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## Light, Smoke, and Fire: How State Law Can Provide Medical Marijuana Users Protection from Workplace Discrimination

Elizabeth Rodd

*Boston College Law School*, [elizabeth.rodd@bc.edu](mailto:elizabeth.rodd@bc.edu)

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# LIGHT, SMOKE, AND FIRE: HOW STATE LAW CAN PROVIDE MEDICAL MARIJUANA USERS PROTECTION FROM WORKPLACE DISCRIMINATION

**Abstract:** Currently, twenty-three states and the District of Columbia have enacted legislation providing an affirmative defense to prosecution under state law for medical marijuana use by qualified patients. Despite growing public and legislative support for the legalization of medical marijuana, marijuana use—both recreational and medicinal—remains illegal under the federal Controlled Substances Act. Given the inconsistency between state and federal law concerning the legality of medicinal marijuana, there is significant uncertainty regarding the rights of employees to enjoy their new medical marijuana privileges. To date, courts have refused to grant protections to employees who have suffered adverse employment action for their off-duty, state-sanctioned medical marijuana use. Although the existing case law has unanimously favored employers, the existence of strongly written dissenting opinions that favor employees as well as the adoption by several states of statutory discrimination protections for medical marijuana users signifies that this existing precedent could easily change. This Note argues that courts should allow employees' claims for disability discrimination to proceed under state law, and that state legislatures should amend their current medical marijuana statutes to afford employment discrimination protection to qualified patients. In doing so, states will be able to protect disabled employees from discrimination due to their use of a state-sanctioned therapeutic remedy.

## INTRODUCTION

Gary Ross suffers from back pain as a result of injuries sustained in 1983 during his service with the United States Air Force.<sup>1</sup> When conventional medications failed to provide relief, Ross's doctor recommended medical marijuana for his pain.<sup>2</sup> After beginning medical marijuana treatment in 1999, Ross's job performance as a telecommunications system administrator never suffered due to his medical marijuana use.<sup>3</sup> In September 2001, when Ross accepted employment with a new telecommunications company, he was subject to a pre-employment drug test and tested positive for tetrahydrocannabinol, the active

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<sup>1</sup> Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 203 (Cal. 2008).

<sup>2</sup> *Id.* Ross resides in California where the Compassionate Use Act of 1996 is in effect. *Id.* See generally CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007 & Supp. 2014) (explaining that one of the purposes of the Act is to allow qualified patients to obtain and use medical marijuana without being subjected to criminal prosecution or sanction).

<sup>3</sup> Ross, 174 P.3d at 203.

chemical in marijuana.<sup>4</sup> Although Ross's medical use of marijuana was state sanctioned and conducted while off duty, the employer discharged Ross without offering any accommodation for Ross's back condition.<sup>5</sup> Ross sued the employer for disability discrimination, but the Supreme Court of California held that Ross did not have a cause of action under state discrimination laws because the use of marijuana remains illegal at the federal level.<sup>6</sup>

Doctors can legally recommend medical marijuana to patients in states where medical marijuana is decriminalized.<sup>7</sup> An increasing number of states are following California's lead and are enacting legislation to legalize medical marijuana.<sup>8</sup> As a result of these recent legislative changes, over one million people

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<sup>4</sup> *Id.*; see also *Cannabis and Cannabinoids*, NAT'L CANCER INST., <http://www.cancer.gov/cancertopics/pdq/cam/cannabis/healthprofessional/page2> (last visited Oct. 5, 2014), archived at <http://perma.cc/SPZ8-SRNB> (explaining that the *cannabis* plant—i.e. marijuana—produces psychoactive compounds called cannabinoids and tetrahydrocannabinol is the primary psychoactive ingredient in these cannabinoids).

<sup>5</sup> *Ross*, 174 P.3d at 203.

<sup>6</sup> *Id.* at 208.

<sup>7</sup> *Id.* at 203; see 410 ILL. COMP. STAT. 130/5 (2013 & Supp. 2014) (“Cannabis has many currently accepted medical uses in the United States, having been recommended by thousands of licensed physicians to at least 600,000 patients in states with medical cannabis laws.”).

<sup>8</sup> *23 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>, archived at <http://perma.cc/6UEP-H399> (last updated July 31, 2014). There are currently twenty-four jurisdictions that have enacted laws legalizing medical marijuana: Alaska, Arizona, California, Colorado, Connecticut, the District of Columbia, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. COLO. CONST. art. XVIII, § 14 (2013); ALASKA STAT. §§ 17.37.010–80 (2012); ARIZ. REV. STAT. ANN. §§ 36-2801 to -2819 (2014) (West); CAL. HEALTH & SAFETY CODE §§ 11362.5–83 (West 2007 & Supp. 2014); CONN. GEN. STAT. § 21a-408 (2013); DEL. CODE ANN. tit. 16, §§ 4901A–4926A (West 2003 & Supp. 2012); D.C. CODE §§ 7-1671.01–13 (2013); HAW. REV. STAT. ANN. §§ 329-121 to -128 (LexisNexis 2013); 410 ILL. COMP. STAT. § 130/1–999 (2013 & Supp. 2014); ME. REV. STAT. ANN. tit. 22, §§ 2421–2430-B (2004 & Supp. 2013); MASS. GEN. LAWS ANN. ch. 94C app., §§ 1-1 to -17 (West 2006 & Supp. 2014); MICH. COMP. LAWS ANN. §§ 333.26421–.26430 (West 2001 & Supp. 2014); MONT. CODE ANN. §§ 50-46-301 to -344 (2013); NEV. REV. STAT. §§ 453A.010–810 (2013); N.H. REV. STAT. ANN. §§ 126-X:1–11 (2005 & Supp. 2013); N.J. STAT. ANN. §§ 24-61-1 to -15 (West 2007 & Supp. 2014); N.M. STAT. ANN. § 26-2B-1–7 (2007 & Supp. 2013); OR. REV. STAT. §§ 475.300–346 (2013); R.I. GEN. LAWS §§ 21-28.6-1 to -13 (2002 & Supp. 2013); VT. STAT. ANN. tit. 18, §§ 4472–4474m (2012 & Supp. 2014); WASH. REV. CODE ANN. §§ 69.51A.005–.903 (West 2007 & Supp. 2014). In 2014 alone, there were fourteen additional states with pending legislation to legalize medical marijuana: Florida, Kansas, Kentucky, Maryland, Minnesota, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, West Virginia, and Wisconsin. See *3 States with Pending Legislation to Legalize Medical Marijuana*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481>, archived at <http://perma.cc/6N5V-Q22Q> (last updated Nov. 5, 2014). Three of these states, Maryland, Minnesota, and New York, passed legislation in 2014 to legalize medical marijuana. MD. CODE ANN., HEALTH–GEN. § 13-3301 to -3316 (LexisNexis 2009 & Supp. 2014); 2014 Minn. Laws 2065; N.Y. PUB. HEALTH § 3360 (McKinney, Westlaw through L.2014, chapters 1 to 422).

currently use medical marijuana, and this number continues to rise.<sup>9</sup> Furthermore, there is increasing public support for legalizing medical marijuana.<sup>10</sup> Despite this evolving legislative and social atmosphere, marijuana use—either for recreational or medical purposes—remains illegal under the federal Controlled Substances Act (“CSA”).<sup>11</sup>

The facts surrounding Mr. Ross’s case highlight the inconsistency between state and federal marijuana laws that has led to uncertainty regarding the rights of employees to engage in state-sanctioned, off-duty use of medical marijuana.<sup>12</sup> Although states have passed medical marijuana laws to protect the health, safety, and welfare of their citizens,<sup>13</sup> courts addressing the issue have thus far unanimously used federal law to deny employees any legal mechanism to extend this protection to medical marijuana use in the employment context.<sup>14</sup> To date, the

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<sup>9</sup> *How Many People in the United States Use Medical Marijuana?*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.answers.php?questionID=001199>, archived at <http://perma.cc/LD8A-S6AP> (last updated Dec. 31, 2012); see *California Medical Marijuana Identification Cards Data by County and Fiscal Year*, CAL. DEP’T OF PUB. HEALTH, <http://www.cdph.ca.gov/programs/MMP/Documents/MMP%20County%20Card%20Count.pdf>, archived at <http://perma.cc/MX6Z-HM5Q> (last updated Mar. 15, 2014) (demonstrating that the number of medical marijuana identification cards issued between 2011 and 2014 was 17,667, as opposed to the eighty-five medical marijuana identification cards issued in 2004); *Medical Marijuana Statistics*, COLO. DEP’T OF PUB. HEALTH & ENV’T, <http://www.colorado.gov/cs/Satellite/CDPHE-CHEIS/CBON/1251593017044>, archived at <http://perma.cc/3MBY-YAYH> (last updated Nov. 2013) (showing that, as of November 2013, there were 110,785 patients using medical marijuana in Colorado which was an approximate 80% increase from the 21,625 patients in October 2009).

<sup>10</sup> Gary Langer, *High Support for Medical Marijuana*, ABC NEWS (Jan. 18, 2010), <http://abcnews.go.com/images/PollingUnit/1100a3MedicalMarijuana.pdf>, archived at <http://perma.cc/D5DJ-VM82>. In a national survey conducted in 1997, 69% of Americans supported the legalization of medical marijuana. *Id.* In a similar study conducted in 2010, this number had risen to 81%. *Id.* In a 2014 poll of New York voters, 88% supported the legalization of medical marijuana. *New York Voters Back Medical Marijuana 10-1, Quinnipiac University Poll Finds Strong Support for Recreational Marijuana Also*, QUINNIPIAC UNIV. POLLING INST. (Feb. 17, 2014), [http://www.quinnipiac.edu/images/polling/ny/ny02172014\\_b1s5tv.pdf/](http://www.quinnipiac.edu/images/polling/ny/ny02172014_b1s5tv.pdf/), archived at <http://perma.cc/7MLF-H89C>. Further, in a study conducted by the New England Journal of Medicine, 76% of doctors supported the use of medical marijuana to help alleviate the symptoms of cancer. See Jonathan N. Adler & James A. Colbert, *Medicinal Use of Marijuana—Polling Results*, 368 NEW ENG. J. MED. 30(1) (2013).

<sup>11</sup> 21 U.S.C. § 812(b)–(c) (2012). Under the Controlled Substances Act, marijuana is classified as a Schedule I controlled substance. *Id.* This is the most restrictive category and signifies Congress’s conclusion that marijuana has no medicinal value and cannot be legally prescribed. § 812(b)–(c); § 829.

<sup>12</sup> See *Ross*, 174 P.3d at 208.

<sup>13</sup> See *Gonzales v. Raich*, 545 U.S. 1, 42–43 (2005) (O’Connor, J., dissenting) (arguing that California’s Compassionate Use Act is an exercise of a state’s traditional and core police powers to define criminal law and protect the health, safety, and welfare of its citizens); *supra* note 8 and accompanying text (discussing that twenty-three states and the District of Columbia have passed state statutes legalizing medical marijuana use).

<sup>14</sup> *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 436–37 (6th Cir. 2012) (holding that the Michigan Medical Marijuana Act does not restrict a private employer’s ability to discipline employees for medical marijuana use and, therefore, the Act could not support a wrongful termination claim); *Ross*, 174 P.3d at 208 (holding that the California Fair Employment and Housing Act does not require an

U.S. Court of Appeals for the Sixth Circuit, the Supreme Court of California, the Montana Supreme Court, the Washington Supreme Court, and the Colorado Court of Appeals have all dismissed employees' claims for employment discrimination and wrongful termination where the employee was terminated for medical marijuana use.<sup>15</sup> As a result, medical marijuana patients are left with an impossible choice of either being able to pursue a career or suffer from chronic, debilitating pain.<sup>16</sup>

This Note argues that, in states where medical marijuana use is legal, employees should be granted protections from employment discrimination under state law.<sup>17</sup> Part I of this Note outlines the federal and state laws surrounding marijuana use and employment discrimination.<sup>18</sup> Part II examines the arguments made by employees in cases involving medical marijuana employment discrimination claims.<sup>19</sup> Further, Part II analyzes why employees' claims have consist-

employer to accommodate an employee who used medical marijuana and that an employee who is terminated for authorized medical marijuana use cannot state a cause of action for termination in violation of public policy); *Coats v. Dish Network, L.L.C.*, 303 P.3d 147, 152 (Colo. App. 2013) (holding that state-licensed medical marijuana use is not a "lawful activity" under the Colorado employment discrimination law); *Johnson v. Columbia Falls Aluminum Co. LLC*, No. DA 08-0358, 2009 WL 865308, at \*4 (Mont. 2009) (holding that an employee who was terminated for use of medical marijuana could not state a claim under the Montana Human Rights Act or the Americans with Disabilities Act); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 536 (Or. 2010) (holding that the Oregon Medical Marijuana Act was preempted by the Federal Controlled Substances Act and, therefore, the employee's use of medical marijuana was illegal and was not entitled to accommodation); *Roe v. TeleTech Customer Care Mgmt.*, 257 P.3d 586, 594–95 (Wash. 2011) (holding that the Washington State Medical Use of Marijuana Act does not proclaim sufficient public policy to support a cause of action for wrongful termination).

