rational basis review of Second Amendment rights and stated that if rational basis was "all that was required to overcome the right to keep and bear arms . . . the Second Amendment . . . would have no effect."<sup>234</sup> Federal circuit courts have also held that *Heller* provided guidance in regard to the use of intermediate or strict scrutiny analysis by comparing constitutional evaluations of First and Second Amendment rights.<sup>235</sup>

As such, federal courts treat scrutiny analysis of Second Amendment rights in much the same manner that they do for First Amendment rights. Within the context of the First Amendment, the Supreme Court has held that strict scrutiny analysis is applicable to any law which seeks to regulate the content of a message.<sup>236</sup> Intermediate scrutiny analysis, on the other hand, applies to content-neutral time, place, and manner restrictions on speech.<sup>237</sup> Applying this reasoning to Second Amendment jurisprudence, courts have ruled that strict scrutiny analysis should apply to "any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen."<sup>238</sup> However, once qualification moves to conduct outside the home, those regulations are measured via intermediate scrutiny analysis.<sup>239</sup> The reason behind narrow, strict scrutiny application in the context of the Second

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231. See also Carly Lagrotteria, Note, *Heller's Collateral Damage: As-Applied Challenges to the Felon-in-Possession Prohibition*, 86 *FORDHAM L. REV.* 1963, 1989–91 (2018) (considering how the Supreme Court and circuit courts have addressed the as-applied challenges presented in *Heller*).

232. *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc).

233. See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 *CONN. L. REV.* 1059, 1077–80 (2011).

234. *Heller*, 554 U.S. at 628 n.27.

235. See *id.* at 582, 595, 625–26, 635 for scrutiny comparisons; *United States v. Marzarella*, 614 F.3d 85, 89 n.4 (describing the application of First Amendment guidance to Second Amendment challenges as "the natural choice" due to Justice Scalia's repeated comparisons).

236. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000).

237. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

238. *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011).

239. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015).

Amendment is due to the “inherent risks to others” posed by possessing firearms in public.<sup>240</sup>

The Seventh Circuit is the lone federal circuit to substantively alter post-*Heller* qualification analysis. Like its sister circuits, the Seventh follows the first step, but diverges at the second. There, the Seventh looks to the type of qualification in question to determine what level of scrutiny to use. If it is total in nature where “law-abiding, responsible citizens” would regularly be entitled to full solicitude, it will apply strict scrutiny.<sup>241</sup> Whereas, if the qualification is categorical in nature, such as the law preventing convicted domestic abuser from possessing firearms, the Seventh Circuit will require the government to make a “form of strong showing” similar to intermediate scrutiny.<sup>242</sup> The stated reasoning for this is that the court does not wish to become mired in the “‘levels of scrutiny’ quagmire.”<sup>243</sup>

Once the level of scrutiny has been established, the government must provide enough evidence to meet the burden of proof. In cases challenging individual category qualifications under intermediate scrutiny, the amount is determined by reference to the length and breadth of the “temporal limitation” imposed. Courts have routinely held that users of illegal drugs are subject to a “limited temporal reach,” meaning the limitation can be removed at any time by the individual ceasing her illegal conduct,<sup>244</sup> while felons and individuals adjudicated as mentally-ill experience permanent temporal limitations because they cannot obtain relief from this disability.<sup>245</sup> Currently, no hard-and-fast rule exists calculating the amount of evidence required, however, the Supreme Court has held that the amount will “vary up or down with the novelty and plausibility of the justification raised.”<sup>246</sup> This language has been interpreted to mean that a permanent temporal limitation requires a greater evidentiary showing than one that is temporary in nature.<sup>247</sup> The government may offer numerous types of evidence to meet its burden, “including legislative history, empirical evidence, case law, and even common sense, but it may not rely upon mere anecdote and supposition.”<sup>248</sup>

Enacted by Congress in 1968, the Gun Control Act originally allowed individuals who had previously been subject to qualification and later had their civil rights restored under federal law to petition for restoration of their Second Amendment rights under the relief-from-disabilities

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240. *Id.*

241. *Ezell v. City of Chicago*, 651 F.3d 684, 708–09 (7th Cir. 2011).

242. *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc).

243. *Id.* at 642.

244. *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 697–98 (6th Cir. 2016) (citation omitted). See cases cited and accompanying text *infra* notes 331–32.

245. *Tyler*, 837 at 697–98.

246. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000); but see cases cited *infra* note 249–52.

247. See, e.g., *Tyler*, 837 F.3d at 694; *United States v. Carter (Carter I)*, 669 F.3d 411, 418–21 (4th Cir. 2012); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010).

248. *Tyler*, 837 F.3d at 694 (internal quotation marks omitted).

provision.<sup>249</sup> In 1992, however, Congress passed an appropriations act, which contained a rider requiring that “none of the funds appropriated herein shall be available to investigate or act upon applications for relief . . . under 18 U.S.C. 925(c).”<sup>250</sup> That provision prohibits the ATF from expending funds to review applications for relief from federal firearms qualification and has been subsequently reauthorized by Congress annually.<sup>251</sup> Congress later renewed a wholly-voluntary, federally-funded, state-run relief-from-disabilities program that applied solely to individuals adjudicated as mentally-ill, though only 31 states had done so in 2016.<sup>252</sup>

### 1. Individuals Adjudicated as Mentally-Ill

The Gun Control Act permanently qualifies the Second Amendment rights of any individual who has been “adjudicated as a mental defective or who has been committed to a mental institution,” with limited exceptions.<sup>253</sup> Though these individuals are viewed similar to felons due to the language of *Heller*, challenges to this provision of the Gun Control Act are much less frequent<sup>254</sup> and are treated much differently. Because the Gun Control Act does not define “committed to a mental institution,” federal courts must rely on state definitions in many cases.<sup>255</sup> Further, the technical and factual minutiae of these cases are closely scrutinized, as voluntary and temporary committal does not qualify as commitment.<sup>256</sup> It is interesting then that a recent Sixth Circuit case provides a roadmap for showing that a qualification, even one that is longstanding and presumptively lawful, may be found unconstitutional, even under intermediate scrutiny analysis.

In *Tyler v. Hillsdale County Sherriff’s Department*, an individual unsuccessfully attempted to purchase a firearm in 2011 due to disclosing an involuntary commitment to an in-patient mental health evaluation center in

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249. See 18 U.S.C. § 925 (2016).

250. The Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub L. No. 102-393, 106 Stat. 1729, 1732 (1992).

251. Pub. L. No. 114-113, 129 Stat. 2242, division H, tit. II at 2583 (2015).

252. *Tyler*, 837 F.3d at 682–83 (quoting NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180 §§ 103,105, 122 Stat. 2559, 2567-70 (2008)).

253. 18 U.S.C. § 922(g)(4) (2016); see also *Tyler*, 837 F.3d at 682–83.

254. The number of published cases makes this disparity in frequency evident. On Lexis, a search of “committed to a mental institution” AND “Gun Control Act” since June 26, 2008 (when *Heller* was decided) yielded 41 cases, while a search for “felon” AND “Gun Control Act” for the same time period yielded 162 cases.

Search Results for Gun Control Act and Various Terms After June 26, 2008, LEXIS ADVANCE RESEARCH, <https://perma.cc/QGA4-GXZN> (enter ““committed to a mental institution” AND “Gun Control Act”” in the search box; limit results by date 06/26/2008 to present; repeat with ““felon” AND “Gun Control Act””).

255. See *United States v. McIlwain*, 772 F.3d 688, 693–97 (11th Cir. 2014) (compiling cases and applying Alabama law to determine whether commitment had occurred); *United States v. Rehlander*, 666 F.3d 45, 50–51 (1st Cir. 2012) (relying on Maine law to define “commitment”).

256. 27 C.F.R. § 478.11 (2017); see also *Rehlander*, 666 F.3d at 50.

1986.<sup>257</sup> Tyler left the hospital of his own volition and psychiatrists later testified that during a 2012 psychological evaluation, he reported “never” experiencing a subsequent depressive episode and was observed to show “no signs of mental illness.”<sup>258</sup> Tyler sued numerous government officials for as-applied violations of his Second Amendment rights after he was denied the purchase of a firearm by a federal dealer.<sup>259</sup> The Sixth Circuit applied the post-*Heller* two-step process and intermediate scrutiny analysis.<sup>260</sup>

The majority found that although Congress has an important government interest in keeping firearms away from “presumptively risky people,” Tyler’s constitutional rights had still been violated.<sup>261</sup> Further, the court ruled that while the government’s interest was of utmost importance, the restriction used was not a reasonable fit to that objective.<sup>262</sup> In order to pass intermediate scrutiny, the government was required to show that there was a “*continued* risk presented by people who were involuntarily committed many years ago and who have no history of intervening mental illness, criminal activity, or substance abuse” but without doing so, the court had “no way of knowing” if the ban was only “‘somewhat over-inclusive’ or if it is much more so.”<sup>263</sup> The government’s “biggest problem,” however, was the change made by Congress allowing relief-from-disability for some individuals adjudicated as mentally-ill, which the court viewed as an implicit statement from Congress that it did not consider those individuals to be more dangerous than the public.<sup>264</sup> The government’s case also failed due to its inability to back its contentions via longitudinal evidence specific to individuals like Tyler.<sup>265</sup> The majority was sympathetic to the government’s concerns and possible public dangers but held that the federal government could not satisfactorily assert that a permanent temporal limitation on the possession of firearms was reasonably necessary, at least in the case of an individual like Tyler.<sup>266</sup>

The government argued that formerly committed individuals are more dangerous than the general public using a number of studies as evidence, but the court ruled that none were applicable to Tyler and were

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257. *Tyler*, 837 F.3d at 684.