<sup>15</sup> See *supra* note 14 and accompanying text (discussing court decisions regarding employment protections afforded to employees engaging in state-sanctioned medical marijuana use).

<sup>16</sup> See GEN. ASSEMB. OF CONN., JUDICIARY COMM., J. FAVORABLE REP., File No. 605, Jan. Sess., at 3 (2011), <http://www.cga.ct.gov/2011/JFR/S/2011SB-01015-R00JUD-JFR.htm>, archived at <http://perma.cc/78N7-BMJD>. A breast cancer survivor articulated this before the Connecticut legislature:

I am currently pursuing a career in social work, and I know it is likely that I will be drug tested for any job opportunities . . . I would be able to pass this test . . . if I was hung over from a sleep aid, taking a prescription painkiller, or even hung-over from drinking alcohol until the pain cannot be felt anymore. If I choose to smoke marijuana, I would be denied this employment opportunity. Please change our laws and let all of us live our lives pain free and in good standing.

*Id.* In adopting its medical marijuana law, the Connecticut legislature made a point to statutorily protect patients from employment discrimination. CONN. GEN. STAT. ANN. § 21a-408p (2013) ("No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient . . ."). Connecticut is among a minority of states, including Arizona, Delaware, Illinois, and Maine, to provide such statutory employment protections. ARIZ. REV. STAT. ANN. § 36-2813 (2014) (West); CONN. GEN. STAT. ANN. § 21a-408p (2013); DEL. CODE ANN. tit. 16 § 4905A (West 2003 & Supp. 2012); 410 ILL. COMP. STAT. § 130/40 (2013 & Supp. 2014); ME. REV. STAT. tit. 22, § 2423-E(2) (2004 & Supp. 2013).

<sup>17</sup> See *infra* notes 171–217 and accompanying text.

<sup>18</sup> See *infra* notes 23–113 and accompanying text.

<sup>19</sup> See *infra* notes 114–170 and accompanying text.

ently failed, and why dissenting opinions have found merits to these claims<sup>20</sup> Finally, Part III of this Note argues that employees who are terminated for their use of state-sanctioned medical marijuana should be afforded discrimination protection under state law.<sup>21</sup> More specifically, Part III argues that courts should allow medical marijuana users to state claims for disability discrimination under state law and that state legislatures should amend their medical marijuana statutes to explicitly provide a cause of action for medical marijuana patients who are discriminated against in the employment context.<sup>22</sup>

## I. THE HAZY LANDSCAPE OF MEDICAL MARIJUANA IN THE EMPLOYMENT DISCRIMINATION CONTEXT

Marijuana legislation and employment discrimination legislation exist at both the federal and state level.<sup>23</sup> This Part outlines these laws in order to provide a better understanding of how state and federal law intersect in the context of a medical marijuana employment discrimination claim.<sup>24</sup> Section A examines federal and state law regarding marijuana.<sup>25</sup> Section B examines federal and state law regarding disability discrimination.<sup>26</sup>

### *A. Federal Marijuana Legislation in the United States*

Laws regarding the regulation of marijuana use, possession, and cultivation are becoming increasingly inconsistent on the federal and state level.<sup>27</sup> Subsection 1 explores federal marijuana laws.<sup>28</sup> Subsection 2 explores state legislation regarding medical marijuana.<sup>29</sup> Finally, Subsection 3 explores the relationship between these federal and state marijuana laws.<sup>30</sup>

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<sup>20</sup> See *infra* notes 114–170 and accompanying text.

<sup>21</sup> See *infra* notes 171–217 and accompanying text.

<sup>22</sup> See *infra* notes 171–217 and accompanying text.

<sup>23</sup> See *infra* notes 27–113 and accompanying text.

<sup>24</sup> See *infra* notes 27–113 and accompanying text.

<sup>25</sup> See *infra* notes 27–76 and accompanying text.

<sup>26</sup> See *infra* notes 77–113 and accompanying text.

<sup>27</sup> Compare 21 U.S.C. § 812 (b)–(c) (2012) (stating that marijuana has no known medical use and is illegal under federal law), with, e.g., ALASKA STAT. § 17.37.030 (2012) (providing an affirmative defense to arrest, prosecution, or penalty under state law for medical marijuana users), and CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(B) (West 2007 & Supp. 2014) (providing an affirmative defense to state criminal prosecution or sanction for medical marijuana users).

<sup>28</sup> See *infra* notes 31–43 and accompanying text.

<sup>29</sup> See *infra* notes 44–56 and accompanying text.

<sup>30</sup> See *infra* notes 57–76 and accompanying text.

## 1. Federal Marijuana Laws in the United States

In 1970, Congress passed the Controlled Substances Act, or CSA.<sup>31</sup> This was the United States' first comprehensive drug control statute, enacted to overhaul the "inadequate and outdated" drug laws.<sup>32</sup> The main purpose of the CSA was to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.<sup>33</sup> To effectuate this purpose, Congress devised a regulatory scheme making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except as authorized by the CSA.<sup>34</sup>

The CSA categorizes controlled substances into one of five schedules according to their abuse potential, known effect, harmfulness, and medicinal value.<sup>35</sup> Schedule I is the most restrictive category and requires findings that the drug has (1) a high potential for abuse, (2) no accepted medical use, and (3) no accepted safety for use in medically supervised treatment.<sup>36</sup> Marijuana is placed in this most restrictive category, along with drugs such as heroin, lysergic acid diethylamide (LSD), and methylenedioxymethamphetamine (ecstasy).<sup>37</sup> In contrast to Schedule II–V drugs, federal law does not permit individuals to legally obtain a prescription to use Schedule I drugs for personal medical use.<sup>38</sup> The CSA's categorizations reflect Congress's conclusion that marijuana lacks a

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<sup>31</sup> See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C.). The CSA constitutes Title II of the Comprehensive Drug Abuse and Prevention and Control Act. See *id.* The CSA provides a statutory framework for the federal government to regulate the lawful production, possession, and distribution of controlled substances. See BRIAN T. YEH, CONG. RESEARCH SERV., RL34635, THE CONTROLLED SUBSTANCES ACT: REGULATORY REQUIREMENTS 1 (2012).

<sup>32</sup> See Letter from President Richard Nixon to Congress (July 14, 1969), available at <http://www.presidency.ucsb.edu/ws/?pid=2126>, archived at <http://perma.cc/K5PA-CZBN>. Prior to the passing of the CSA, the only congressional effort to control marijuana use was the Marihuana Tax Act of 1937. Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551 (repealed 1970); see Andrew J. LeVay, Note, *Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense*, 41 B.C. L. REV. 699, 702–03 (2000) (explaining that under the 1937 Act, people using marijuana for any purpose were required to register and pay a tax).

<sup>33</sup> H.R. REP. NO. 91-1444, at 3–5 (1970). Specifically, the CSA sought to provide (1) drug abuse prevention and rehabilitation of users, (2) more effective means for law enforcement to control and prevent drug abuse, and (3) a balanced scheme of criminal penalties for offenses involving drugs. *Raich*, 545 U.S. at 12–13.

<sup>34</sup> 21 U.S.C. §§ 841(a)(1), 844(a) (2012). One such authorization that the CSA provides is allowing licensed medical practitioners to prescribe controlled substances listed in Schedules II–V to patients. See 21 C.F.R. §§ 1306.11, 1306.21 (2014) (explaining the prescription requirements for Schedule II–V drugs).

<sup>35</sup> 21 U.S.C. §§ 811(c), 812.

<sup>36</sup> §§ 812(b)(1), 812(c).

<sup>37</sup> § 812(c). Examples of drugs placed in the less restrictive Schedule II category include cocaine, morphine, opium, and oxycodone. *Id.*

<sup>38</sup> See § 829(a)–(c); *Ams. for Safe Access v. Drug Enforcement Admin.*, 706 F.3d 438, 441 (D.C. Cir.), cert. denied, 134 S. Ct. 267 (2013).

medical use or purpose and, therefore, practitioners should not be authorized to legally prescribe it to patients.<sup>39</sup>

Although there is evidence suggesting that Congress intended marijuana to be classified as a Schedule I controlled substance only temporarily, marijuana still remains a Schedule I controlled substance.<sup>40</sup> Nonetheless, since 1972 there have been several unsuccessful petitions to reschedule marijuana.<sup>41</sup> Recently, on

<sup>39</sup> § 812(b); *Emerald Steel Fabricators*, 230 P.3d at 528; see Erik R. Neusch, Comment, *Medical Marijuana's Fate in the Aftermath of the Supreme Court's New Commerce Clause Jurisprudence*, 72 U. COLO. L. REV. 201, 210 (2001) ("Because of marijuana's status as a Schedule I drug, physicians who recommend, and patients who use, marijuana in accordance with state law can be held criminally liable under federal law.").

<sup>40</sup> RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* 246 (1999) (describing how members of Congress anticipated that marijuana's Schedule I status would soon change given the uncertainty that surrounded experts' discussion about the effects of marijuana); see also H.R. REP. NO. 91-1444, at 12 (1970) ("The extent to which marijuana should be controlled is a subject upon which opinions diverge widely."). After placing marijuana in Schedule I, Congress convened a Commission on Marihuana and Drug Abuse to aid in resolving the issue of marijuana's medicinal value. See 21 U.S.C. § 812(c); Brief for Petitioner at 11, *Ams. for Safe Access v. Drug Enforcement Admin.*, 706 F.3d 438 (D.C. Cir. 2013) (No. 11-1265), 2012 WL 250752, at \*11. On March 22, 1972, the Commission recommended that marijuana be decriminalized for personal use. Brief for Petitioner, *supra* at 12. Nonetheless, neither Congress nor the Nixon administration revisited the issue of rescheduling marijuana. 21 U.S.C. § 812(c). Some argue that this was an oversight due to the distractions brought by the Watergate Scandal. See LeVay, *supra* note 32, at 703–04. There is evidence, however, that Nixon's desire to keep marijuana classified as a Schedule I drug was an important component to his "War on Drugs" campaign. See *Interview with Dr. Robert DuPont*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/interviews/dupont.html>, archived at <http://perma.cc/A5GF-QJGP> (last visited Nov. 7, 2014). Dr. Robert DuPont, the former head of the Special Action Office of Drug Abuse Prevention, stated that when he came to the White House, President Nixon said, "You're the drug expert, not me, on every issue but one, and that's decriminalization of marijuana. If you make any hint of supporting decriminalization, you are history." *Id.*

<sup>41</sup> LeVay, *supra* note 32, at 704. The first petition occurred in 1972 when the National Organization for the Reform of Marijuana Laws (NORML) unsuccessfully petitioned the Bureau of Narcotics and Dangerous Drugs (now the Drug Enforcement Agency) to reschedule marijuana as a Schedule II drug. See *id.* On September 6, 1988, the DEA's Chief Administrative Law Judge, Judge Francis L. Young, concluded that "the provisions of the [CSA] permit and require transfer of marijuana from Schedule I to Schedule II" because marijuana is one of the "safest therapeutically active substances known to man." Marijuana Rescheduling Petition, No. 86-22, at 58–59, 67 (Drug Enforcement Agency Sept. 6, 1988). In 1992, Robert Bonner, the DEA administrator, rejected Judge Young's recommendation to reschedule marijuana, creating a new five-part analysis for determining whether a substance has a currently accepted medical use. Marijuana Scheduling Petition; Denial of Petition; Remand, 57 Fed. Reg. 10499-02, 10503 (Mar. 26, 1992) (finding that the evidence relied upon by Judge Young that marijuana is medicinal were "false, dangerous, and cruel"). Bonner applied a five-part test to assess whether marijuana has a currently accepted medical use, requiring that: (1) the drug's chemistry must be known and reproducible; (2) there are adequate safety studies; (3) there are adequate and well-controlled studies proving efficacy; (4) the drug is accepted by qualified experts; and (5) the scientific evidence is widely available. See *id.* at 10504–06. On February 18, 1994, the Court of Appeals for the District of Columbia upheld the DEA administrator's categorization of marijuana as a Schedule I drug. See *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131, 1133 (D.C. Cir. 1994). A second unsuccessful petition to reschedule marijuana was filed on October 9, 2002, by the Coalition to Reschedule Cannabis. *Ams. for Safe Access*, 706 F.3d at 441–42. On June



February 14, 2013, H.R. 689 was introduced to Congress to provide for the re-scheduling of marijuana.<sup>42</sup> After over forty decades of unsuccessful attempts to reschedule marijuana, the CSA maintains that there is no valid medical purpose for marijuana.<sup>43</sup>

## 2. State Medical Marijuana Legislation

Although medical marijuana remains illegal under federal law, twenty-three states along with the District of Columbia have enacted legislation legalizing the use of medical marijuana.<sup>44</sup> This proliferation of medical marijuana legislation at the state level illustrates the rising public support for the use of medical marijuana.<sup>45</sup> Moreover, the state legislation demonstrates that states are exercising their traditional police power to “protect the health, safety, and welfare of their citizens.”<sup>46</sup>

Given that the purpose of the state medical marijuana laws is largely to protect the health, safety, and welfare of medical marijuana users, these states have found that marijuana provides a legitimate therapeutic remedy.<sup>47</sup> Although the

21, 2011, the DEA denied this petition and, on January 22, 2012, the Court of Appeals for the District of Columbia upheld the DEA’s decision, reasoning that marijuana does not have a currently accepted medical use because there are not adequate and well-controlled studies proving efficacy. *Id.* at 442.