258. *Id.* at 683–84.

259. *Id.* at 684.

260. *Id.* at 692–93.

261. *Id.* at 693, 697–99 (citations omitted).

262. *Id.* at 699.

263. *Id.* at 698–99 (internal quotation marks omitted).

264. *Id.* at 697 (citations omitted); *see also* sources cited *supra* notes 248–51.

265. *Tyler*, 837 F.3d at 694–98.

266. *Id.* at 697. Because Congress had, until 1992, used a relief-from-disabilities program and had subsequently reauthorized the program to be implemented by the states, the majority felt Congress did not believe all committed individuals to be permanently dangerous and could therefore not rule as such. *Id.*; *see id.* at 682–83 (quoting NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180 §§ 103,105, 122 Stat. 2559, 2567–70 (2008)).

therefore anecdotal, at best.<sup>267</sup> The Sixth Circuit reviewed the studies but found that, “without any longitudinal evidence documenting that previously committed people, on average, pose a greater threat of violence than members of the general public,” the government did not meet its burden under intermediate scrutiny analysis.<sup>268</sup>

## 2. Users of Illegal Drugs

The Gun Control Act also makes it illegal for any individual who uses or is addicted to illegal drugs to possess a firearm.<sup>269</sup> The federal government, meanwhile, asserts that because users of illegal drugs are more violent than the general population—according to Congress—those individuals should have their right to bear arms qualified.<sup>270</sup> This is known as the “psychopharmacological model of violence” theory, which posits that “ingesting a psychoactive substance. . . . may lead to a volatile, unrestrained state that precipitates a violent act.”<sup>271</sup> Similar to other individual category qualifications, federal circuit courts have unanimously found section 922(g)(3) to be constitutional, though they differ as to the amount of evidence the federal government must produce.<sup>272</sup> The Fourth Circuit, remanded a case in order to allow the parties to “substantiate the fit between [section] 922(g)(3) and the government’s important interest in protecting the community from gun violence”<sup>273</sup> using scientific studies. When reviewing these challenges, some federal courts appear loathe to differentiate between the various types of illegal drugs the individual used or is alleged to have used, even where marijuana is not the sole drug in question.<sup>274</sup> And this is not

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267. *Tyler*, 837 F.3d at 694–97.

268. *Id.* at 698.

269. 18 U.S.C. § 922(g)(3) (2017).

270. *See* *Wilson v. Lynch*, 835 F.3d 1083, 1093–94 (9th Cir. 2016); *United States v. Carter (Carter II)*, 750 F.3d 462, 463–64 (4th Cir. 2014); *United States v. Yancey*, 621 F.3d 681, 686 (7th Cir. 2010).

271. Carrie B. Oser et al., *The Drugs Violence Nexus Among Rural Felony Probationers*, 24 J. INTERPERSONAL VIOLENCE 1285, 1286–87 (2009) (citations omitted).

272. Numerous courts have held the provision to be constitutional, seemingly without evidence. *See* *United States v. Dugan*, 657 F.3d 998, 999–1000 (9th Cir. 2011); *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010); *United States v. Richard*, 350 F. App’x 252, 260 (10th Cir. 2009).

273. *Carter II*, 750 F.3d at 463–64.

274. The Fourth Circuit, for example, stated it was under no requirement to make a “particularized demonstration” specifically regarding marijuana use and violence after finding ruling all drugs users are more violent than the general public based upon scientific studies and government surveys that did not differentiate between cocaine and marijuana users. *Id.* at 467–70. Regardless of personal opinion on the subject of marijuana legalization, the idea that users of cocaine, a potent stimulant, may be placed into the same study alongside users of marijuana, a hallucinogen and depressant, in order to determine whether the drugs cause violent behavior in individuals without controlling for such variables is laughable at best. WORLD HEALTH ORG., NEUROSCIENCE OF PSYCHOACTIVE SUBSTANCE USE AND DEPENDENCE 84–86, 89 (Centre for Addiction and Mental Health et al. eds., 2004).

a one-off decision, as the Ninth Circuit adopted the reasoning used in *United States v. Carter (Carter II)* without question when ruling that the Gun Control Act applied equally to qualified patients as any other users of illegal drugs.<sup>275</sup> In order to enforce the federal ban on firearms possession by marijuana users in the age of increasing acceptance and use of medical marijuana, the ATF recently released its policy regarding firearms sales to qualified patients.

ATF OPEN LETTER: Published on September 21, 2011, the Open Letter<sup>276</sup> contained guidance handed down from the ATF to apprise federally-licensed firearms sellers of the agency's policy regarding sales to qualified patients and marijuana users. Specifically, the ATF Open Letter requires that licensees must refuse any firearms transaction to a person they have "reasonable cause to believe" is a user of marijuana.<sup>277</sup> Reasonable cause may include, but is not limited to, "an inference of current use" drawn from "evidence of recent use or possession" or a "pattern of use or possession that reasonably covers the present time."<sup>278</sup> The ATF's policy provides no exceptions, even where medical marijuana has been legalized and the individual is a qualified patient.<sup>279</sup> By publishing the policy, the ATF knowingly drafted firearms licensees into its service to police marijuana users and qualified patients based on little more than bare suspicion or inference.<sup>280</sup> The ATF Open Letter has been upheld as a valid policy measure by the Ninth Circuit,<sup>281</sup> though it is still a controversial measure.<sup>282</sup>

#### IV. UNCONSTITUTIONAL APPLICATION

This Part seeks to unite parts I and II by showing that the state laws legalizing medical marijuana are constantly and consistently undermined by federal law on marijuana, because it forces qualified patients to choose between therapeutic medicine and the right to bear arms. Further, this Part will explain why qualified patients should not only be afforded their Second Amendment rights, but also offers guidance on future challenges to the Gun Control Act. Section A discusses the Ninth Circuit's recent decision in

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275. *Wilson*, 835 F.3d at 1094.

276. Arthur Herbert, *Open Letter to all Federal Firearms Licensees*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Sept. 21, 2011), <https://perma.cc/WJX6-FN6X>.

277. *Id.* (citing 18 U.S.C. § 922(d)(3)).

278. *Id.* (quoting 27 C.F.R. § 478.11).

279. *Id.*

280. When purchasing a firearm from a federal licensee, an individual must complete ATF Form 4473 and is compelled by federal law to make a candid admission of use of illegal drugs, which asks if the individual is a user of illegal drugs and notes that medical marijuana legalization does not affect federal laws criminalizing marijuana use or possession at question 11.e. *Id.*; see also BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, FORM 4473, FIREARMS TRANSACTION RECORD (revised Oct. 2016).

281. *Wilson v. Lynch*, 835 F.3d 1083, 1095 (9th Cir. 2016).

282. See generally Steve Byas, *Use Pot – Even Medical Marijuana – and Lose your Second Amendment Rights*, NEW AM. (Jan. 16, 2018) <https://perma.cc/D57K-XKAG>.

*Wilson v. Lynch*, which made use of the post-*Heller* two-step test qualify the Second Amendment rights of a qualified patient. Section B describes the shortcomings of *Wilson's* use of that test, as well as its application to similar questions in the future. Finally, Section C will discuss why the DOJ, DEA, and ATF's enforcement of the CSA or Gun Control Act is currently illegal under application of the Rohrabacher-Farr Amendment.

#### A. Modest Collateral Burdens: *Wilson v. Lynch*

In 2000, Nevada enacted comprehensive medical marijuana legalization for which the plaintiff, S. Rowan Wilson, registered in 2011, becoming a qualified patient.<sup>283</sup> In October of the same year, Wilson unsuccessfully attempted to purchase a firearm from a federally-licensed seller.<sup>284</sup> Although Wilson claimed that her registration was intended to “convey a particularized message in support of medical use of marijuana” and that she never used marijuana,<sup>285</sup> the firearms dealer had recently learned of the ATF Open Letter.<sup>286</sup> After the sale was refused, Wilson sued the Attorney General and ATF, alleging numerous violations of her constitutional rights.<sup>287</sup>

Based upon circuit precedent for challenges to the Gun Control Act set by *United States v. Chovan*, the Ninth Circuit applied its version of the post-*Heller* two-step test to Wilson's claims.<sup>288</sup> The court held that part one was satisfied because the legislation in question and the ATF Open Letter each “directly burden her core Second Amendment right to possess a firearm” by “preventing Wilson from purchasing a firearm.”<sup>289</sup> Before proceeding to step two, the court determined that intermediate scrutiny analysis was appropriate, as the burden to Wilson was “not severe.”<sup>290</sup>

Wilson conceded that the government has a substantial interest in preventing gun violence, but argued that application of the Gun Control Act was unconstitutional because her registration was merely an act of political

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283. See NEV. CONST. art. IV, § 38; NEV. REV. STAT. ANN. § 453A.200 (LexisNexis 2017).

284. *Wilson*, 835 F.3d at 1089.

285. *Id.* at 1095.

286. Wilson completed ATF Form 4473 but did not answer question 11.e, which led the firearms seller to refuse the transaction. *Id.* at 1089–90; see also *supra* note 280 and accompanying text.

287. *Wilson*, 835 F.3d at 1090. Wilson asserted that section 922(d)(3), (g)(3) of the Gun Control Act, title 27 Code of Federal Regulations section 478.11, and the ATF Open Letter all violated her Second Amendment rights. *Id.* Additionally, Wilson alleged violations of her First and Fifth Amendment rights and that the ATF Open Letter violated the Administrative Procedure Act. *Id.*

288. *Id.* at 1092 (quoting *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)).