<sup>42</sup> H.R. 689, 113th Cong. (2013). The prognosis for this bill states that it only has a one percent chance of being enacted. *See H.R. 689: States’ Medical Marijuana Patient Protection Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr689>, archived at <http://perma.cc/HS3S-ARTX> (last visited Oct. 7, 2014). If passed, this bill provides that within 180 days of its enactment, the Secretary of Health and Human Services shall recommend to the administrator of the DEA that marijuana be listed as a Schedule III substance under the CSA. H.R. 689 § 2(a)(1).

<sup>43</sup> *See* 21 U.S.C. § 812(c).

<sup>44</sup> *See supra* note 8 (listing the legislation legalizing medical marijuana in these twenty-four jurisdictions).

<sup>45</sup> *See* Adler & Colbert, *supra* note 10, at 30(1) (describing that seventy-six percent of polled doctors supported the use of medical marijuana to alleviate symptoms of cancer); Langer, *supra* note 10 (describing a twelve percent increase in support for legalizing medical marijuana between 1997 and 2010).

<sup>46</sup> *Raich*, 545 U.S. at 42–43 (O’Connor, J., dissenting) (arguing that the CSA encroaches on states’ traditional police powers to define criminal law and to protect the health, safety, and welfare of their citizens). Many states explicitly express that the purpose of the medical marijuana legislation is to protect the health, safety, and welfare of their citizens. *See, e.g.*, 410 ILL. COMP. STAT. § 130/5(e) (2013 & Supp. 2014) (“Illinois joins in this effort for the *health and welfare* of its citizens.”) (emphasis added); MONT. CODE ANN. § 50-46-301 (2013) (“The purpose of this part is to . . . give local governments a role in establishing standards for the cultivation, manufacture, and use of marijuana that protect the *public health, safety, and welfare* of residents within their jurisdictions.”) (emphasis added); N.J. STAT. ANN. 24:61-2 (West 2007 & Supp. 2014) (“New Jersey joins this effort for the *health and welfare* of its citizens.”) (emphasis added).

<sup>47</sup> *See e.g.*, 410 ILL. COMP. STAT. § 130/5(c) (“The medical utility of cannabis is recognized by a wide range of medical and public health organizations, including the American Academy of HIV Medicine, the American College of Physicians, the American Nurses Association, the American Public Health Association, the Leukemia & Lymphoma Society, and many others.”); MICH. COMP. LAWS ANN. § 333.26422(a) (West 2001 & Supp. 2014) (“Modern medical research, including as found by the National Academy of Sciences’ Institute of Medicine in a March 1999 report, has discovered ben-

use of medical marijuana dates back millennia,<sup>48</sup> the CSA maintains that marijuana provides no medicinal value.<sup>49</sup> This is in contrast to a 1997 study by the National Academy of Sciences' Institute of Medicine, which concluded that there are beneficial uses of marijuana for relieving pain and treating medical conditions such as "chemotherapy-induced nausea and vomiting and AIDS wasting."<sup>50</sup> Although there are still concerns about the potential harmful effects of marijuana, state legislatures justify medical marijuana laws based on findings that medical marijuana can be used to provide relief for conditions such as cachexia, cancer, glaucoma, AIDS, nausea, post-traumatic stress syndrome, severe pain, seizures, persistent muscle spasms, and multiple sclerosis.<sup>51</sup>

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eficial uses for marihuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions."); N.J. STAT. ANN. 24:61-2 ("Modern medical research has discovered a beneficial use for marijuana in treating or alleviating the pain or other symptoms associated with certain debilitating medical conditions, as found by the National Academy of Sciences' Institute of Medicine in March 1999."); see also *infra* note 50 and accompanying text (discussing the 1997 study by the National Academy of Sciences).

<sup>48</sup> Annaliese Smith, Comment, *Marijuana as a Schedule I Substance: Political Ploy or Accepted Science?*, 40 SANTA CLARA L. REV. 1137, 1139–40 (2000). A Chinese treatise on pharmacology dated 2737 B.C.E. is the earliest known reference to marijuana. *Id.* In the United States during the nineteenth century, pharmacologists recommended marijuana for its analgesic properties and marijuana became a popular medicinal drug. *Id.* From 1850 to 1941, marijuana was included in the United States Pharmacopoeia as a recognized medicinal drug. MARK EDDY, CONG. RESEARCH SERV., RL33211, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES 1 (2010), available at <https://www.fas.org/sgp/crs/misc/RL33211.pdf>, archived at <http://perma.cc/825F-Q8H7>. The popularity of medical marijuana was dampened with the passage of the Marihuana Tax Act of 1937. See Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551 (1937) (repealed 1970). Although this act was intended to prevent non-medical use of marijuana, it made obtaining marijuana difficult and thus resulted in marijuana's removal from the U.S. Pharmacopoeia. LeVay, *supra* note 32, at 702. Legislative counsel for the American Medical Association opposed the tax act, testifying that "it may serve to deprive the public of the benefits of a drug that on further research may prove be of substantial value." EDDY, *supra* at 2.

<sup>49</sup> See 21 U.S.C. § 812(b) (2012); see also *supra* notes 31–43 and accompanying text (discussing the federal policy on marijuana).

<sup>50</sup> See INST. OF MED., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 4, (Janet Joy et al., eds. 2003) (finding that cannabis reduces neuropathic pain, improves appetite and caloric intake especially in patients with reduced muscle mass, and may relieve pain for patients with multiple sclerosis). In 1997, the White House Office of National Drug Control Policy asked the Institute of Medicine to conduct this study in response to the enactment of the California Compassionate Use Act of 1996. *Id.* at 2.

<sup>51</sup> *Oregon Medical Marijuana Program Statistics*, OR. HEALTH AUTH., <https://public.health.oregon.gov/diseasesconditions/chronicdisease/medicalmarijuanaprogram/pages/data.aspx>, archived at <http://perma.cc/94X6-WSXD> (last updated Oct. 1, 2014). There are documented adverse side effects that may result from using marijuana, including rapid heart beats, low blood pressure, muscle relaxation, bloodshot eyes, slowed digestion, dizziness, depression, hallucinations, paranoia, and loss of lung function. See *Questions and Answers About Cannabis*, NAT'L CANCER INST., <http://www.cancer.gov/cancertopics/pdq/cam/cannabis/patient/page2>, archived at <http://perma.cc/5TXR-N5VK> (last updated Mar. 25, 2014). The National Cancer Institute has recently initiated new clinical trials to test the effect of cannabis on the cognitive function of cancer patients. See *Clinical Trials (PDQ<sup>®</sup>)*, NAT'L CANCER INST., <http://www.cancer.gov/clinicaltrials/search/view?cdrid=754778&version=Patient&protocolsearchid=9089288>, archived at <http://perma.cc/AC6J-HYEU> (last updated Sept. 18, 2014).

In addition to sharing a common purpose, the twenty-four enacted medical marijuana statutes provide a common remedy.<sup>52</sup> The statutes permit residents to possess, consume, or cultivate marijuana without state criminal prosecution by obtaining a qualifying diagnosis and recommendation from a board-licensed physician.<sup>53</sup> A few states explicitly provide an affirmative defense for medical marijuana patients facing criminal prosecution.<sup>54</sup> Alternatively, many statutes have broader protections, stating that medical marijuana patients are not to be subject to “penalty,” “sanction,” or may not be “denied any right or privilege.”<sup>55</sup> Furthermore, several states explicitly extend protections to the employment context, precluding employers from discriminating against an employee in hiring or termination if the discrimination is based on a medical marijuana patient’s positive drug test.<sup>56</sup>

### 3. The Interaction Between Federal and State Marijuana Legislation

Marijuana legislation raises a critical preemption issue.<sup>57</sup> At the state level, there some are laws that permit the use of marijuana for medical purposes.<sup>58</sup> Conversely, at the federal level, the use of medical marijuana is prohibited.<sup>59</sup> In turn, if the federal statute preempts the state medical marijuana laws, then the state law would be without effect.<sup>60</sup> Federal preemption of state law is grounded

<sup>52</sup> See *supra* note 8 (listing the twenty-four medical marijuana statutes).

<sup>53</sup> See *supra* note 8 (listing the twenty-four medical marijuana statutes).

<sup>54</sup> See COLO. CONST. art. XVIII, § 14 (2013); D.C. CODE § 7-1671.08 (2013); HAW. REV. STAT. § 329-125 (LexisNexis 2013); NEV. REV. STAT. § 453A.200 (2013); VT. STAT. ANN. tit. 18, § 4474b (2012 & Supp. 2014).

<sup>55</sup> See ALASKA STAT. § 17.37.030 (2012); CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(B) (West 2007 & Supp. 2014); MASS. GEN. LAWS ch. 94C app., § 1-4 (West 2006 & Supp. 2014); MICH. COMP. LAWS ANN. § 333.26424 (West 2001 & Supp. 2014); MONT. CODE ANN. § 50-46-319 (2013); N.J. STAT. ANN. § 24:61-2 (West 2007 & Supp. 2014); N.M. STAT. ANN. § 26-2B-4 (2007 & Supp. 2013); OR. REV. STAT. § 475.300 (2013); R.I. GEN. LAWS § 21-28.6-4 (2002 & Supp. 2013); WASH. REV. CODE § 69.51A.040 (West 2007 & Supp. 2014).

<sup>56</sup> See ARIZ. REV. STAT. ANN. § 36-2813 (2014) (West); CONN. GEN. STAT. § 21a-408p (2013); DEL. CODE ANN. tit. 16 § 4903A (West 2003 & Supp. 2012); 410 ILL. COMP. STAT. § 130/40 (2013 & Supp. 2014); ME. REV. STAT. tit. 22, § 2423-E(2) (2004 & Supp. 2013); 2014 Minn. Laws 2065.

<sup>57</sup> See Stacy A. Hickox, *Clearing the Smoke on Medical Marijuana Users in the Workplace*, 29 QUINNIPIAC L. REV. 1001, 1041 (2011); see also Raich, 545 U.S. at 42 (O’Connor, J., dissenting) (“One of federalism’s chief virtues, of course, is that it promotes innovation by allowing for the possibility that ‘a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.’” (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting))).

<sup>58</sup> See *supra* note 8 and accompanying text (listing the statutes that have legalized medical marijuana).

<sup>59</sup> 21 U.S.C. § 812(b)–(c) (2012).

<sup>60</sup> See U.S. CONST. art VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land.”); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (reasoning that the Supremacy Clause demands that all state provisions in conflict with federal law be without effect).

in the Supremacy Clause of the U.S. Constitution, which invalidates state laws that interfere with, or are contrary to, federal law.<sup>61</sup> There are three types of preemption analysis: express preemption, field preemption, and implied conflict preemption.<sup>62</sup> Under each type of analysis, the focus is congressional intent.<sup>63</sup>

Notably, in passing the CSA, it was not Congress's intent to "occupy the field" of drug legislation.<sup>64</sup> Instead, Congress expressly gave states the authority to pass their own drug laws so long as there is "no positive conflict between [the CSA] and the State law so that the two cannot consistently stand together."<sup>65</sup> Because Congress wrote this savings clause into the CSA giving states the authority to enact legislation regulating controlled substances, neither express nor field preemption is applicable.<sup>66</sup> Therefore, courts have applied implied conflict preemption analysis to determine whether there is a positive conflict between the CSA and state medical marijuana laws.<sup>67</sup> Implied conflict preemption requires either (1) that it is impossible for an entity to comply with both federal and state law or (2) that the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the congressional act.<sup>68</sup> Apply-

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<sup>61</sup> U.S. CONST. art VI, § 2.

<sup>62</sup> See *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (explaining that (1) states cannot regulate in a field that Congress has determined to be regulated by its exclusive governance, (2) Congress may withdraw specific powers from the states by enacting statutes with express preemption clauses, and (3) states laws are preempted when they conflict with federal law).

<sup>63</sup> *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (discussing that "the purpose of Congress is the touchstone in every pre-emption case").

<sup>64</sup> 21 U.S.C. § 903 (2012).

<sup>65</sup> *Id.*

<sup>66</sup> *Arizona*, 132 S. Ct. at 2501. Express preemption applies in situations where Congress has written into the statute that states cannot enforce legislation in that particular area. *Id.* Field preemption applies in situations where the scheme of federal regulation is so comprehensive that it is reasonable that Congress left no room for states to supplement the law, or where the federal statutes touch on a field where the federal interests are dominant. *Id.*

<sup>67</sup> See, e.g., *Wyeth*, 555 U.S. at 563–64 (applying implied conflict preemption analysis by examining whether an actual conflict between state failure-to-warn laws and federal FDA requirements existed, either because it is physically impossible to comply with both state and federal law or because the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress); *Beek v. City of Wyoming*, 846 N.W.2d 531, 537 (Mich. 2014) (applying the same implied conflict preemption analysis as articulated in *Wyeth v. Levine* in considering whether the CSA preempts the Michigan Medical Marijuana Act); *Emerald Steel Fabricators*, 230 P.3d at 528 (applying the same implied conflict preemption analysis as articulated in *Wyeth* in considering whether the CSA preempts the Oregon Medical Marijuana Act).

<sup>68</sup> *Wyeth*, 555 U.S. at 563. First, regarding impossibility preemption, the U.S. Supreme Court has held that it is not physically impossible to comply with logically inconsistent statutes when a person can simply refrain from doing the activity that one statute purports to authorize and the other statute purports to proscribe. *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996). Second, an obstacle conflict preemption analysis involves three inquiries: (1) what is the purpose of the federal law?; (2) how do we tell that purpose?; and (3) is there a presumption against preemption because the laws involve an area historically governed by state police powers? See *Wyeth*, 555 U.S. at 565. Finally, to determine whether a state statute stands as an obstacle to the accomplishment of the full purposes and objectives

ing this analysis, courts are divided regarding whether the CSA preempts state medical marijuana statutes.<sup>69</sup>

In addition to these judicial decisions regarding the relationship between federal and state marijuana laws, the U.S. Department of Justice has commented three times on this conflict of law.<sup>70</sup> On October 19, 2009, David W. Ogden, Deputy Attorney General, issued a memorandum articulating a policy that urged federal prosecutors not to enforce the federal marijuana ban against persons who act in clear and unambiguous compliance with state medical marijuana laws.<sup>71</sup> In

of Congress, the purposes and objectives of the state statute at issue must also be identified. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144–46 (1963).

<sup>69</sup> *Compare, e.g., Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 483 (Cal. Dist. Ct. App. 2008) (holding that there is no obstacle preemption in regards to state medical marijuana statute), *People v. Crouse*, No. 12-CA-2298, 2013 WL 6673708, at \*9 (Colo. App. Dec. 19, 2013) (same), and *Beek* 846 N.W.2d at 534 (same), with *Haerberle v. Lowden*, No. 2011-CV-709, 2012 WL 7149098, at \*3–4 (D. Colo. Aug. 8, 2012) (striking down state marijuana statute due to obstacle preemption), and *Emerald Steel Fabricators*, 230 P.3d at 536 (same). Although courts are divided regarding obstacle preemption, they all rely on the reasoning of the U.S. Supreme Court to hold that the CSA does not preempt the state laws since it is possible to comply with both federal and state law because individuals can refrain from general marijuana use. See *Beek*, 846 N.W.2d at 537. The CSA and state medical marijuana statutes are, however, logically inconsistent: on the one hand, the CSA prohibits any use of marijuana, medical or otherwise, while, on the other hand, state medical marijuana statutes authorize—but do not mandate—use of medical marijuana. *Compare* 21 U.S.C. § 812(b)–(c) (2012) (stating that marijuana has no known medical use and is illegal under federal law), with, e.g., ALASKA STAT. § 17.37.030 (2012) (providing an affirmative defense to arrest, prosecution, or penalty under state law for medical marijuana users), and CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(B) (West 2007 & Supp. 2014) (providing an affirmative defense to state criminal prosecution or sanctions for medical marijuana users). In *Beek*, the Michigan Supreme Court held that the Michigan Medical Marijuana Act is not preempted by the CSA on the basis of impossibility preemption. 846 N.W.2d at 537. The court reasoned that because the Michigan Medical Marijuana Act does not mandate the use of medical marijuana, it is not physically impossible to comply with both the Michigan Medical Marijuana Act and the CSA simultaneously. *Id.*

<sup>70</sup> See Memorandum from James M. Cole, Deputy Attorney General, on Guidance Regarding Marijuana Enforcement to All U.S. Attorneys (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>, archived at <http://perma.cc/SL4F-799L> [hereinafter Cole 2013 Memorandum]; Memorandum from James M. Cole, Deputy Attorney General, on Guidance Regarding the Ogden Memo n Jurisdictions Seeking to Authorize Marijuana for Medical Use to U.S. Attorneys (June 29, 2011), available at <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf>, archived at <http://perma.cc/K3JE-2JK9> [hereinafter Cole 2011 Memorandum]; Memorandum from David W. Ogden, Deputy Attorney General, on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana to Selected U.S. Attorneys (Oct. 19, 2009), available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf>, archived at <http://perma.cc/E9K5-4YFT> [hereinafter Ogden Memorandum].

<sup>71</sup> See Ogden Memorandum, *supra* note 70, at 2. This memorandum explained that it is not an efficient use of federal resources to prosecute patients or caregivers who use or administer medical marijuana according to a treatment regiment consistent with state law. See *id.* Pursuant to the Ogden Memorandum, states were able to experiment with laws legalizing medical marijuana without being concerned that patients or caregivers would be federally prosecuted. See *id.* This policy reflected the reasoning of Justice Stevens' concurring opinion in *United States v. Oakland Cannabis Buyers' Cooperative*. See 532 U.S. 483, 502 (2001) (Stevens, J., concurring) (arguing that there is a duty on federal courts to minimize conflict between federal and state law, and that states should be permitted to serve as laboratories); see also *New State Ice Co.*, 285 U.S. at 311 (“It is one of the happy incidents of

contrast, on January 29, 2011, James M. Cole, Deputy Attorney General, released a memorandum in response to “an increase in the scope of commercial cultivation, sale, distribution and use of marijuana for purported medical purposes.”<sup>72</sup> The Cole memorandum stressed that those involved in the cultivation, distribution, sale, or use of medical marijuana are not shielded from federal criminal prosecution, and gave federal prosecutors the discretion to prosecute such persons if such actions are consistent with resource constraints.<sup>73</sup> In response to increased state legislation legalizing marijuana—both medicinal and recreational—on August 29, 2013 Cole released a second memorandum concluding that, in circumstances where states have legalized marijuana in some form and have implemented effective regulatory measures, “enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.”<sup>74</sup>

In sum, there is some agreement among the courts and federal executive branch that federal and state marijuana laws can coexist.<sup>75</sup> Nevertheless, some courts still hold that the CSA preempts state medical marijuana laws, and the federal government maintains that state-sanctioned medical marijuana use can be federally prosecuted.<sup>76</sup>

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the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”)

<sup>72</sup> See Cole 2011 Memorandum, *supra* note 70, at 1–2. The Cole 2011 Memorandum focused only on the cultivators of marijuana because, like the Ogden Memorandum, it explained that it is not an efficient use of federal resources to prosecute patients or caregivers who use or administer medical marijuana according to a treatment regimen consistent with state law. See [Cole 2011 Memorandum, *supra* note 70], at 1; Ogden Memorandum, *supra* note 70, at 2.

<sup>73</sup> See Cole 2011 Memorandum, *supra* note 70, at 2.

<sup>74</sup> See Cole 2013 Memorandum, *supra* note 70, at 3. This memorandum explains that “the federal government has traditionally relied on state and local law enforcement agencies to address marijuana activity *through enforcement of their own narcotics laws.*” See *id.* at 2. (emphasis added). This memorandum explains that the Department of Justice only has stepped in to enforce the CSA when marijuana activity has threatened enumerated harms. See *id.* (explaining these harms to be: preventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to gangs and cartels; preventing the diversion of marijuana from states where it is legal under state law in some form to other states; preventing state-authorized marijuana activity from being used as a cover or pretext for trafficking of other illegal drugs or other illegal activity; preventing violence and the use of firearms in the cultivation of marijuana; preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; preventing the growing of marijuana on public lands and the environmental dangers posed by marijuana production; preventing marijuana possession or use on federal property). Notably, medical marijuana use in the employment context is absent from that list of enumerated harms. See *id.* at 1–2.

<sup>75</sup> See *Qualified Patients Ass’n v. City of Anaheim*, 115 Cal. Rptr.3d 89, 110 (Cal. Ct. App. 2010); *Crouse*, 2013 WL 6673708, at \*9; *Beek*, 846 N.W.2d at 534; Cole 2013 Memorandum, *supra* note 70, at 1. Currently there is proposed legislation in the U.S. House of Representatives that would amend the CSA to not preempt state law. See H.R. 964, 113th Cong. (2013). This proposed legislation has a “Special Rule Regarding State Marijuana Laws” that explicitly states that no provision of the CSA shall preempt such state laws. See *id.*

<sup>76</sup> See *Emerald Steel Fabricators*, 230 P.3d at 536; Cole 2013 Memorandum, *supra* note 70, at 1.

## B. Employment Discrimination Protections in the United States

Patients using medical marijuana for therapeutic purposes likely suffer from disabilities that qualify them as members of a protected class under either federal or state disability discrimination laws.<sup>77</sup> For instance, in 2008 in *Ross v. RagingWire Telecommunications, Inc.*, the Supreme Court of California held that the plaintiff was a qualified individual with a disability due to his back injuries.<sup>78</sup> Subsection 1 explores federal disability discrimination laws.<sup>79</sup> Subsection 2 explores disability discrimination laws at the state level.<sup>80</sup> Finally, Subsection 3 explores the relationship and interaction of these federal and state disability discrimination protections.<sup>81</sup>

### 1. Federal Disability Discrimination Law

Title I of the Americans with Disabilities Act of 1990 (“ADA”) protects employees from disability discrimination.<sup>82</sup> Congress enacted the ADA because it recognized that people with handicaps or disabilities often face barriers such as prejudice, stereotypes, and discrimination.<sup>83</sup> The ADA gives employees and job applicants the right to bring suit against covered employers who discriminate against individuals who are otherwise qualified for a particular job.<sup>84</sup> This discrimination includes employer actions that are based not only on the disabilities themselves but also on symptoms of, or mitigating measures used for, a disability.<sup>85</sup> To establish a prima facie case of disability discrimination under the ADA, plaintiffs must show that they are: (1) disabled within the meaning of the ADA; (2) qualified, with or without “reasonable accommodation,” to perform the es-

<sup>77</sup> See *supra* note 51 and accompanying text (discussing the medical conditions of medical marijuana users).

<sup>78</sup> 174 P.3d at 203 (explaining that the plaintiff received government disability benefits for his pain injuries).

<sup>79</sup> See *infra* notes 82–92 and accompanying text.

<sup>80</sup> See *infra* notes 93–107 and accompanying text.

<sup>81</sup> See *infra* notes 108–113 and accompanying text.

<sup>82</sup> Americans with Disabilities Act, 42 U.S.C. §§ 12111–12117 (2012).

<sup>83</sup> See § 12112(a)–(b) (explaining that no employer shall discriminate against any “qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment”); Elisa Y. Lee, Note, *An American Way of Life: Prescription Drug Use in the Modern ADA Workplace*, 45 COLUM. J.L. & SOC. PROBS. 303, 306 (2011) (explaining that the ADA recognizes that people with disabilities need enhanced protection in the employment context due to misconceptions that employers might have about the potential job performance and safety risks of disabled employees).

<sup>84</sup> §§ 12111(8), 12112. Covered employers under the ADA include those employers who are “engaged in an industry affecting commerce who has 15 or more employees.” § 12111(5)(A). Covered employers do not include “the United States [or] a corporation wholly owned by the government of the United States.” § 12111(5)(B). Individuals are “qualified” if they can, with or without reasonable accommodation, perform the essential functions of the employment. § 12111(8).

<sup>85</sup> See § 12112; Lee, *supra* note 83, at 306.

sential functions of the job at issue; and (3) have suffered an adverse employment decision because of the disability.<sup>86</sup> Additionally, plaintiffs must also overcome any “direct threat” defense that the employer raises.<sup>87</sup>

The ADA recognizes an important exception to disability protection for users of illegal drugs.<sup>88</sup> Under the ADA, “a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs.”<sup>89</sup> The ADA defines “illegal use of drugs” as the use of drugs that is unlawful under the CSA, excluding any drug use under medical supervision.<sup>90</sup> Federal courts have construed medical marijuana use to be an illegal use of drugs under the ADA.<sup>91</sup> Therefore, the ADA provides no disability discrimination protection for medical marijuana patients who are terminated because of their drug use.<sup>92</sup>

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<sup>86</sup> §§ 12102(2), 12111(a), 12112(b); *see* *Cravens v. Blue Cross & Blue Shield of Kan. City*, 214 F.3d 1011, 1016 (8th Cir. 2000) (explaining the requirements for a prima facie case of disability discrimination under the ADA). The ADA Amendments Act expanded the definition of “disability,” reasoning that “the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554 (2008) (codified at 42 U.S.C. §§ 12103, 12205a). Reasonable accommodation is defined as including “appropriate adjustment or modifications of examinations,” that could be construed to include drug tests. § 12111(a). Employers can counter that a particular accommodation was not reasonable because it causes undue hardship. § 12111(10).