289. *Id.* at 1092.

290. *Id.* at 1093 (holding that Wilson could have obtained firearms before becoming a qualified patient or given up her status altogether).



speech but also because application wrongly deprives qualified patients of their constitutional rights by deeming them more violent simply by virtue of their status as qualified patients.<sup>291</sup> The government, meanwhile, contended that empirical data from scientific studies supports a “strong link between drug use and violence” and that the Gun Control Act should be applied to qualified patients as any other illegal drug users.<sup>292</sup>

This link, the court argued, is of particular importance because Congress’ purpose in creating the Gun Control Act was to keep firearms away from “presumptively risky people.”<sup>293</sup> If illegal drugs users, including qualified patients, are more likely to act violently than the general public, the government may argue that the regulation is both important and a reasonable fit. Based upon the evidence presented in *Carter II*<sup>294</sup> and reasoning that marijuana users are “more likely” to engage in illegal conduct to obtain marijuana, the Ninth Circuit agreed that a link exists between marijuana use and violence.<sup>295</sup> The court did note that its concerns about violence perpetrated by qualified patients may be overstated because they “often suffer from debilitating illnesses, for which marijuana may be an effective palliative,” but did not alter its holding in any meaningful way.<sup>296</sup>

Wilson contended that the government’s purported reasonable fit could not apply to her as she was a qualified patient for political purposes only, an assertion that resonated with the Ninth Circuit, though not sufficiently to rule in her favor.<sup>297</sup> Further, she alleged that the ATF Open Letter effectively made any federally-licensed firearms dealer into a police officer so long as they have “reasonable cause to believe” an individual is a marijuana user while still allowing dealers to make a “blanket assertion” finding that any qualified patient is a marijuana user “without any investigation or due process.”<sup>298</sup> The Ninth Circuit, however, disregarded these claims by favorably comparing these actions to Terry Stops made by police who reasonably believe an individual to be armed and dangerous.<sup>299</sup> The court further held that the ATF’s policy “simply clarifies that a firearms dealer has ‘reasonable cause to believe’ an individual is an unlawful user if

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291. *Id.* at 1093–95.

292. *Id.* at 1093 (citing *United States v. Carter (Carter II)*, 750 F.3d 462, 466–69 (4th Cir. 2014)); *United States v. Yancey*, 621 F.3d 681, 686 (7th Cir. 2010). Though neither party offered evidence to back their assertions, the Ninth Circuit accepted the government’s contentions based on evidence accepted in two prior holdings from the Fourth and Seventh circuits, both of which applied the Gun Control Act to marijuana users. *Wilson*, 835 F.3d at 1093–95.

293. *Wilson*, 835 F.3d at 1093 (citation omitted).

294. *Carter II*, 750 F.3d at 467–69.

295. *Wilson*, 835 F.3d at 1094.

296. *Id.*

297. *Id.* at 1094–95.

298. *Id.* at 1099–1100.

299. *Id.* at 1095 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). The court’s reasoning here does nothing to rebut claims that the ATF Open Letter is a vast overreach of police power without concern for due process.

she holds a registry card” and therefore raises no due process concerns.<sup>300</sup> A distinction without a difference if ever one could be said to exist.

To the court and government, the resolution was imminently reasonable, if inconvenient to qualified patients: Congress passed the Gun Control Act in order to prevent gun violence and included a qualification against illegal drug users because it found such individuals to be more violent than the general public based on the psychopharmacological model of violence; qualified patients use marijuana, which is an illegal drug under federal law; therefore, qualified patients are illegal drug users and thus subject to the same qualifications as other illegal drug users, whether they share the same characteristics or obtained a registry card for other reasons.<sup>301</sup> Any, admittedly possible, constitutional violations visited upon qualified patients, the court stated, are simply “modest collateral burdens” that are to be tolerated.<sup>302</sup>

## B. Applying the Two-Step Test to Qualified Patients Appropriately

Admittedly, the *Wilson* decision is not entirely analogous to the bulk of cases that courts are likely to adjudicate in the future involving qualified patients and challenges to the Gun Control Act. *Wilson* registered solely as an expression of her views on the subject of marijuana legalization and did not use the substance.<sup>303</sup> If we accept this as true, as the Ninth Circuit did, then *Wilson* certainly posed no greater danger than any other member of the general public and the government offered no evidence to the contrary. Yet, the court still found the government’s argument persuasive and held that *Wilson*’s constitutional rights had not been violated. This, perhaps counterintuitively, is the precise reason a case like *Wilson* is so illustrative of the problem faced by qualified patients nationwide.

*Wilson* presented the Ninth Circuit with a unique opportunity upon which the court failed to capitalize. The Ninth Circuit maintains federal appellate jurisdiction over nine states and two territories, of which all but two states have created comprehensive medical marijuana programs<sup>304</sup> covering at least 2.1 million qualified patients.<sup>305</sup> Rather than issue a narrow opinion

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300. *Wilson*, 835 F.3d at 1099–1100.

301. *Id.* at 1094–95.

302. *Wilson*, 835 F.3d at 1095. *Wilson* unsuccessfully appealed the ruling to the Supreme Court. *Wilson v. Sessions*, 137 S. Ct. 1396 (2017) *cert. denied*.

303. *Wilson*, 835 F.3d at 1095.

304. Alaska, Arizona, California, Guam, Hawaii, Montana, Nevada, Oregon, and Washington all maintain programs while Idaho and the Northern Mariana Islands do not. *See infra* Appendix, Table 1.

With the addition of Florida in the Eleventh Circuit and Louisiana in the Fifth Circuit, all federal circuits now maintain appellate jurisdiction over at least one state with a comprehensive medical marijuana regime. *See infra* Appendix, Table 1.

305. The Ninth Circuit is home to at least 88% of all qualified patients in the United States. *See ProCon.org, Number of Legal Medical Marijuana Patients* (May 17, 2018), <https://perma.cc/E7SG-C8KK>. This estimate notes the difficulty in accurately calculating

on a complex and novel area of law, the court admittedly<sup>306</sup> applied a constitutionally-burdensome standard to all qualified patients. The following analyzes the correct application of the post-*Heller* two-step test and explains how the standard should be used in future cases involving qualified patients.

### 1. Does the Regulation Burden Conduct Protected by the Second Amendment?

At a basic level, the answer to this question is likely an unequivocal “yes.” Clearly, the Gun Control Act infringes upon a qualified patient’s constitutional rights and the act of possession of a firearm is otherwise protected by the Second Amendment following *Heller*. More context and nuance will be required of future challenges, however, because some federal circuits have expanded the first step inquiry to include historical context and its bearing on narrow category prohibitions. Wilson did not face such inquiries as she maintained she was not an unlawful drug user and thus, any historical review at the first step was inapplicable to her case.<sup>307</sup>

While this Article argues that scientific evidence proves that qualified patients are no more violent than the general public and that the federal government cannot meet its burden under the two-part test for individual category qualifications as-applied to qualified patients,<sup>308</sup> marijuana is still illegal at the federal level under the CSA and qualified patients who are admitted marijuana users must contend with that fact. This alone likely ensures that qualified patients suing for restoration of their Second Amendment rights will have to respond to questions that Wilson did not.<sup>309</sup>

The first and most pressing of these questions concerns the historical precedent for qualification of firearm possession for users of illegal drugs, a

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numbers in states such as California and Washington, where registration programs are either wholly elective or were not mandated until many years after creation, though the methodology used has been cited as an accurate representation. *Id.* at nn.2, 6 & 9. No estimate is available for Guam. *Id.*

306. *Wilson*, 835 F.3d at 1096.

307. Although numerous federal courts have weighed in on the meaning and import of “longstanding” and “presumptively lawful” from *Heller*, illegal drug use was not mentioned in reference to those terms, so qualified patients will likely be spared having to argue that issue. *See* *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 627 n.26 (2008).

308. Under the two-step test, the qualified patient would necessarily assert an as-applied challenge to section 922(g)(3). A facial challenge to the Gun Control Act would fail under this context because a “person to whom a statute properly applies can’t obtain relief based on argument that a differently situated person might present.” *United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010). As-applied challenges, which asks a court to rule a provision or section unconstitutional as-it-applies to the litigant, and / or similarly-situated individuals, conversely, are the more common and preferred method to use to challenge to a federal statute. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450–51 (2008); *United States v. Raines*, 362 U.S. 17, 21 (1960).

309. *See* *United States v. Yancey*, 621 F.3d 681, 683–85 (7th Cir. 2010).

highly-contentious issue. In a somewhat related matter, the issue of historic precedent for felon-in-possession laws has been addressed numerous times by federal courts, with no firm answer. Taking *Heller* at face value, a reader would be inclined to believe that all felons had been barred from possessing firearms long before 1968 and that the issue was well-settled,<sup>310</sup> but that is not the case. Not only are the federal circuit courts unsure on the matter, legal scholars have debated the issue for many years, with no consensus achieved.<sup>311</sup>

The debate on historicity is no less fraught—nor inconclusive—when discussing qualifications for users of illegal drugs. Though most federal circuit court cases involving section 922(g)(3) have avoided the question of history all together,<sup>312</sup> the Seventh Circuit did attempt an analysis in *Yancey*.<sup>313</sup> There, the court reviewed common law history and legal precedent to find that “unvirtuous citizens” could have their Second Amendment rights qualified.<sup>314</sup>

First, the court referenced Congress’s objectives in creating the Gun Control Act before citing some 27 state and district laws that purportedly outlawed firearms possession by illegal drug users—including qualified patients—thus implying that Congress was not alone in viewing such individuals as “unfit to possess firearms.”<sup>315</sup> However, the Seventh Circuit’s conclusion ignored the seven states that maintained comprehensive medical marijuana programs at the time of the decision, five of which contained language exempting qualified patients from abridgement of their rights and privileges based on their status as qualified patients.<sup>316</sup> According to *Yancey*,

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310. See *Heller*, 554 U.S. at 625.

311. See *United States v. Phillips*, 827 F.3d 1171, 1174–75 n.2 (9th Cir. 2016); compare C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J. L. & PUB. POL’Y 695, 708–19 (2009) (stating that forfeiture of weapons upon conviction of a violent felony likely occurred during the common law era, but the felon was not barred from possession after serving her prison sentence and that felon-in-possession laws were largely nonexistent before World War I) with Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1362–64 (2009) (discussing differences in felonious activities).

312. See, e.g., *United States v. Carter (Carter I)*, 669 F.3d 411, 415–16 (4th Cir. 2012) (stating that the court is not required to address the historical requirements behind step one unless it holds that the government has not met its burden at step two); *United States v. Dugan*, 657 F.3d 998 (9th Cir. 2011); *United States v. Seay*, 620 F.3d 919 (8th Cir. 2010).

313. *Yancey*, 621 F.3d at 683–85.

314. *Id.* at 685 (citations omitted).

315. *Id.* at 684.

316. Among the 27 states listed, California, Colorado, D.C., Hawaii, Nevada, New Jersey, and Rhode Island each had comprehensive medical marijuana regimes, with California, Colorado, Nevada, New Jersey, and Rhode Island each having laws exempting qualified patients from such regulations. Moreover, all other states that have adopted comprehensive programs and finalized their laws since *Yancey* was decided have created similar exceptions. See *infra* Appendix, Table 2.

this means that most states with comprehensive programs view qualified patients as fit to possess firearms along with the general public.<sup>317</sup>

Second, the court tied qualifications for illegal drug users to felon-in-possession laws, but noted the ongoing debate regarding the history of felon-in-possession laws, especially those that include non-violent felons.<sup>318</sup> That debate notwithstanding, the Seventh Circuit then opined that “most scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry.”<sup>319</sup> As part of its basis for making this statement, the court referenced a 1938 federal law that, it says, codified rules against non-violent felons possessing firearms. Presumably, this is in reference to the Federal Firearms Act, a law that only qualified firearms possession for individuals who committed “crimes of violence” and made no mention of either non-violent felonies or drug offenses.<sup>320</sup>

Regardless of the Seventh Circuit’s confusing statements, the qualified patient should move beyond the first step as the historical basis for qualification for illegal drug use is, at best, uncertain, and some federal circuits will defer to the second step regardless.<sup>321</sup> Indeed, marijuana was not outlawed in most states until the 1930s<sup>322</sup> and was not made a felony until 1937.<sup>323</sup> Further, it is a non-violent felony and was not made a qualifying offense until 1968.<sup>324</sup> Prior to 1930s, however, we are left with the same academic debate from *Phillips*<sup>325</sup> and *Yancey*,<sup>326</sup> which produces no hard evidence to suggest that this qualification of illegal drug users has historical merit. Conversely, it appears that medical marijuana use, as a non-violent felony offense, would be categorized as an action that would not have resulted in qualification prior to World War I.<sup>327</sup> Therefore, this Article will proceed to the second step.

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317. *Yancey*, 621 F.3d at 684.

318. *Id.* at 685.

319. *Id.* at 684–85.

320. Federal Firearms Act, Pub. L. No. 5-785, 52 Stat. 1250 §§ (6), (2)(e)-(f) (1938); see also Marshall, *supra* note 311, at 729–30. Non-violent felonies and illegal drug use were not added as qualifying offenses until the Gun Control Act 30 years later. See Pub. L. No. 90-618, § 922(d)(3), 82 Stat. 1213, 1220 (1968) (codified at 18 U.S.C. § 922(g)(3) (2017)).

321. See sources *supra* notes 215–18 and accompanying text.

322. See Mikos, *supra* note 36, at 1427 n.14.

323. A precursor to the CSA, Congress approved the Marihuana Tax Act in 1937 as the first federal ban on marijuana. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551. The predecessor to the Marihuana Tax Act, the Harrison Narcotics Tax Act of 1914, regulated only cocaine and opium, though it is widely viewed as a catalyst for later federal narcotics legislation. TODD GARVEY ET AL., CONG. RESEARCH SERV., R43435, MARIJUANA: MEDICAL AND RETAIL – SELECTED LEGAL ISSUES 1 (2015); see also Pub. L. No. 63-223, 38 Stat. 785 (1914).

324. Pub. L. No. 90-618, § 922(d)(3), 82 Stat. 1213, 1220 (1968) (codified at 18 U.S.C. § 922(g)(3) (2017)).

325. *United States v. Phillips*, 827 F.3d 1171 (9th Cir. 2016).

326. *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010).

327. See Marshall, *supra* note 311, at 698, 708.

## 2. Does the Restriction or Regulation Pass Muster Under Any Appropriate Level of Scrutiny?

Federal courts have unanimously agreed that individual category qualifications stemming from the Gun Control Act should be analyzed under an intermediate level of scrutiny.<sup>328</sup> Though intermediate scrutiny has been described in numerous ways, the Ninth Circuit in *Chovan* gave a particularly efficient description of the government's burden, requiring "(1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulations and the asserted objective."<sup>329</sup> As a preliminary matter, qualified patients should concede the first part of the intermediate scrutiny analysis as the federal government's stated objective in creating and defending the Gun Control Act of keeping "firearms out of the hands of presumptively risky people" appears ironclad.<sup>330</sup> However, even conceding the first part, intermediate scrutiny still requires the government to enunciate not only an appropriate objective but also furnish proof that a reasonable fit exists between the regulation and the objective.

The necessary amount of proof is determined by reference to the type of temporal limitation imposed by the individual category qualification in the Gun Control Act.<sup>331</sup> Thus the question becomes whether the temporal limitation, as applied to qualified patients, is permanent, limited, or perhaps a third option? Federal circuit courts have routinely held that individuals barred from possessing firearms under section 922(g)(3) suffer only a temporary deprivation of their rights, reasoning that the qualification extends only for the duration of the illegal conduct and applies solely to "current drug users."<sup>332</sup> *Wilson* expanded that standard to qualified patients, stating that such individuals could regain their Second Amendment rights at any time "by surrendering [their] registry card[s]."<sup>333</sup>

It is quite unlikely that federal courts will consider the qualification of qualified patients to be a permanent temporal limitation on par with individuals adjudicated as mentally-ill or felons due to unanimous agreement between the circuits in opposition to the idea. However, the status of qualified

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328. *See generally* cases cited *supra* notes 234–40 (comparing federal appellate court treatment of Second Amendment cases to First Amendment cases).

329. *United States v. Chovan*, 735 F.3d 1135, 1139 (9th Cir. 2013) (citing *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010)).

330. *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 112 n.6 (1983).

331. *See generally* cases cited *supra* notes 245–47

332. *United States v. Yancey*, 621 F.3d 681, 687 (7th Cir. 2010); *see also* *United States v. Carter (Carter I)*, 669 F.3d 411, 419 (4th Cir. 2012); *United States v. Patterson*, 431 F.3d 832, 839 (5th Cir. 2005); *United States v. Jackson*, 280 F.3d 403, 406 (4th Cir. 2002).

333. *Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016). While *Wilson* did not make an argument based upon the Rohrabacher-Farr Amendment, it should be noted that the actions of the DOJ and ATF are almost certain violations of that rule and should cease while it is in effect. *See infra* note 363 and Part III.C.

patients should not be regarded with the flippancy typically shown by federal courts to illegal drug users or considered analogous with individuals under domestic violence protective orders.<sup>334</sup> Qualified patients represent a different dynamic than the simple black-and-white formulation made by the Gun Control Act, *Wilson*, or other federal court decisions. Whereas, courts have instructed users of illegal drugs to abandon their use of narcotics to avoid qualification, giving the same instructions to qualifying patients is a far greater ask. In effect, giving such an ultimatum is akin to asking an individual to choose between one of the most cherished constitutional rights in all of American history and the use of medicine, as defined by a consensus of the scientific and medical communities and by more than 30 states.<sup>335</sup> This is an unacceptable choice wrought by bad policy and a reliance on incorrect science as common sense.

Though federal courts have heretofore recognized only two levels of temporal limitation, qualified patients may represent a third level between those that are truly limited and those that are permanent like in *Tyler*. An intermediate temporal limitation, as it were. This third level would place the amount of proof required somewhere between what was offered in *Carter II* and in *Tyler*, although by all practical definitions, the amount of scientific proof offered appears to have been roughly the same—at least in terms of the total number of studies referenced.<sup>336</sup> However, even assuming federal courts decline to accept or even entertain a third type of temporal limitation, a careful review of available, scientifically-rigorous longitudinal evidence should conclude that the government's purported fit is unreasonable, because it cannot show there is a continued risk of violence presented by qualified patients who have no history indicating other types of individual category qualification possessing firearms.<sup>337</sup> Indeed, it may be that the type of temporal limitation is inconsequential, so long as the court is willing and able to properly review the scientific context.