<sup>87</sup> § 12111(3). Employers can raise the direct threat defense if they believe that the accommodation will cause “significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” *Id.* Direct threat defenses must be based on an individual assessment of the employee’s present ability to safely perform the essential functions of the job. *See* 29 C.F.R. § 1630.2(r) (2014).

<sup>88</sup> 42 U.S.C. § 12114 (2012).

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

<sup>90</sup> § 12111(6). The Equal Employment Opportunity Commission (“EEOC”), the federal agency responsible for promulgating regulations for Title I of the ADA, has provided examples of drugs being taken under the supervision of a licensed health care professional. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, TECHNICAL ASSISTANCE MANUAL § 8.3 (1992), *available at* <http://askjan.org/links/ADAtam1.html#VIII>, *archived at* <http://perma.cc/F5QA-GDB6> [hereinafter TECHNICAL ASSISTANCE MANUAL]. For one, “a person who takes morphine for the control of pain caused by cancer is not using a drug illegally if it is taken under the supervision of a licensed physician.” *Id.* Morphine is a Schedule II drug under the CSA and can be legally prescribed by a health care professional. 21 U.S.C. § 812(c) (2012). Additionally, “a participant in a methadone maintenance treatment program cannot be discriminated against by an employer based upon the individual’s lawful use of methadone.” TECHNICAL ASSISTANCE MANUAL, *supra* § 8.3. Methadone is a Schedule II drug under the CSA and may also be legally prescribed by a health care professional. 21 U.S.C. § 812(c). Therefore, the EEOC illustrates that use of non-Schedule I drugs, taken under medical supervision, can be afforded ADA protection. *See* TECHNICAL ASSISTANCE MANUAL, *supra* § 8.3.

<sup>91</sup> *See* *James v. City of Costa Mesa*, 700 F.3d 394, 404 (9th Cir. 2012) (rejecting a plaintiff’s argument that state-sanctioned, doctor-recommended marijuana use is excepted from the ADA’s definition of illegal drugs); *Barber v. Gonzales*, No. CV-05-0173, 2005 WL 1607189, at \*1 (E.D. Wash. Jul. 1, 2005) (holding that the ADA illegal drug provision must be read consistently with the CSA and “it is immaterial whether such drug use is authorized by state law”).

<sup>92</sup> *See* *James*, 700 F.3d at 404; *Barber*, 2005 WL 1607189, at \*1.



## 2. State Disability Discrimination Laws

Unlike the ADA, state disability discrimination laws allows employees to state a claim for employment discrimination related to medical marijuana use.<sup>93</sup> To that end, although the federal government extensively regulates the United States workplace as a whole, state law has a history of providing more comprehensive disability discrimination protection than the federal government.<sup>94</sup> Significantly, many states enacted legislation prohibiting private sector disability discrimination prior to the passing of the ADA.<sup>95</sup> Additionally, states provide protection for disability discrimination through common law tort remedies for wrongful discharge.<sup>96</sup>

To state a claim of disability discrimination under a state discrimination law, an employee generally has to establish the same *prima facie* case as under federal law.<sup>97</sup> Nonetheless, state laws are significantly distinct from the ADA in other ways.<sup>98</sup> For instance, in states that have enacted statutes legalizing medical

<sup>93</sup> See Hickox, *supra* note 57, at 1041. State disability nondiscrimination laws can protect medical marijuana users if the user is regarded as disabled by the employer. *Id.*

<sup>94</sup> See Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 *FORDHAM L. REV.* 469, 489–90, 500 (1993) (“State law sometimes covers a broader range of discrimination than federal law.”). Notably, all fifty states have enacted statutes that prohibit discrimination in the workplace. See *id.*; Sandra F. Sperino, *Revitalizing State Employment Discrimination Law*, 20 *GEO. MASON L. REV.* 545, 557 n.109 (2013) (citing to each of the fifty states’ disability discrimination statutes).

<sup>95</sup> See Drummonds, *supra* note 94, at 491 n.113 (explaining that Illinois enacted its disability discrimination statute in 1980, New York enacted its disability discrimination statute in 1986, and Oregon enacted its disability discrimination statute in 1973). These state laws provided model legislation for the federal adoption of the ADA, offered practical experience about how a national law prohibiting disability discrimination would affect private sector employers, and dulled business opposition to a federal disability discrimination regulatory scheme. *Id.* at 500.

<sup>96</sup> *Id.* at 507 (explaining that these state tort laws alleviate the harshness of the employer-at-will rule); Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 *WASH. L. REV.* 719, 721 (1991) (explaining the law of wrongful discharge generally).

<sup>97</sup> See, e.g., ALASKA STAT. § 18.80.220 (2012) (explaining that an employer cannot refuse employment to a person or discriminate against a person based on the person’s disability when the demands of the position do not require distinction on the basis of such disability); ARIZ. REV. STAT. ANN. § 41-1463 (2014) (West) (explaining that an employee must establish that they are disabled according to the statute and are qualified to perform the essential functions of the employment position, with or without reasonable accommodation, assuming that such accommodation does not impose an undue burden on the employer); OR. REV. STAT. § 659A.030 (2013) (explaining that under the disability discrimination law, employers must make a reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability who is a job applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer); see also *supra* note 86 and accompanying text (explaining how to state a *prima facie* case employment disability discrimination under the ADA).

<sup>98</sup> See Hickox, *supra* note 57, at 1041–42 (“The exclusion of illegal drug users from disability nondiscrimination statutes various throughout the . . . states with medical marijuana legislation.”); Sperino, *supra* note 94, at 557–58 (“None of the state [disability discrimination] statutes mimics the

marijuana, many of the laws do not carve out an exception to disability discrimination protection for employees who engage in illegal drug use.<sup>99</sup> In contrast, in some states, legislation carves out an exception for employees from their disability discrimination protections if the employee engages in illegal drug use, without defining “illegal drug use” in terms of the CSA.<sup>100</sup> Only some states explicitly exempt employees from disability discrimination protection if they engage in “illegal drug use” as defined by the CSA.<sup>101</sup> Additionally, although every state disability discrimination statutes provide defenses to employers, many states have not adopted the ADA’s “direct threat” defense.<sup>102</sup>

In addition to disability discrimination statutes, state laws provide a remedy for aggrieved employees through common law wrongful discharge claims.<sup>103</sup> Wrongful discharge cases arise in the context of at-will employment where the employees are not covered by a written contract or statutory job protection scheme.<sup>104</sup> As a general rule, “[a]n employer may discharge an at-will employee for no cause, good cause, or even cause morally wrong without fear of liability.”<sup>105</sup> Some states have carved out a narrow exception to this rule by attaching tort liability to employers who discharge employees “when the termination

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federal statutes in all important respects. These differences suggest courts should be more cautious in deciding whether state laws should adopt the frameworks applied in federal discrimination claims.”).

<sup>99</sup> ALASKA STAT. § 18.80.220 (2012); CONN. GEN. STAT. § 46a-60 (2013); DEL. CODE ANN. tit. 19 § 724 (West 2003 & Supp. 2012); DC CODE § 2-1402.11 (2013); HAW. REV. STAT. § 378-2 (LexisNexis 2013); MASS. GEN. LAWS ch. 151B § 4 (2006 & Supp. 2014); MONT. CODE ANN. §§ 49-2-303, 49-4-101 (2013); NEV. REV. STAT. § 613.330 (2013); N.J. STAT. ANN. § 10:5-12 (West 2007 & Supp. 2014); N.M. STAT. ANN. § 28-1-7 (2007 & Supp. 2013); VT. STAT. ANN. tit. 21 § 495 (2012 & Supp. 2014); WASH. REV. CODE §§ 49.60.030, 49.60.180 (West 2007 & Supp. 2014).

<sup>100</sup> ARIZ. REV. STAT. ANN. § 41-1463 (2014) (West); CAL. HEALTH & SAFETY CODE §§ 1290–12926 (West 2007 & Supp. 2014); COLO. REV. STAT. § 24-34-402 (2014); 775 ILL. COMP. STAT. § 5/2-102 (2013 & Supp. 2014); ME. REV. STAT. tit. 5 § 4572 (2004 & Supp. 2013); MICH. COMP. LAWS ANN. § 37.2102 (West 2001 & Supp. 2014); N.H. REV. STAT. ANN. § 354-A:7 (2005 & Supp. 2013).

<sup>101</sup> OR. REV. STAT. § 659A.030 (2013); R.I. GEN. LAWS § 28-5-7 (2002 & Supp. 2013). In Oregon and Rhode Island, employees are better off to state a claim for wrongful termination because it is a violation of public policy than to argue against the statutory mandate that the state disability discrimination definition of “illegal use of drugs” comports with the federal CSA definition. *See Coats*, 303 P.3d at 156 (Webb, J., dissenting) (explaining that wrongful termination claims have no federal counterpart and therefore do not require a consideration of the federal definition of the illegal use of drugs).

<sup>102</sup> *See Hickox*, *supra* note 57, at 1044, 1053–54. Only California, Delaware, Maine, and Vermont mirror the ADA by providing a direct threat defense. *Id.* at 1044. In other states, employers can use the defense that the employee was unable to perform the essential duties of their position. *See id.* at 1053–54. Both the direct threat defense and the defense that the employee was unable to perform the essential duties of their position require a reliable medical opinion in order to be substantiated. *See id.* at 1044, 1053–54. Another defense available to employers is that being drug-free is an essential characteristic of employment, such as with safety sensitive positions. *See id.* at 1057.

<sup>103</sup> *See Drummonds*, *supra* note 94, at 507.

<sup>104</sup> L. Camille Hébert, *Consideration of Lawful Off-duty Conduct as Invasion of Privacy*, 2 EMP. PRIVACY L. § 13:47 (2014).

<sup>105</sup> *Roe*, 257 P.3d at 595 (internal quotations omitted).

would frustrate a clear manifestation of public policy.”<sup>106</sup> Still, this public policy exception is narrow, and it is significantly constrained by the employer’s ability to dismiss the employee’s case with an overriding justification for the dismissal.<sup>107</sup>

### 3. Relationship Between Federal and State Disability Discrimination Laws

The ADA provides that it shall not limit any state law that provides greater or equal disability discrimination protection.<sup>108</sup> Because of this statutory language, neither field nor express preemption analysis is applicable in determining the interplay between federal and state disability discrimination laws.<sup>109</sup> Actions under either state disability discrimination laws or wrongful termination claims that provide equal or greater protection than the ADA are consistent with the federal purposes of the ADA and do not stand as an obstacle to the federal remedial scheme.<sup>110</sup>

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<sup>106</sup> *Id.*; see, e.g., *Petermann v. Int’l Bhd. of Teamsters, Local 396*, 344 P.2d 25, 28 (Cal. Ct. App. 1959) (holding that employee’s discharge for refusing to commit perjury violates public policy); *Palmateer v. Int’l Harvester Co.*, 421 N.E.2d 876, 879–80 (Ill. 1981) (holding that employee’s discharge for reporting theft to law enforcement officials violates public policy). To establish a case for wrongful termination on the basis of public policy, an employee must establish that: (1) there exists a clear public policy; (2) discouraging the conduct in which they engaged would jeopardize the public policy; (3) the public policy linked conduct caused the dismissal; and (4) the defendant must not be able to offer an overriding justification for the dismissal. *Roe*, 257 P.3d at 595. In 1996, in *Gardner v. Loomis Armored, Inc.*, the Washington Supreme Court recognized that the public policy exception generally arises in four situations: (1) when employees are fired for refusing to commit an illegal act, such as price fixing; (2) when employees are fired for performing a public policy duty or obligation, such as jury duty; (3) when employees are fired for exercising a legal right or privilege, such as filing a worker’s compensation claim; and (4) when employees are fired in retaliation for employer misconduct, such as whistleblowing. 913 P.2d 377, 379 (Wash. 1996). Furthermore, because these tort laws are under state law—not federal—there remains ambiguity as to whether federal law can articulate the public policy of a state. See Nancy Modesitt, *Wrongful Discharge: The Use of Federal Law as a Source of Public Policy*, 8 U. PA. J. LAB. & EMP. L. 623, 626 (2006).

<sup>107</sup> *Roe*, 257 P.3d at 595. In order to support a claim for a violation of public policy, that policy must be “delineated in either constitutional or statutory provisions.” *Ross*, 174 P.3d at 215 (quoting *Stevenson v. Superior Court*, 941 P.2d 1157, 1161 (Cal. 1997)). The public policy cannot merely serve the interests of the individual but must benefit the public, and the policy must have been well-established, fundamental, and substantial at the time of discharge. See *Ross*, 174 P.3d at 215.

<sup>108</sup> 42 U.S.C. § 12201(b) (2012). (“Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any . . . law of any State . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.”).

<sup>109</sup> *Arizona*, 132 S. Ct. at 2501 (explaining that express preemption applies in situations where Congress has written into the statute that states cannot enforce legislation in that particular area and field preemption applies in situations where the scheme of federal regulation is so comprehensive that it is reasonable that Congress left no room for states to supplement the law); see *supra* notes 62–66 and accompanying text (explaining express and field preemption).

<sup>110</sup> § 12201(b); see *Treglia v. Town of Manlius*, 313 F.3d 713, 723 (2d Cir. 2002) (explaining that the New York disability discrimination statute defines disability more broadly than the ADA and, therefore, the district court should not have dismissed plaintiff’s state disability discrimination claim based solely on the definition of disability as applied to the plaintiff’s ADA claim); *Wood v. Cnty. of*

Despite the fact that the preemption language in the ADA acknowledges that states can implement disability discrimination laws that differ from the ADA, many courts interpret state disability discrimination laws in tandem with the ADA.<sup>111</sup> Most significant to the issue of medical marijuana use, courts have interpreted illegal use of drugs under state disability discrimination statutes as being consistent with the definition under the ADA.<sup>112</sup> Although courts engage in this construction, the ADA makes it clear that the parallel reading of state and federal law is not statutorily mandated.<sup>113</sup>

## II. JUDICIAL INTERPRETATION OF MEDICAL MARIJUANA USE IN THE EMPLOYMENT CONTEXT

In deciding whether an employer may fire an employee or refuse to hire an applicant for state-sanctioned medical marijuana use, courts to date have unanimously upheld the actions of the employer.<sup>114</sup> This Part analyzes the claims

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Alameda, 875 F. Supp. 659, 666 (N.D. Cal. 1995) (explaining that Congress intended plaintiffs to have the benefit of both federal and state causes of action for disability discrimination protection); *see also supra* note 68 and accompanying text (explaining implied conflict preemption).

<sup>111</sup> *See, e.g.,* Cotter v. Ajilon Servs., Inc., 287 F.3d 593, 597 (6th Cir. 2002) (“Michigan’s Persons with Disabilities Civil Rights Act [PWDCRA] substantially mirrors the ADA, and resolution of a plaintiff’s ADA claim will generally . . . resolve the plaintiff’s PWDCRA claim.”); Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884, 891 n.1 (9th Cir. 2001) (“The Oregon disability discrimination statute is modeled after the ADA.”); Fiumara v. President & Fellows of Harvard Coll., 526 F. Supp. 2d 150, 156 (D. Mass. 2007) (“In almost all relevant respects, Massachusetts disability discrimination analysis is identical to that of ADA claims.”). *But see* Sperino, *supra* note 94, at 565 (arguing that state discrimination laws do not have to be interpreted consistently with their federal counterparts).

<sup>112</sup> *See Emerald Steel Fabricators*, 230 P.3d at 521. In 2010, in *Emerald Steel Fabricators v. Bureau of Labor & Industries*, the Oregon Supreme Court noted that “Oregon law requires that [the Oregon disability discrimination statute] be interpreted consistently with” the ADA. *Id.* Although Oregon has interpreted the state and federal statutes consistently, there is no statutory mandate to do so either in the Oregon or federal law. *See* 42 U.S.C. § 12201 (2012); OR. REV. STAT. § 659A.030 (2013); *see also, e.g., Hutton*, 273 F.3d at 891 n.1 (reasoning that the Oregon disability discrimination statute should be read consistently with the ADA); Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1087 (9th Cir. 2001) (reasoning that the standard for stating a prima facie case of disability discrimination under Oregon law is consistent with doing so under the ADA).

<sup>113</sup> *See* § 12201. (“Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any . . . law of any State . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.”).

<sup>114</sup> *See Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 436–37 (6th Cir. 2012) (holding that the Michigan Medical Marijuana Act does not restrict a private employer’s ability to discipline employees for medical marijuana use and, therefore, the Act could not support a wrongful termination claim); *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 208 (Cal. 2008) (holding that the California Fair Employment and Housing Act does not require an employer to accommodate an employee who used medical marijuana and that an employee who is terminated for authorized medical marijuana use cannot state a cause of action for termination in violation of public policy); *Coats v. Dish Network, L.L.C.*, 303 P.3d 147, 152 (Colo. App. 2013) (holding that state-licensed medical marijuana use is not a “lawful activity” under the Colorado employment discrimination law); *Johnson v. Columbia Falls Aluminum Co. LLC*, No. DA 08-0358, 2009 WL 865308, at \*4 (Mont. Mar. 31, 2009) (holding that

brought by employees who have suffered adverse employment treatment due to their medical marijuana use, court opinions disagreeing with the employees' arguments, and dissenting judges have found merit in these arguments.<sup>115</sup> Section A discusses employees' claims that they were wrongfully terminated in violation of public policy.<sup>116</sup> Section B discusses employees' claims that they suffered disability discrimination.<sup>117</sup>

### *A. Arguments for Wrongful Termination Based on Public Policy*

Employees have argued that termination or refusal to hire based on medical marijuana use constitutes wrongful discharge in violation of the public policy concerns underlying state medical marijuana laws.<sup>118</sup> Despite the general rule that an employer may discharge an at-will employee without cause, states recognize a common law tort claim for wrongful discharge when the termination would frustrate public policy.<sup>119</sup> Cognizant of the fact that such an exception has the potential of exposing employers to liability, in 2011, in *Roe v. TeleTech Customer Care Management*, the Washington Supreme Court noted that courts must "proceed cautiously" when deciding whether to decide a case on public policy considerations when there is little legislative or judicial expression on the subject.<sup>120</sup>

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an employee who was terminated for using medical marijuana could not state a claim under either the Montana Human Rights Act or the Americans with Disabilities Act); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 536 (Or. 2010) (holding that the Oregon Medical Marijuana Act was preempted by the federal Controlled Substances Act and, therefore, the employee's use of medical marijuana was illegal and was not entitled to accommodation); *Roe v. TeleTech Customer Care Mgmt. LLC*, 257 P.3d 586, 594–95 (Wash. 2011) (holding that the Washington State Medical Use of Marijuana Act does not proclaim sufficient public policy to support a cause of action for wrongful termination).

<sup>115</sup> See *infra* notes 118–170 and accompanying text. This Part is limited to a discussion of employee's claims of wrongful termination and disability discrimination. See *id.* Employees have additionally brought claims under state medical marijuana laws, but courts have determined that these laws do not provide a private right of action against employers. See *Casias*, 695 F.3d at 435 (holding that the Michigan Medical Marijuana Act did not give an employee a private right of action against an employer because the Act does not regulate private employers); *Johnson*, 2009 WL 865308, at \*2 (holding that the Montana Medical Marijuana Act does not provide an employee with either an express or implied private right of action against an employer). But see *Savage v. Maine Pretrial Servs., Inc.*, 58 A.3d 1138, 1143 (Me. 2013) (holding that, because the Maine Medical Use of Marijuana Act has a specific provision precluding an employer from discriminating against a medical marijuana user, the Act provides a private right of action for qualifying patients who have been discriminated against by employers).

<sup>116</sup> See *infra* notes 118–135 and accompanying text.

<sup>117</sup> See *infra* notes 136–170 and accompanying text.

<sup>118</sup> See *Casias*, 695 F.3d at 436–37; *Roe*, 257 P.3d at 595.

<sup>119</sup> *Roe*, 257 P.3d at 595; see *Drummonds*, *supra* note 94, at 507 (explaining the existence of wrongful termination suits for violating public policy at common law).

<sup>120</sup> 257 P.3d at 595 (quoting *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089 (Wash. 1984)). In *Roe*, the plaintiff suffered from debilitating migraine headaches that caused chronic pain, nausea, blurred vision, and sensitivity to light. *Id.* at 588. In June 2006, the plaintiff began using med-

The court in *Roe* outlined a four-part test for analyzing a public policy wrongful discharge action, explaining that the employee must prove that: (1) there exists a clear public policy, (2) discouraging the conduct in which they engaged would jeopardize the public policy, (3) the public policy linked to the conduct that caused the dismissal, and (4) the defendant cannot offer an overriding justification for the dismissal.<sup>121</sup> The court only applied the first prong, concluding that the employee's public policy argument failed because the Washington State Medical Use of Marijuana Act ("MUMA") does not evince a "clear public policy" to forbid an employer from discharging an employee because the employee uses medical marijuana.<sup>122</sup>

The court declined to find a "clear public policy" by reasoning that voters in support of the MUMA could not have intended such a public policy exception regarding wrongful termination claims.<sup>123</sup> The only reference to employment in the voters' pamphlet on the MUMA was the assertion that the law would prohibit marijuana use in the workplace.<sup>124</sup> Further, previous court decisions discussed the purpose of MUMA solely in the context of an affirmative defense, not as a broad public policy to impose an employer accommodation obligation.<sup>125</sup> Lastly, the court reasoned that, because medical marijuana remains illegal under federal law, holding that a public policy exists would not align with the narrow intention of the public policy exception.<sup>126</sup>

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ical marijuana in accordance with the Washington State Medical Use of Marijuana Act. *Id.* at 588–89. In October 2006, the plaintiff was offered a position as a customer service representative with the defendant, but her position was terminated due to a positive drug test result. *Id.*

<sup>121</sup> *Id.* at 595.

<sup>122</sup> *See id.* at 595–96.

<sup>123</sup> *See id.*

<sup>124</sup> *See id.* at 596. In addition, MUMA itself only mentions employment in one instance, stating "[n]othing in this chapter requires any accommodation of any on-site medical use of [marijuana] in any place of employment." WASH. REV. CODE § 69.51A.060(4) (West 2007 & Supp. 2014). The majority of medical marijuana statutes similarly offer no explicit mention of protection to registered users in the employment context and courts have rejected arguments that there are implicit protections for employees. Jennifer Gimler Brady & Michael B. Rush, *Employment Protections Under Medical Marijuana Laws: The Changing Landscape*, BLOOMBERG L. REP., 2 (Sept. 21, 2011), available at <http://www.bna.com/employment-protections-under-medical-marijuana-laws-the-changing-landscape-contributed-by-jennifer-gimler-brady-and-michael-b-rush-potter-anderson-corroon-llp/>, archived at <http://perma.cc/9W7Z-2FGJ>.

<sup>125</sup> *See Roe*, 257 P.3d at 596; *see also* State v. Hanson, 157 P.3d 438, 442 (Wash. Ct. App. 2007) (reasoning that the Washington Medical Use of Marijuana Act provides an affirmative defense to state criminal prosecutions for qualified patients); State v. Ginn, 117 P.3d 1155, 1159 (Wash. Ct. App. 2005) (reasoning that the Washington Medical Use of Marijuana Act provides an affirmative defense to state criminal prosecutions for qualifying patients).

<sup>126</sup> *See Roe*, 257 P.3d at 597; *see also* Ross, 174 P.3d at 215 (Kennard, J., concurring) (reasoning that there can be no public policy exception because it must be viewed against the backdrop of both federal criminal laws, which prohibit marijuana possession, and the ADA, which excludes protection to any employee who uses illegal drugs); *Thompson*, 685 P.2d at 1089 (explaining that the public policy exception has a narrow intention and that courts should proceed cautiously if called upon to declare public policy).

Applying similar reasoning, in 2012, in *Casias v. Wal-Mart Stores, Inc.*, the U.S. Court of Appeals for the Sixth Circuit also dismissed an employee's public policy argument because there was no clear public policy.<sup>127</sup> There, the court reasoned that Michigan voters could not have intended to create a new category of protected employees when enacting the Michigan Medical Marijuana Act ("MMMA").<sup>128</sup> The court concluded that the employee's argument would "mark a radical departure from the general rule of at-will employment," which is not the intention of the public policy exception.<sup>129</sup>

The *Roe* and *Casias* courts narrowly interpreted the purpose of the statutes to conclude that no public policy for employee discrimination protection could be read into the statutes.<sup>130</sup> To reach the opposite conclusion, the dissenting judge in *Roe* interpreted the purpose of the MUMA broadly, and argued that the employee stated a sufficient claim for wrongful termination.<sup>131</sup> First, the dissent argued that the employee satisfied the first prong of the test because the MUMA states a clear public policy to protect employment discrimination.<sup>132</sup> The dissent reasoned that the MUMA's purpose is to protect the health, safety, and welfare of medical marijuana patients, and this evinces an intent to provide employment discrimination protection.<sup>133</sup> The dissent also argued that the employer's conduct would discourage other disabled employees from using medical marijuana, a treatment approved by Michigan voters.<sup>134</sup> Therefore, allowing the employer to fire an employee for legal medical marijuana use jeopardizes the clear policy of the MUMA.<sup>135</sup>

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<sup>127</sup> See 695 F.3d at 436–37. In *Casias*, the plaintiff was an employee at Wal-Mart from 2004 to 2009, when the plaintiff was terminated for testing positive for marijuana in violation of the company's drug use policy. *Id.* at 431. The plaintiff suffered from sinus cancer and was issued a registry card under the Michigan Medical Marijuana Act and began using medical marijuana on June 15, 2009. *Id.*

<sup>128</sup> See *id.* at 437. The Sixth Circuit agreed with the district court's reasoning that, in passing the MMMA, voters could not have intended to have created a new category of protected employees. See *id.* The court stressed that the MMMA does not include any language regarding employment, nor does it confer a responsibility upon private employers to accommodate medical marijuana use. See *id.*

<sup>129</sup> *Casias*, 695 F.3d at 437 (quoting *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914, 920 (W.D. Mich. 2011)).