Put simply, the Fourth Circuit's conclusion in *Carter II*, which was later adopted fully by the Ninth Circuit in *Wilson*, was incorrect from scientific, medical, and legal perspectives. There, the court made clear that it saw little reason to address marijuana users specifically, instead choosing to

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334. See 18 U.S.C. 922(g)(8) (2016); *United States v. Mahin*, 668 F.3d 119, 125 (4th Cir. 2012); *United States v. Chapman*, 666 F.3d 220, 228 (4th Cir. 2012).

335. See *supra* notes 41–46; see generally MASS. GEN. LAWS ANN. ch. 94C § Appx. (Westlaw through Chapter 108 of 2018 2d Ann. Sess.) (entitled “Humanitarian Medical Use of Marijuana”); 35 PA. CONS. STAT. ANN. § 10231.102(1) (West Supp. 2018); 21 R.I. GEN. LAWS § 21-28.6-2(1) (Supp. 2017); WASH. REV. CODE ANN. § 69.51A.005 (LexisNexis, LEXIS through 2018 c 6).

336. In *Carter II*, the Fourth Circuit reviewed six total assessments—four studies and two government surveys—to determine that there is a “strong link between drug use and violence.” *United States v. Carter (Carter II)*, 750 F.3d 462, 467–69 (4th Cir. 2014). In *Tyler*, the Sixth Circuit consulted the same number but arrived at the opposite conclusion in regard to individuals adjudicated as mentally-ill under similar circumstances to the plaintiff. *Tyler v. Hillsdale Cty. Sheriff's Dep't* 837 F.3d 678, 694–97 (6th Cir. 2016).

337. See *supra* notes 267–70, 272, 329.

lump all drug users together, stating that the court was not required to make such a “particularized demonstration” on the matter.<sup>338</sup> A close reading of the opinion appears to show that the court went to such lengths to avoid any particularized demonstration in order to avoid ruling in favor of the defendant.<sup>339</sup> However, if the purpose of the ruling is to ascertain the constitutionality of the statute as applied to the individual and that person did not use illegal drugs outside marijuana—like Carter<sup>340</sup>—comparisons to studies purporting to show a link between drug use and violence that mix numerous other drugs in with marijuana are circumstantial and should not be applied to the individual in question.<sup>341</sup>

In *Carter II*, the court reviewed four studies and two government surveys, five of which were offered by the government. Of those reviewed, none claim to be longitudinal in nature and to show a causal link between marijuana use and violence.<sup>342</sup> Of the five pieces of evidence presented by the government, two were annual reports of government survey data showing statistics for crimes committed and drug use by those individuals amongst prisoners and arrestees.<sup>343</sup> While such aggregations are useful in some respects, proving a causal link between marijuana use and violent behavior is not one of them.<sup>344</sup> The government also introduced three studies, which

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338. *Carter II*, 750 F.3d at 467.

339. The court argued that the Wei study’s conclusion, which failed to “identify a statistically significant correlation” between marijuana use and violent behavior, was not “particularly relevant” after citing the same study to argue the opposite point of its conclusion in the same paragraph. In order to argue against the study, the court went so far as to impugn its methodology and valuations because it used “hard drug use” as a risk factor for violence and this “weakened the correlation,” all without noting that Carter was not a user of “hard drugs” so the diminished correlation would have applied specifically to him. *Id.* at 468 & n.15 (citing Evelyn H. Wei, Rolf Loeber, & Helene Raskin White, *Teasing Apart the Developmental Associations Between Alcohol and Marijuana Use and Violence*, 20 J. CONTEMP. CRIM. JUST. 166, 179 (2004)).

340. *Carter II*, 750 F.3d 462.

341. *Tyler*, 837 F.3d at 694–98 (noting at least four separate instances where the court deemed the government’s empirical evidence to be insufficient as it did not apply specifically to the plaintiff or similarly-situated individuals).

342. The Oser study notes as much in its discussion where the authors state that the data examined was correlational, not causal in nature and that “longitudinal data are ideal” for such studies. Oser et al., *supra* note 271, at 1300.

343. *Carter II*, 750 F.3d at 467 n.3, 468 n.9.

344. Lana Harrison & Joseph Gfroerer, *The Intersection of Drug Use and Criminal Behavior: Results from the Nat’l Household Survey on Drug Abuse*, 38 CRIME & DELINQUENCY 422, 439–41 (1991). In fact, the Harrison and Gfroerer study has harsh criticism for the types of government surveys cited positively by the *Carter II* court. In their discussion, the authors chastise the method by which the National Household Survey on Drug Abuse (“NHSDA”) gathers and reports data, stating flatly that bias, underreporting, and under-coverage are all likely to be present in the numbers used by those studies due to insufficient data collection measures. Subsequent reviews confirm that government surveys, such as those by NHSDA, still contain numerous reporting and data collection issues more than 20 years later, such as processing errors in tabulating survey data, inferential errors due to “poor study design and execution,” and specification errors in what is being researched.



the court relied upon heavily,<sup>345</sup> even though two of them reach conclusions that directly contradict the point for which they were offered and cited by the Fourth Circuit and a third is wholly inapplicable.<sup>346</sup> The final study, which was offered by the defendant, was cited by the court in the same paragraph both as evidence that marijuana use and violence “coincide” and, oddly enough, as a cudgel against the study’s authors for failing to find any correlation between marijuana and violence when controlling for risk factors and not using relaxed standards of scientific rigor that Congress employs.<sup>347</sup> Instead of reading these studies for their conclusions and ruling based upon that information, it seems more likely that both the government and the court cherry-picked data from tables or sections that backed their preferred outcome and ignored the vast amounts of evidence contained in those same studies that did not.

Contrary to the arguments of the courts in *Carter II* and *Wilson*, longitudinal studies performed over more than 30 years have shown that marijuana does not correspond to the psychopharmacological model of violence and its use does not make individuals more violent.<sup>348</sup> One recent study, performed in 2016, found that marijuana causes decreased levels of

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Timothy P. Johnson, *Sources of Error in Substance Use Prevalence Surveys*, INT’L SCHOLARLY RESEARCH NOTICES 12 (2014).

345. *Carter II*, 750 F.3d at 467 nn.2 & 5–6.

346. The Fourth Circuit cited the Harrison and Gfroerer study to show that individuals who have used marijuana in combination with alcohol and/or cocaine are more likely to be violent than those who only use alcohol. *Id.* at 467. The court’s primary hypothesis, taken from a table showing outcomes, is rebutted in the results and discussion of the study, however, where the authors state, “[t]here is no firm evidence of a causal relationship between drug use and crime,” be it violent or otherwise. Harrison & Gfroerer, *supra* note 344, at 423. In citing to Oser, the Fourth Circuit appears to have taken a table from a study out of context, again, as the authors’ discussion makes clear. *Carter II*, 750 F.3d at 467. The Oser study, which the authors note was not longitudinal in nature, found that a link between drug use and violence exists, but only for *male stimulant users in rural populations*—not marijuana users—and still attributed much of the nexus between drug use and violence to violent victimization and economic compulsion brought on by a host of outside factors. Oser et al., *supra* note 271, at 1298–1301.

In citing the McCoy study, the Fourth Circuit states that it found cocaine and/or opiate users—categorized as “Chronic Drug Users” by the authors—are more likely to be violent, which is generally correct according to the findings of the study, but the court failed to note that the study also found that individuals who “may have used marijuana or other drugs” but were not Chronic Drug Users were not more likely to commit violent acts. *Carter II*, 750 F.3d at 467; H. Virginia McCoy, Sarah E. Messiah, & Zhinuan Yu, *Perpetrators, Victims, and Observers of Violence: Chronic and Non-Chronic Drug Users*, 16 J. INTERPERSONAL VIOLENCE 890, 893–94, 903–907 (2001).

347. *Carter II*, 750 F.3d at 468 & nn.10, & 12–15.

348. See Wei, *supra* note 339, at 197; see also text accompanying *supra* note 338. See generally Sharon M. Boles & Karen Miotto, *Substance Abuse and Violence: A Review of the Literature*, 8 AGGRESSION & VIOLENT BEHAV. 155 (2003); R. Myerscough & S. Taylor, *The Effects of Marijuana on Human Physical Aggression*, 49 J. PERS. SOC. PSYCHOL. 1541 (1985); Helene Raskin White, Rolf Loeber, Magda Stouthamer-Loeber & David P. Farrington, *Developmental Associations Between Substance Use and Violence*, 11 DEV. & PSYCHOPATHOLOGY 785 (1999).

aggression—lower than individuals ingesting alcohol and those given a placebo who were sober—even when scientists attempted to agitate test subjects.<sup>349</sup> This is directly in line with other studies showing that marijuana decreases aggressiveness levels, leading to decreased levels of violence.<sup>350</sup> Another study compared 20 substances—including marijuana, cocaine, alcohol, and tobacco—and rated them from most to least harmful with scores divided between harm to others and harm to self.<sup>351</sup> Of the 20 cited, marijuana was eighth, below both alcohol and cigarettes, meaning that it was not among the most harmful either to self or others and no correlation with violence could be shown.<sup>352</sup> This is not to argue that individuals cannot have psychological episodes while consuming marijuana,<sup>353</sup> but is intended to show that the analysis used by federal circuits is woefully inadequate and must be revised. Simply put, there is scant evidence to show that marijuana use causes violent behavior in greater instances than the general public and without such evidence, the government cannot meet its burden under intermediate scrutiny or the post-*Heller* two-step test.