<sup>130</sup> See *Casias*, 695 F.3d at 467; *Roe*, 257 P.3d at 595.

<sup>131</sup> See *Roe*, 257 P.3d at 598–99 (Chambers, J., dissenting); see also *supra* note 121 (describing the four-part test for a prima facie case of public policy wrongful discharge).

<sup>132</sup> See *Roe*, 257 P.3d. at 598 (Chambers, J., dissenting). This policy is stated at the beginning of the MUMA: "The people find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their health care professional's professional medical judgment and discretion." See *id.* (citing WASH. REV. CODE § 69.51A.005(b) (West 2007 & Supp. 2014)).

<sup>133</sup> See *id.* at 598–99; see *supra* note 47 (discussing the purpose behind medical marijuana statutes).

<sup>134</sup> *Roe*, 257 P.3d at 599 (Chambers, J., dissenting).

<sup>135</sup> See *id.* at 598–99. Regarding the third prong of the public policy test, it was undisputed that the public policy was linked to the employee's dismissal given that the employee's protected conduct caused her employer to fire her. See *id.* Therefore, the dissent concluded that the employee established

### B. Arguments for Wrongful Termination Based on Disability Discrimination

In addition to public policy arguments, employees who have been terminated for medical marijuana use have sued their employers based on disability-based discrimination.<sup>136</sup> Courts have consistently held that state disability discrimination statutes cannot extend their protection to medical marijuana use because marijuana use for medical purposes is illegal under federal law.<sup>137</sup> Many state disability discrimination statutes preclude protection to employees who engage in the illegal use of drugs.<sup>138</sup> Furthermore, even in states that lack such an express statutory exclusion, it is unlikely that a court will be convinced that allowing an employee to engage in illegal drug use is a reasonable accommodation.<sup>139</sup> In determining how to define illegal use of drugs under state law, courts have relied on the federal definition.<sup>140</sup>

This Section presents the two ways that courts have defined “illegal use of drugs” using the federal Controlled Substance Act (“CSA”) definition.<sup>141</sup> Subsection 1 discusses how a court has defined an employee’s state-sanctioned use of medical marijuana as an illegal use of drugs on the basis of federal preemption by the CSA.<sup>142</sup> Subsection 2 discusses how courts have defined employees’ use of state-sanctioned medical marijuana as an illegal use of drugs by imparting the federal definition onto the state law.<sup>143</sup>

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a prima facie case for wrongful termination. *See id.* Further, the dissent explained that the fourth element, which allows an employer to negate the employee’s case if the employer can offer an overriding justification for the dismissal, should be an issue presented to a jury. *See id.* Because the law does not require employers to employ drug impaired workers who cannot perform the essential functions of their position, the dissent reasoned that a jury would best be able to balance an employee’s prima facie case against the employer’s justification for the dismissal. *See id.*

<sup>136</sup> *See, e.g., Ross*, 174 P.3d at 202–03 (discussing whether the plaintiff could state a cause of action for disability discrimination under the California Fair Employment and Housing Act for termination based on medical marijuana use); *Emerald Steel Fabricators*, 230 P.3d at 536 (discussing how the Oregon Medical Marijuana Act (“OMMA”) intersects with federal law in the context of a disability discrimination claim); *Washburn v. Columbia Forest Prods., Inc.* 134 P.3d 161, 162 (Or. 2006) (discussing whether Oregon’s disability discrimination statutes require an employer to make disability-related accommodations for an employee who uses medical marijuana for medical purposes).

<sup>137</sup> *See, e.g., Ross*, 174 P.3d at 208 (holding that the CSA preempts the Compassionate Use Act (“CUA”)); *Coats*, 303 P.3d at 152 (holding that the CSA preempts the Colorado Civil Rights Act); *Emerald Steel Fabricators*, 230 P.3d at 536 (holding that the CSA preempts the OMMA).

<sup>138</sup> *See supra* note 100 and accompanying text (outlining state disability discrimination statutes that preclude protection for employees engaging in illegal drug use).

<sup>139</sup> *Kellams v. Norco, Inc.*, No. 27811-5-III, 2009 WL 4676152, at \*4 (Wash. Ct. App., Dec. 10, 2009) (dismissing an employee’s discrimination claim when that employee was engaging in the illegal use of codeine without a prescription).

<sup>140</sup> *See infra* notes 141–170 and accompanying text.

<sup>141</sup> *See infra* notes 144–170 and accompanying text.

<sup>142</sup> *See infra* notes 144–159 and accompanying text.

<sup>143</sup> *See infra* notes 160–170 and accompanying text.



## 1. Preemption Regarding the CSA and State Medical Marijuana Statutes

In 2010, in *Emerald Steel Fabricators v. Bureau of Labor & Industries*, the Oregon Supreme Court held that an employer who terminated an employee for using medical marijuana did not violate the Oregon statute for disability discrimination.<sup>144</sup> The court reasoned that, to the extent that the Oregon Medical Marijuana Act (“OMMA”) affirmatively authorizes the use of medical marijuana, the CSA preempts and nullifies the OMMA.<sup>145</sup> The Oregon disability discrimination statute precludes protection for employees engaged in the illegal use of drugs.<sup>146</sup> Therefore, the court concluded that the employee’s use of the drug was illegal because the OMMA was nullified by the CSA, and consequently no state law could authorize the employee’s use of medical marijuana.<sup>147</sup>

To reach the conclusion that the CSA preempts the Oregon law, the court engaged in an implied conflict preemption analysis.<sup>148</sup> The court explained that, in passing the CSA, Congress intended to impose a blanket prohibition on the use of marijuana without regard to states permitting the use of marijuana for medical purposes.<sup>149</sup> The court reasoned that a state law that authorizes conduct that federal law prohibits stands as an obstacle to the enforcement of federal law.<sup>150</sup> Because the court found that the CSA preempted the Oregon statute, the Oregon statute was unenforceable.<sup>151</sup> As a result, the court concluded that under

<sup>144</sup> See 230 P.3d at 529. In *Emerald Steel Fabricators*, the plaintiff suffered from anxiety, panic attacks, nausea, vomiting, and severe stomach cramps. See *id.* at 520. After conventional drugs proved ineffective, in 2002 the employee began to use medical marijuana pursuant to the OMMA. See *id.* In 2003, the defendant hired the plaintiff to work as a drill press operator on a temporary basis. *Id.* After performing satisfactory work, the defendant hired the plaintiff on a permanent basis, but shortly thereafter discharged the employee after testing positive for marijuana in a mandatory drug test. *Id.* at 521.

<sup>145</sup> See *id.* at 529.

<sup>146</sup> See OR. REV. STAT. § 659A.112 (2013).

<sup>147</sup> See *Emerald Steel Fabricators*, 230 P.3d at 529.

<sup>148</sup> See *id.*; see *supra* note 68 and accompanying text (discussing implicit conflict preemption analysis).

<sup>149</sup> See *Emerald Steel Fabricators*, 230 P.3d at 529 (citing *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 494 & n.7 (2001)) (explaining that Congress enacted the CSA to impose a blanket federal prohibition on the use of marijuana, however Congress did not expressly indicate that states could not enact their own criminal drug laws or make different decisions about the appropriate use of marijuana).

<sup>150</sup> See *Emerald Steel Fabricators*, 230 P.3d at 529. To apply this reasoning, the court relied on *Michigan Cannery & Freezers Ass’n, Inc. v. Agricultural Marketing & Bargaining Board*. See 467 U.S. 461, 478 (1984); *Emerald Steel Fabricators*, 230 P.3d at 529. In *Michigan Cannery*, the U.S. Supreme Court held that a state law that permitted food producers to apply to a state board for authority to act as the exclusive bargaining agent for all producers of a particular community was preempted by a federal law that prohibited that very activity. See 467 U.S. at 478. The Court concluded that “because the Michigan Act authorizes producers’ associations to engage in conduct that the federal Act forbids” the state law is an obstacle to the federal law. See *id.*

<sup>151</sup> See *Emerald Steel Fabricators*, 230 P.3d at 529.

both Oregon law and federal law, use of medical marijuana was illegal.<sup>152</sup> In sum, because the Oregon disability discrimination statute precludes protection to any employee that is engaged in the illegal use of drugs, the employee in this case could not state a claim of employment discrimination.<sup>153</sup>

The dissent in *Emerald Steel Fabricators* argued that the CSA does not preempt the OMMA because the state statute does not stand as an obstacle to the federal law.<sup>154</sup> The dissent highlighted that Congress did not write an express preemption clause into the CSA, but rather intended to preserve state power in the realm of controlled substance regulation.<sup>155</sup> Based on this congressional intent, the dissent argued that an obstacle preemption analysis should begin with a presumption that the historic police powers exercised by the state of Oregon were not superseded by the CSA.<sup>156</sup> From this presumption, the dissent argued that the Oregon statute neither overrides federal law nor prevents the federal government from enforcing the CSA.<sup>157</sup> Because the CSA can be implemented and enforced in the federal sphere at the same time that Oregon authorizes the use of medical marijuana in the state sphere, the dissent concluded that there is no federal preemption.<sup>158</sup> Accordingly, under this reasoning, state-sanctioned use of medical marijuana should not be considered an illegal use of drugs under Oregon law.<sup>159</sup>

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<sup>152</sup> See *id.*

<sup>153</sup> See *id.* at 536.

<sup>154</sup> *Id.* (Walters, J., dissenting).

<sup>155</sup> *Id.* at 537; see 21 U.S.C. § 903 (2012) (stating that states have authority to pass laws on the same subject matter so long as there is no “positive conflict between [the CSA] and that State law so that the two cannot consistently stand together”). The dissent stressed that the majority erred in failing to begin its preemption analysis with the presumption of state sovereignty. See *Emerald Steel Fabricator*, 230 P.3d at 537 (Walters, J., dissenting); see also *Gonzales v. Raich*, 545 U.S. 1, 42–43 (2005) (O’Connor, J., dissenting) (arguing that California’s Compassionate Use Act is an exercise of a state’s traditional and core police powers to define criminal law and protect the health, safety, and welfare of its citizens).

<sup>156</sup> See *Emerald Steel Fabricator*, 230 P.3d at 536–37 (Walters, J. dissenting) (“A cornerstone of the Supreme Court’s Supremacy Clause analysis is that in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, the Court starts with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”) (internal quotations omitted).

<sup>157</sup> See *id.* The dissent argued that the majority was incorrect in finding that the standard of conduct and policy choice represented by the CSA prohibits a different state standard of conduct and policy choice. See *id.* Furthermore, the dissent reasons that, because the OMMA does not “give[] permission to violate the Controlled Substances Act or affect[] its enforcement, the Oregon act does not pose an obstacle to the federal act . . . .” See *id.* at 539.

<sup>158</sup> *Id.* at 543.

<sup>159</sup> *Id.*

## 2. Construing “Illegal Use of Drugs” with Federal Law

In addition to defining state-sanctioned medical marijuana as an illegal use of drugs by preempting the state marijuana laws with the CSA, courts have also defined medical marijuana use as illegal under state law by applying the federal definition.<sup>160</sup> For instance, in 2008, in *Ross v. RagingWire Telecommunications, Inc.*, the Supreme Court of California held that the definition of “illegal use of drugs” under state law required a consideration of the federal definition.<sup>161</sup> The court concluded that the California Fair Employment and Housing Act (“FEHA”) did not require an employer to accommodate an employee who used medical marijuana because medical marijuana use was illegal.<sup>162</sup> The court reasoned that the California Compassionate Use Act could not give marijuana the same status as any legal prescription drug because medical marijuana remains illegal under federal law.<sup>163</sup> Accordingly, because federal law precludes any state from completely legalizing marijuana for medical purposes, courts must define state-sanctioned medical marijuana use as an “illegal use of drugs.”<sup>164</sup> Therefore, because California’s disability discrimination law precludes employees from protection when they are engaged in the illegal use of drugs, the court did not interpret state discrimination statutes as protecting medical marijuana use.<sup>165</sup>

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<sup>160</sup> See *Ross*, 174 P.3d at 204 (explaining that no state law can completely define the use of medical marijuana as legal because the drug remains illegal under federal law); *Coats*, 303 P.3d at 150 (holding that medical marijuana cannot be legal under state law because it is illegal under federal law).

<sup>161</sup> Compare *Ross*, 174 P.3d at 204 (holding that the employee was denied disability discrimination protection due to his illegal use of drugs because the state cannot define marijuana use as legal while it remains illegal under federal law), with *Emerald Steel Fabricators*, 30 P.3d at 529 (holding that the employee was denied disability discrimination protection because the CSA preempts the OMMA).

<sup>162</sup> *Ross*, 174 P.3d at 204.