Moving beyond *Carter II* and the Fourth Circuit's review of scientific studies and government surveys, there is ample evidence available from other sources to support the contention that marijuana use does not cause increased levels of violence. For instance, in *Tyler*, the majority relied heavily on Congress' decision to revise the relief-from-disabilities provision of the Gun Control Act solely as it applied to individuals adjudicated as mentally-ill, which the Sixth Circuit viewed as a legislative determination indicating that Congress no longer considered such individuals to be more violent.<sup>354</sup> Utilizing this reasoning, most of the states that maintain comprehensive medical marijuana programs, and laws forbidding possession of firearms by users of illegal drugs, do not consider qualified patients to be more violent as those individuals are exempted from such restrictions.<sup>355</sup> Though not as persuasive as the congressional decision in *Tyler*, these states have made their own legislative determinations indicating that they do not consider qualified patients to be more violent than the general public.

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349. E.B. de Sousa Fernandes Perna et al., *Subjective Aggression During Alcohol & Cannabis Intoxication Before & After Aggression Exposure*, 233 *PSYCHOPHARMACOLOGY* 3331, 3338–39 (2016).

350. See Myerscough & Taylor, *supra* note 348.

351. David J. Nutt, Leslie A. King & Lawrence D. Phillips, *Drug Harms in the UK: A Multicriteria Decision Analysis*, 376 *LANCET* 1558 (2010).

352. *Id.* at 1558, 1561 & fig.2, 1563 & fig.4.

353. See NAT'L ACADS. OF SCIS., ENG'G & MED., *supra* note 45, at 296 & box 12-1, 326 box 12-3.

354. See *generally* sources cited *supra* notes 248–51, 263.

355. Of the 27 states cited in *Yancey*, seventeen now have comprehensive medical marijuana programs, two have not finalized their laws yet, and thirteen exempt qualified patients from state firearms qualification laws. See *supra* text accompanying note 316; see *infra* Appendix, Table 2; see *generally* *United States v. Yancey*, 621 F.3d 681, 684 (7th Cir. 2010).

Further, the common sense conclusions arrived at by the Ninth Circuit in *Wilson*—arguing that qualified patients are even less prone to violence than typical marijuana users because the means and avenues through which marijuana has traditionally been purchased do not apply to them—are useful to show that marijuana users and qualified patients are not more prone to violence.<sup>356</sup> The court stated that increased “negative interactions” with police and frequent use of “black market sources who themselves frequently resort to violence” were both factors indicating an increased penchant for violence in marijuana users.<sup>357</sup> The holding goes on to state that it is arguable that “medical marijuana users are less likely to commit violent crimes, as they often suffer from debilitating illnesses” and they are not required to interact with police or the black market to obtain marijuana.<sup>358</sup> At the time, the court ignored this hypothesis because it could not overcome concerns over “irrational or unpredictable behavior” from ingesting marijuana.<sup>359</sup> However, such concerns have been invalidated by the longitudinal, scientific evidence presented earlier in this Part, which shows that marijuana users are not prone to such risky behavior, and may in fact be less likely to become aggressive while using marijuana.<sup>360</sup> Therefore, federal courts are free to accept the Ninth Circuit’s common sense hypothesis as an indicator that qualified patients are less likely to be prone to violence, a conclusion that some studies have also reached.<sup>361</sup> Finally, it must be noted that the DOJ and ATF should be barred from undertaking this type of enforcement in states with medical marijuana regimes due to the restrictions of the Rohrabacher-Farr Act.<sup>362</sup>

Without a link between marijuana and violence, the government should not be able to meet the standards for either intermediate scrutiny or

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356. *Wilson v. Lynch*, 835 F.3d 1083, 1094 (9th Cir. 2016).

357. *Id.*

358. *Id.*

359. *Id.*

360. *See De Sousa Fernandes Perna et al., supra* note 349. Common sense would also dictate that marijuana users are less prone to violence than the general public because alcohol use is far more common than marijuana use and “alcohol is the drug with the strongest association to violence.” *See Oser et al., supra* note 271, at 1287 (citations omitted).

361. One study, which analyzed the effects that medical marijuana legalization had on state crime by measuring the seven Part I Uniform Crime Reporting offenses from 1990-2006, found that legalization led to reductions in homicide and assault rates, while robbery and burglary rates remained steady. Overall, the authors concluded that their “findings run counter to arguments suggesting the legalization of marijuana for medical purpose poses a danger to public health in terms of exposure to violent crime and property crimes.” Robert G. Morris et al., *The Effect of Medical Marijuana Laws on Crime: Evidence from State Panel Data, 1990-2006*, 9 PLOS ONE 1, 6–7 (2014). This reinforces other, more limited studies that have shown that marijuana legalization does not increase crime in states or cities where marijuana has been legalized recreationally. Angela Dills, Sietse Goffard, & Jeffrey Miron, *Dose of Reality: The Effect of State Marijuana Legalization*, CATO INST., 799 POL’Y ANALYSIS 1, 14–16 (Sept. 16, 2016).

362. *See infra* Part III, Section C.

the post-*Heller* two-step test. Overwhelmingly, longitudinal, scientific evidence shows that marijuana does not make its users more violent, and may even lessen an individual's aggressive tendencies below the threshold of sober individuals. Further, legislative determinations by numerous states that have legalized medical marijuana show that they do now view qualified patients as more dangerous or prone to violence. Even common sense—reinforced by studies of criminal activity rates—leads to the conclusion that marijuana does not make individuals more violent.<sup>363</sup> Although the government can answer the first part of intermediate scrutiny analysis successfully, it cannot show that an objective fit exists between qualification of Second Amendment rights if it cannot prove that qualified patients are more violent. For the government, failing intermediate scrutiny analysis also means failing the second step of the post-*Heller* test, meaning that the qualification is unconstitutional, at least as applied to qualified patients.

### **C. Preliminary Injunction: The Rohrabacher-Farr Amendment Blocks Gun Control Act and CSA Enforcement Against Qualified Patients**

While Part II.B argues that federal law and precedent require that federal courts revise their analysis of section 922(g)(3) for future cases involving qualified patients, the federal government currently faces a much direr threat to its marijuana enforcement strategies. Indeed, the Rohrabacher-Farr Amendment, so long as it remains in force, presents a foundational impediment to any enforcement action undertaken using DOJ funds that would prevent states from implementing or furthering their medical marijuana laws or would seek to punish individuals or businesses that attempted to take advantage of those laws. Such restrictions extend to all of the DOJ's subsidiary agencies,<sup>364</sup> including the FBI, DEA, and the ATF and

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363. Though a small number of marijuana users do experience contraindications from ingestion, causing them symptoms outside those regularly expected, this is not uncommon of medicine and studies have shown that individuals who have mental disorders or who are predisposed to them may exhibit violence uncommon to typical marijuana ingestion. However, such outliers do not invalidate longitudinal data showing that marijuana either has no effect or lessens aggression and violence in most users and that qualified patients who do not fall under any of the other individual category qualification requirements of the Gun Control Act cannot be shown to be more violent than the general public. See Christopher Ingraham, *Researchers got people drunk or high, then made a fascinating discovery about how we respond*, WASH. POST (July 20, 2016), <https://perma.cc/FZA3-LZ2J>; see also *supra* text accompanying note 44; NAT'L ACADS. OF SCIS., ENG'G & MED, *supra* note 45, at 289-312. But see Sarah Young, *Smoking Cannabis Increases Violent Behavior in Young People with Mental Health Disorders, Study Finds*, INDEPENDENT (Oct. 9, 2017), <https://perma.cc/XF45-BNXX>.

364. U.S. DEP'T OF JUST., ORGANIZATIONAL CHART, (2018) <https://perma.cc/7KN7-9JML>; see also *United States v. McIntosh*, 833 F.3d 1163, 1168–69 (9th Cir. 2016) (applying the holding to both the DOJ and the DEA); Brief of Members of Congress Rohrabacher (R-CA) and Farr (D-CA) as *Amici* in Support of Charles C. Lynch's Motion for Rehearing *En Banc*, at 15–16, *United States v. Lynch* (9th Cir. May 5, 2015) (Nos. 10-

include any enforcement actions used by those agencies such as the DEA's administration of the CSA or the ATF's application of the Gun Control Act. Briefly, this subpart will address the problems inherent with the *McIntosh* strict compliance requirement as well as the tangible ramifications of the Rohrabacher-Farr Amendment on DOJ enforcement policy.

Although the Rohrabacher-Farr Amendment is still a valid defense to many DOJ actions for many qualified patients, the strict compliance standard leaves obvious avenues for the DOJ to operate that should have been forbidden. Instead, the Ninth Circuit's standard allows the DOJ and the federal government to continually maintain the threat that Rohrabacher-Farr was intended to quash, and one that the court has previously recognized as an unconstitutional threat and overreach in *Conant*. By allowing a federal agency to maintain the threat of arrest, prison time, and the forfeiture of rights that accompanies federal marijuana charges, the strict compliance standard fundamentally undermines the stated purpose and plain language of Rohrabacher-Farr by exerting undue influence and attempting to again criminalize conduct that a state has previously held to be legal.<sup>365</sup> The following illustrates the shortcomings with the strict compliance standard.

First, while the idea that qualified patients cannot strictly comply with state or municipal medical marijuana laws may seem laughable, it is a real and pressing concern in many states. Whereas medical marijuana laws are seemingly commonplace and have been in place for years, many outstanding legal questions have yet to be resolved, and many others are the subject of inconclusive court rulings and state circuit splits. For example, one outstanding legal question that has never been fully resolved in California involves quantity possession limits.<sup>366</sup> While the amount is codified in most states, California law allows for "qualified patients, valid identification cardholders, and their primary caregivers to pool their efforts and resources to cultivate marijuana . . . in amounts necessary to meet the reasonable medical needs of qualified patients and cardholders."<sup>367</sup> However, no test exists to determine what constitutes a reasonable amount.<sup>368</sup> In fact, due in part to allowing municipalities to adopt and modify parts of the state law, California's laws are so scattered and contradictory at the municipal level that a set of guidelines issued by the State's Attorney General in 2008 was

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50219, 10-50264 ) (quoting members of the House of Representatives who opposed the amendment stating that subordinate agencies to the DOJ would also be affected).

365. See *Conant v. Walters*, 309 F.3d 629, 645–46 (9th Cir. 2002) (Kozinski, J., concurring).

366. See ProCon.org, *30 Legal Medical Marijuana States & DC: Laws, Fees, and Possession Limits* (June 26, 2018), <https://perma.cc/4ABY-5C3T> (noting that while some states have defined ounce or plant limitations, other states have vague "30-day supply" limits).

367. *People v. London*, 175 Cal. Rptr. 3d 392, 402 (4th Dist. Ct. App. 2014).

368. *People v. Wright*, 146 P.3d 531, 541–42 (Cal. 2006); see also *People v. Kelly*, 222 P.3d 186, 196–97, 213–14 (Cal. 2010) (finding that attempts to establish possession limits via a new state law unconstitutionally abridged the state's original medical marijuana law).

later deemed to be merely “persuasive” and therefore non-binding upon both citizens and state courts.<sup>369</sup> Another example comes in the form of restrictions on dispensaries. Due to an oversight in drafting its legislation, the Michigan Supreme Court held that the state’s medical marijuana law did not allow for dispensaries to be licensed by the state.<sup>370</sup> Conversely, the state law allowed but did not require municipalities to issue operating licenses until late 2017, when new state licenses were approved legislatively.<sup>371</sup> Under either example, any Michigan or California qualified patient exercising their rights under state law in good faith could still be charged in federal court by the DOJ and this enforcement action would be well-within the *McIntosh* strict compliance standard, yet violating Rohrabacher-Farr.

Second, the strict compliance requirement further allows the DOJ to commandeer state police functions and substitute its own decision-making authority where state law enforcement has previously determined that an individual was not breaking any state law. A brazen affront to the principals of federalism, usually championed by conservatives, the DOJ has utilized this tactic for many years, with Charles Lynch being the most notable example. Lynch was deemed by state law enforcement to have been acting in compliance with the law but was arrested by federal officers and later prosecuted by the DOJ anyway.<sup>372</sup> In such instances, the purpose of Rohrabacher-Farr is directly frustrated, state efforts to enforce their own laws are undermined by a meddling federal agency, and individuals who should not be in court are subjected to expensive, pointless, and illegal hearings in federal court.<sup>373</sup> Further, the strict compliance standard largely violates precedent in the Ninth Circuit, which has long required that state courts hear

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369. *People v. Hochandel*, 98 Cal. Rptr. 3d 347, 358, 363 (Cal. Ct. App. 2009); *see also* CAL. ATT’Y GEN., CAL. DEP’T OF JUST., GUIDELINE FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE (2008).

370. *See State v. McQueen*, 828 N.W.2d 644, 650–57 (Mich. 2013) (holding that although Michigan’s medical marijuana statutory definition of “medical use” of marijuana does include its sale, the law does not provide for the establishment of dispensaries or cultivation centers, or for transfers which would trigger immunity or affirmative defense provisions).

371. Kathleen Gray, *Michigan: Medical Marijuana Dispensaries Can Stay Open – For Now*, DETROIT FREE PRESS, (Nov. 1, 2017, 4:54 PM), <https://perma.cc/HNR4-9XGN>. *See* MICH. COMP. LAWS §§ 333.27101-27801 (2016) (amending Michigan’s medical marijuana law to allow for dispensaries and other commercial facilities and transactions); Dep’t of Licensing and Regulatory Affairs, *Medical Marijuana Facility Licensing* (2018) <https://perma.cc/VL46-HXW6> (requiring implementation of new facilities licensing laws by December 15, 2017).

372. Brief of Sen. Mark Leno (SD-11) et al. as Amici Curiae in Support of Charles C. Lynch’s Motion for Rehearing *En Banc*, at 13–15, *United States v. Lynch*, (9th Cir. May 7, 2015) (Nos. 10-50219 and 10-50264).

373. Prior to the creation of Rohrabacher-Farr, defenses predicated upon legal medical marijuana use under state law were not accepted by federal courts. *See, e.g.* *United States v. Stacy*, 734 F. Supp. 2d 1074, 1083 (S.D. Cal. 2010) (holding that the defendant was precluded from asserting a medical marijuana defense).

and determine the appropriateness of affirmative defenses predicated upon state law and introduced by a defendant.<sup>374</sup>

Third, the *McIntosh* standard seemingly requires the DOJ to break multiple federal laws in order to bring enforcement actions before federal courts. Rohrabacher-Farr is unequivocal in its requirement that the DOJ not use *any* federal funding to prevent state medical marijuana laws from being implemented, yet the Ninth Circuit appears to have presented the DOJ with an out. However, the Amendment contains no such exception, thus placing the agency at odds with the law. Additionally, the Ninth Circuit failed to address the Anti-Deficiency Act,<sup>375</sup> which states that an employee of the United States may not “make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.”<sup>376</sup> Though the Anti-Deficiency Act is typically used in contract disputes, the language is quite clear and is not delimited to those actions solely.<sup>377</sup> Thus, by bringing an action that would chill medical marijuana implementation in federal court using funds appropriated by Congress, the DOJ is readily violating two federal laws: The Rohrabacher-Farr Amendment and the Anti-Deficiency Act.

In order to find that strict compliance is appropriate, the Ninth Circuit first argued that it was required to read the word “laws” literally, allowing it to find the narrowest interpretation and stating that it could not take legislative intent into account due to Supreme Court precedent.<sup>378</sup> In its ruling, the court implied that the Supreme Court has long-forbidden federal courts from using legislative intent when interpreting an imprecise appropriations rider, but this conclusion appears to be a misreading of the cited cases. In *Cherokee Nation*, the Supreme Court utilized the Committee Reports and legislative statements to elucidate the meaning and requirements of a dense appropriation’s act on tribal funding.<sup>379</sup> The language cited by the Ninth Circuit, when read in the context of the opinion, holds that legislative history is only forbidden if it is used to change the wording of an appropriations rider authorized by Congress.<sup>380</sup> In *Lincoln*, the Supreme Court did not forbid the use of intent to glean the correct inference, but

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374. *Strauss v. United States*, 376 F.2d 416, 419 (5th Cir. 1967) (quoting *Perez v. United States*, 297 F.2d 12, 13–14 (5th Cir. 1961)).

375. Anti-Deficiency Act, Pub. L. No. 97-258, § 1341, 96 Stat. 923 (1982) (codified at 31 U.S.C. § 1341(a)(1)(A) (2017)).

376. 31 U.S.C. § 1341(a)(1)(A) (2011).

377. For examples of how the Anti-Deficiency Act is traditionally applied, *see generally* *Davis & Assocs., Inc. v. District of Columbia*, 501 F. Supp. 2d 77 (D.D.C. 2007); *Union Pac. R.R. Corp. v. United States*, 52 Fed. Cl. 730 (2002).

378. *United States v. McIntosh*, 833 F.3d 1163, 1178–79 (9th Cir. 2016) (citing *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646 (2005)); *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (citations omitted).

379. 543 U.S. at 639–41.

380. *Id.* at 644–46 (finding against the federal government, which argued that specific provisions were invalid due to conflicting legislative history, though the final wording was clear in the enacted language).

instead forbid federal courts from taking legislative intent into account when determining how funds should be spent.<sup>381</sup> In fact, *Lincoln* makes a distinction between “lump-sum appropriation[s],” like those described in the case, and those like Rohrabacher-Farr that contain specific language “statutorily restricting what can be done with those funds,” forbidding legislative intent in interpreting the former while making no such restrictions on the latter.<sup>382</sup>

Thus, if federal courts look to legislative intent to interpret Rohrabacher-Farr, as the Supreme Court explicitly allowed and performed in *Cherokee Nation*, it is quite clear that it was written to eliminate federal “medical marijuana prosecutions and forfeiture actions immediately in states that permit the use of medical marijuana.”<sup>383</sup> Six of the amendment’s sponsors argued during its debate that the rider was intended to halt *all* federal prosecutions of individuals taking advantage of medical marijuana laws.<sup>384</sup> Indeed, the intent to stop the DOJ *and its subsidiary agencies* from prosecuting medical marijuana offenses, regardless of compliance with state law, was so well understood that opponents of the Amendment openly campaigned against it on these terms. One Representative stated that it would “make it difficult, if not impossible, for the DEA and [DOJ] to enforce the law” while another complained that the DEA would be unable to enforce the CSA and would be “prohibited from going into that person’s house growing as many plants as they want.”<sup>385</sup> In short, the members of Congress who passed Rohrabacher-Farr were well aware of its scope and the intent of its writers, even where individuals were outwardly and knowingly in violation of medical marijuana laws, as that issue was to be resolved by the states themselves, not the federal government.<sup>386</sup>

Regardless of whether the *McIntosh* standard is adopted by other federal courts, disposed of altogether, or results in a circuit split, Rohrabacher-Farr still presents a fundamental impediment to all DOJ enforcement as described in this Article. Not only does it require the DOJ to cease prosecution of any individual who is strictly compliant—in the Ninth Circuit—or otherwise, it also requires all DEA agents attempting to enforce the CSA in the enumerated states to cease those actions as well. This means all actions described in Section I.B should have already ceased because all funding for the DEA and its enforcement of the CSA comes directly from the

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381. 508 U.S. at 192–93.

382. *Id.* at 192.

383. See Brief of Members of Congress Rohrabacher (R-CA) and Farr (D-CA) as *Amici* in Support of Charles C. Lynch’s Motion for Rehearing *En Banc*, *supra* note 363, at 11.

384. *Id.* at 11–15.

385. *Id.* at 15–16 (statements of Reps. Fleming and Harris, respectively, both of whom opposed the Amendment); see *supra* note 364.

386. See generally Kris Hermes, *Feds Back off Medical Marijuana Enforcement in 32 States and DC*, AMERICANS FOR SAFE ACCESS (Dec. 29, 2014) <https://perma.cc/U3ED-Q5KX>; Allayne Sherer, *First major victory in the fight to end federal interference*, AMERICANS FOR SAFE ACCESS (May 31, 2014) <https://perma.cc/3Z52-EA8N>.



DOJ. Likewise, all ATF action to administer section 922(g)(3) of the Gun Control Act in those enumerated states should have ceased, including all requirements listed in the ATF Open Letter due to the ATF being a subordinate agency to the DOJ and receiving all its funding from them.

## V. CONCLUSION

This Article seeks to be the first to describe the constitutional violations being visited upon and threatened against qualified patients acting legally under state law by the federal government. When federal courts apply the Gun Control Act to qualified patients and deprive them of their right to bear arms, they are utilizing bad or misunderstood data and further misapplying precedent to do so. By analyzing this issue through a generalized framework looking at medical marijuana law and policy at both the state and federal levels as well as Second Amendment jurisprudence and the application of the former to the latter, this Article intends to serve as both an introduction to the subject and a guide for future discourse.

It should also be noted that this Article does not seek the proliferation of additional firearms into a country already rife with violence and mass casualty incidents caused by them. Instead, the Article seeks to shed light on the constitutional violations that are occurring and call for equal treatment under federal and state law.

While it may seem a laughable excuse to some, medical marijuana helps many Americans cope with pain, anxiety, death and the many side effects attendant to debilitating illnesses. Stigmatizing and punishing qualified patients is an unnecessary and unconstitutional overreach based on illegitimate science and the federal government's prohibitionist attitude toward marijuana, and seemingly, little more.

## APPENDIX

<b>Table I: List of Comprehensive Medical Marijuana Programs by State with Federal Circuit Court<sup>387</sup></b>		
<b>State</b>	<b>Year Program Adopted*</b>	<b>Federal Circuit</b>
California	1996	Ninth
Washington	1998	Ninth
Oregon	1998	Ninth
Alaska	1998	Ninth
Maine	1999	First
Colorado	2000	Tenth
Nevada	2000	Ninth
Hawaii	2000	Ninth
Vermont	2004	Second
Montana	2004	Ninth
Rhode Island	2006	First
New Mexico	2007	Tenth
Michigan	2008	Eighth
New Jersey	2009	Third
Arizona	2010	Ninth
D.C. <sup>388</sup>	2010	D.C.
Delaware	2011	Third
Connecticut	2012	Second
Massachusetts	2012	First
New Hampshire	2013	First
Illinois	2013	Seventh

387. Information in Table 1 was compiled from the following sources: *State Medical Marijuana Laws*, Table 1, NAT'L CONF. OF STATE LEGS. (June 27, 2018), <https://perma.cc/T75F-KZYG>; see also ProCon.org, *29 Legal Medical Marijuana States & DC: Laws, Fees, and Possession Limits*, June 26, 2017, <https://perma.cc/Q9YF-FXRS>; MARIJUANA POLICY PROJECT, *supra* note 33.

388. In 1998, Washington, D.C. voters passed Initiative 59 with 69% voting in favor, but it was blocked congressionally via a spending measure, which was subsequently lifted in December 2009, allowing the District's city council to vote to allow medical marijuana. Ashley Southall, *Washington, D.C. Approves Medical Use of Marijuana*, N.Y. TIMES (May 4, 2010), <https://perma.cc/QW3C-URB9>.

New York	2014	Second
Minnesota	2014	Eighth
Guam	2014	Ninth
Maryland	2014	Fourth
Puerto Rico	2015	First
Ohio <sup>389</sup>	2016	Sixth
Pennsylvania	2016	Third
North Dakota <sup>390</sup>	2016	Eighth
Arkansas	2016	Eighth
Florida	2016	Eleventh
Louisiana <sup>391</sup>	2016	Fifth
West Virginia <sup>392</sup>	2017	Fourth
* Year program was fully adopted by state either via popular vote or legislative act		

389. Ohio's medical marijuana program is currently being implemented and is scheduled to become operational in September 2018. *Timeline & Rules*, OHIO MED. MARIJUANA CONTROL PROGRAM, <https://perma.cc/45FE-QC7K>.

390. North Dakota's medical marijuana program is currently being implemented and is scheduled to open to the public sometime in 2018. John Hageman, *North Dakota Health Dep't Begins Implementing New Medical Marijuana Law*, BISMARCK TIMES (May 2, 2017) <https://perma.cc/5ZLQ-636N>.

391. Prior to 1996, Louisiana was the only state with a medical marijuana law, however, it was symbolic and ineffective. Passed in 1978, the law allowed physicians to prescribe marijuana for medicinal purposes. James McClure, *The First State to Legalize Medical Marijuana Is Finally About to Get it Right*, CIVILIZED (May 17, 2016), <https://perma.cc/Y699-JZ39>. Recently however, state officials worked to amend the statute, resulting in Louisiana's adoption of comprehensive medical marijuana program, available in 2018. Melinda Deslatte, *Louisiana Medical Marijuana Bill Signed*, CANNABIST (May 20, 2016) <https://perma.cc/87V3-E8EC>.

392. West Virginia's implementation period is the longest of all recent adoptees with registration not expected to begin until July 1, 2019. Bureau for Pub. Health, *West Virginia Medical Cannabis Program*, W. VA. DEP'T OF HEALTH & HUMAN RES., (Apr. 20, 2017).

<b>Table II: List of States with Laws Qualifying Gun Possession by Illegal Drug Users and Comprehensive Medical Marijuana Programs and Application to Qualified Patients</b>			
<b>State</b>	<b>Statute Qualifying Gun Possession by Drug User</b>	<b>Language Exempting Qualified Patients</b>	<b>Language Enforcing Qualification</b>
California	CAL. PENAL CODE § 12021(a)(1) (2011) (repealed 2012)	<i>People v. Leal</i> , 210 Cal. App. 4th 829, 842 (1st Dist. App. 2012) <sup>393</sup>	
Colorado	COLO. REV. STAT. § 18-12-203(1)(f)	COLO. CONST. art. XVIII § 14(2)(a) <sup>394</sup>	
Nevada	NEV. REV. STAT. ANN. § 202.360(1)(d)	NEV. REV. STAT. ANN. §§ 202.257(1)(b); 453A.300 <sup>395</sup>	
Hawaii	HAW. REV. STAT. § 134-7(c)(1)		Paul Perrone, <i>Firearm Registrations in Hawaii, 2016</i> , Department of the Attorney General, at 7-8 & tbl.3 <sup>396</sup>
Rhode Island	11 R.I. GEN. LAWS § 47-6	21 R.I. GEN. LAWS § 28.6-4	
New Jersey	N.J. STAT. ANN. § 2C:58-3(c)(2)	N.J. STAT. ANN. § 24:61-6(b)	
D.C.	D.C. CODE § 22-4503(a)(4)		D.C. CODE § 7-1671.03(e) <sup>397</sup>
Delaware	DEL. CODE ANN. tit. 11, § 1448(a)(3) (2017)	DEL. CODE ANN. tit. 16, § 4903A(a)	
Massachusetts	MASS. GEN. LAWS CH. 140 § 129B(1)(iii)	MASS. ANN. LAWS CH. 94C §§ 4; 6(A)	
New Hampshire	N.H. REV. STAT. ANN. § 159:3(I)(b)(3)	N.H. REV. STAT. ANN. § 126-X:2(i)	
Illinois	720 ILL. COMP. STAT. ANN. 5/24-3.1(a)(3)	410 ILL. COMP. STAT. ANN. 130/25(a)	

393. See generally 210 Cal. App. 4th 829, 842 (1st Dist. Ct. App. 2012).

394. See Hutchins, *supra* note 87.

395. When read together, Nevada law states that firearm possession is illegal for a qualified patient only when the individual is both under the influence of marijuana and maintains actual physical possession of the firearm simultaneously, not solely for ownership.

396. According to Hawaii's Attorney General, current qualified patients will be denied firearms permits by the State but may successfully obtain a permit "one year after the expiration" of registration card.

397. See Klieger et al., *supra* note 32; see generally D.C. CODE § 7-1671.08(c), (d) (2017).

Minnesota	MINN. STAT. § 624.713(1)(10)(iii)	MINN. STAT. §§ 152.32(1), (2)(a)	
Maryland	MD. CODE ANN., PUB. SAFE. § 5-133(b)(4), (5)	MD. CODE ANN., HEALTH- GEN. § 13-3313(a)	
Ohio	OHIO REV. CODE ANN. § 2923.13(A)(4)	Official rules not yet finalized	
Arkansas	ARK. CODE ANN. § 5-73- 309(7)	ARK CONST. amend. 98 § 3(a), (c), (i)	
Florida	FLA. STAT. § 790.25(2)(b)(1)	FLA. STAT. § 381.986(14)(a), (b)	
West Virginia	W. VA. CODE § 61-7- 7(a)(2), (3)	Official rules not yet finalized	