<sup>163</sup> See *id.*

<sup>164</sup> *Id.* Similar to the majority’s reasoning in *Ross*, in 2013, in *Coats v. Dish Network, L.L.C.*, the Colorado Court of Appeals held that for something to be “lawful,” it must be subject to both state and federal law. See 303 P.3d at 150–51. Although this case dealt with a statutory wrongful termination claim under the Colorado Civil Rights Act (“CCRA”) as opposed to a disability discrimination claim, the court relied on *Ross* to define “lawful.” See *id.* In *Coats*, the employee argued that the CCRA prohibits an employer from discharging an employee for “engaging in any lawful activity off the premises of the employer during nonworking hours.” *Id.* at 148 (quoting COLO. REV. STAT. § 24-34-402.5(1) (2014)). Although the employee acknowledged that medical marijuana remains illegal under the CSA, the employee argued that “lawful activity” under the CCRA refers only to state law, not federal law. *Id.* Accordingly, because the Colorado Medical Marijuana Amendment legalizes medical marijuana use on the state level, the plaintiff reasoned that medical marijuana use was protected under the CCRA. *Id.* The *Coats* court disagreed, holding that the employer did not violate the CCRA by discharging an employee for testing positive for medical marijuana use because medical marijuana use is illegal under state and federal law. See *id.* at 150–51 (“Activities conducted in Colorado, including medical marijuana use, are subject to both state and federal law.”) (citing *Raich*, 545 U.S. at 29).

<sup>165</sup> *Ross*, 174 P.3d at 204.

Although the majority in *Ross* applied the federal definition of illegal use of drugs to state law, the dissent distinguished state and federal law.<sup>166</sup> The dissent argued that nothing in the FEHA supports the majority's proposition that a requested accommodation can never be deemed reasonable if it involves conduct that is criminal under federal law.<sup>167</sup> Accordingly, the dissent argued that the employee stated a valid claim of disability discrimination under the FEHA.<sup>168</sup> The dissent recognized that the employer has the ability to counter the employee's cause of action with the argument that the employee's use of off-duty medical marijuana had substantial adverse effects on the employer's business operations.<sup>169</sup> In *Ross*, however, because the employer did not present any facts to prove that the employee's off-duty use of medical marijuana had substantial adverse effects on the employer's business operations, the dissent reasoned that the competing interests of the employee outweighed those of the employer.<sup>170</sup>

### III. A JOINT SOLUTION: STATES SHOULD TAKE JUDICIAL AND LEGISLATIVE ACTION TO PROVIDE EMPLOYMENT DISCRIMINATION PROTECTION TO QUALIFIED PATIENT EMPLOYEES

Although current case law regarding medical marijuana use and employment discrimination has favored employers, state legislation or judicial decisions could override this precedent.<sup>171</sup> The current status of the law does not balance

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<sup>166</sup> See *id.* at 212 (Kennard, J., dissenting). Like the *Ross* dissent, the dissent in *Coats* challenged the incorporation of federal law into the meaning of "lawful activity" under the CCRA. See *Coats*, 303 P.3d at 157 (Webb, J., dissenting). The dissent in *Coats* also concluded that the discharge of an employee based on off-duty conduct is primarily a matter of state concern and, thus, should only concern state law. *Id.*

<sup>167</sup> See *Ross*, 174 P.3d at 212 (Kennard, J., dissenting).

<sup>168</sup> See *id.* at 213.

<sup>169</sup> See *id.*

<sup>170</sup> See *id.* at 214–15. The dissent further reasoned that the majority opinion did not deny that the FEHA may require an employer to accommodate a disabled employee's physician-approved medical use of substances that could potentially impair job performance. See *id.* at 214 ("Considered strictly in terms of its physical effects relevant to employee productivity and safety, and not its legal status, marijuana does not differ significantly from many prescription drugs—for example, hydrocodone (Vicodin), hydromorphone (Dilaudid), oxycodone (OxyContin), methylphenidate (Ritalin), methadone (Dolophine), and diazepam (Valium)—that may affect cognitive functioning and have a potential for abuse."). Judge Kennard concluded that medical marijuana use should be afforded the same protections under the FEHA, and that the employee's complaint had stated a cause of action for disability discrimination under the FEHA. See *id.*

<sup>171</sup> See, e.g., *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 436–37 (6th Cir. 2012) (holding that the Michigan Medical Marijuana Act does not restrict a private employer's ability to discipline employees for medical marijuana use and, therefore, the Act could not support a wrongful termination claim); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 536 (Or. 2010) (holding that the Oregon Medical Marijuana Act was preempted by the federal Controlled Substances Act and, therefore, the employee's use of medical marijuana was illegal and was not entitled to accommodation); *Roe v. TeleTech Customer Care Mgmt.*, 257 P.3d 586, 594–95 (Wash. 2011) (holding that the Washington State Medical Use of Marijuana Act does not proclaim sufficient public policy to

the competing interests of employees and employers, and it forces medical marijuana patients to make the impossible choice between employment and medical treatment.<sup>172</sup> This Part argues that employees who are terminated for their use of state-sanctioned medical marijuana should be able to state a claim for discrimination under state law.<sup>173</sup> First, Section A argues that courts should conclude that state-sanctioned medical marijuana use is not an “illegal use of drugs” under state law and, therefore, state disability discrimination statutes should protect employees using medical marijuana.<sup>174</sup> Second, Section B argues that state legislatures should amend their medical marijuana statutes to explicitly provide protection for medical marijuana users in the employment context.<sup>175</sup> In doing so, states will provide a private right of action, as well as a wrongful discharge for violation of public policy claim, for employees who have suffered discrimination from their employers due to medical marijuana use.<sup>176</sup>

### *A. Courts Should Permit Employment Disabilities Claims for Medical Marijuana Users Under State Law*

Courts should not dismiss medical marijuana users’ state law claims of disability discrimination for failure to state a claim.<sup>177</sup> By allowing these claims to proceed, the competing interests of the employers and employees can be proper-

support a cause of action for wrongful termination); *see also* Matthew D. Macy, *Employment Law and Medical Marijuana—An Uncertain Relationship*, 41 *COLO. LAW.* 57, 61 (2012), available at [http://www.macylawfirm.com/pdf/The\\_Colorado\\_Lawyer\\_Jan\\_2012\\_MMacy.pdf](http://www.macylawfirm.com/pdf/The_Colorado_Lawyer_Jan_2012_MMacy.pdf), archived at <http://perma.cc/5H7H-P6UD> (explaining that the current judicial landscape regarding medical marijuana use in the employment context is likely to change because (1) the intersection of medical marijuana and employment law is a relatively new and evolving area, (2) the case law regarding this issue is limited, and (3) the split between federal and state law creates confusion).

<sup>172</sup> *See* *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 214, 216 (Cal. 2008) (Kennard, J., dissenting) (arguing that an employee who is terminated for off-duty, state-sanctioned medical marijuana use ought to be able to state a claim of disability discrimination, just as if they were terminated for using a federally legal, prescribed medicine, and that this would best balance the interests of employees and employers); Hickox, *supra* note 57, at 1054 (arguing that if an employee raises a prima facie case of discrimination, this balances the needs of the employee and employer because the employer can then try to establish that any use of marijuana prevents the user from performing adequately).

<sup>173</sup> *See infra* notes 177–217 and accompanying text.

<sup>174</sup> *See infra* notes 177–206 and accompanying text.

<sup>175</sup> *See infra* notes 207–217 and accompanying text.

<sup>176</sup> *See infra* notes 207–217 and accompanying text.

<sup>177</sup> *See Emerald Steel Fabricators*, 230 P.3d at 537 (Walters, J., dissenting); *Ross*, 174 P.3d at 216 (Kennard, J., dissenting). To state a successful claim of disability discrimination under state discrimination laws, an employee must generally show that they: (1) are disabled; (2) are qualified, with or without reasonable accommodation to perform the essential functions of the job at issue; and (3) have suffered an adverse employment decision because of the disability. *See, e.g.*, ALASKA STAT. § 18.80.220 (2012) (listing the requirements for a successful disability discrimination claim); CONN. GEN. STAT. § 46a-60 (2013) (describing the burden of proof for a disability discrimination claim); D.C. CODE § 2-1402.11 (2013) (outlining the prima facie case for disability discrimination).

ly balanced.<sup>178</sup> In the context of medical marijuana, an employee's claim for disability discrimination turns on whether the accommodation to allow the employee to use medical marijuana while off duty is reasonable.<sup>179</sup> This Section argues that courts should deny employers' defenses that employees cannot state a disability discrimination claim because state-sanctioned, off-duty medical marijuana use is not a reasonable accommodation because it constitutes an illegal use of drugs under state law.<sup>180</sup> Subsection 1 argues that state-sanctioned medical marijuana use is not illegal under state law because the Controlled Substances Act ("CSA") does not preempt state law.<sup>181</sup> Subsection 2 argues that the state definition of "illegal use of drugs" does not necessitate an incorporation of the federal definition.<sup>182</sup>

### 1. State Medical Marijuana Statutes Are Not Preempted by the CSA

Although not universally accepted, many courts have held that the CSA does not preempt state statutes that provide affirmative defenses to state prosecution of medical marijuana use.<sup>183</sup> Nonetheless, in 2010, in *Emerald Steel Fabri-*

<sup>178</sup> See *Ross*, 174 P.3d at 214, 216 (Kennard, J., dissenting). In cases of employment discrimination regarding medical marijuana use, the employee's interest of avoiding termination compete with the employer's interest of maintaining a safe and functional work environment. See *id.* Marijuana, like other prescription drugs, may affect cognitive functioning and, therefore, its medical use poses some risks of absenteeism and impaired productivity among employees. See *id.* at 214–15. In order to best balance these competing interests, an employee who is terminated for off-duty, state-sanctioned use of medical marijuana ought to be able to state a claim of disability discrimination, just as they would be able to do if they were terminated for using federally legal prescribed medication. See *id.* In response to the employee's prima facie case of disability discrimination under state law, the employer has several defenses available to ensure that the safety and efficiency of its workplace is preserved. See *Hickox*, *supra* note 57, at 1044, 1053, 1057 (explaining that an employer can overcome an employee's prima facie case for disability discrimination with various defenses); *supra* note 102 and accompanying text (outlining employer defenses for disability discrimination).

<sup>179</sup> See *supra* notes 55, 77–78 (explaining that most medical marijuana patients qualify as disabled under state disability discrimination laws).

<sup>180</sup> See *infra* notes 183–206 and accompanying text.

<sup>181</sup> See *infra* notes 183–199 and accompanying text.

<sup>182</sup> See *infra* notes 200–206 and accompanying text.

<sup>183</sup> Compare *Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 483 (Cal. Ct. App. 2008), *cert denied* 556 U.S. 1235 (2009) (holding the California Medical Marijuana Program was not preempted), *People v. Crouse*, No. 12-CA-2298, 2013 WL 6673708, at \*9 (Colo. App. Dec. 19, 2013) (holding that there is no preemption for the state medical marijuana law), and *Beek v. City of Wyoming*, 846 N.W.2d 531, 534 (Mich. 2014) (holding that the state's medical marijuana statute was not preempted by federal law), with *Haerberle v. Lowden*, No. 2011-CV-709, 2012 WL 7149098, at \*3–4 (D. Colo. Aug. 8, 2012) (finding that the state's medical marijuana statute was preempted), and *Emerald Steel Fabricators*, 230 P.3d at 525 (holding that federal law preempted the state medical marijuana scheme). The U.S. Supreme Court's decision to deny writ of certiorari in *County of San Diego v. San Diego NORML* further supports the argument that the CSA does not preempt state medical marijuana statutes. See *San Diego NORML*, 566 U.S. 1235 (2009). There, the U.S. Supreme Court declined to overturn the California Court of Appeal's holding that the CSA does not preempt the California Medical Marijuana Program, passed in 2003 to augment the 1996 Compassionate Use Act. See *id.*

cators, Inc. v. Bureau of Labor & Industry, the Oregon Supreme Court relied on flawed reasoning to hold that the CSA preempts the Oregon Medical Marijuana Act.<sup>184</sup> The dissent in *Emerald Steel Fabricators* explained that the majority failed to begin its analysis with a presumption against preemption because the CSA involves an area historically governed by state police powers.<sup>185</sup> Ignoring this, the District Court of Colorado has since adopted the majority's conclusion in *Emerald Steel Fabricators*.<sup>186</sup>

Courts should cease adopting *Emerald Steel Fabricators*'s flawed holding because it gives employers an unwavering defense against employment discrimination claims from employees using medical marijuana.<sup>187</sup> The preemption analysis regarding the CSA and state medical marijuana laws must instead begin with the assumption that Congress did not intend to supersede the historic police powers exercised by states by enacting the CSA.<sup>188</sup> This is the proper interpretation because the CSA contains a savings clause intended to preserve state law.<sup>189</sup>

<sup>184</sup> 230 P.3d at 525; *see id.* at 538 (Walters, J. dissenting) (arguing that the majority wrongly concluded that the CSA precludes the enforcement of the Oregon Medical Marijuana Act ("OMMA") and wrongly limited the state's power to make its own law). The OMMA states that "[a] person who possesses a registry identification card . . . may engage in . . . the medical use of marijuana." OR. REV. STAT. § 475.306(1) (2013). Furthermore, the Act defines a registry identification card as "a document issued by the authority that identifies a person *authorized* to engage in the medical use of marijuana." OR. REV. STAT. § 475.302(10) (2013) (emphasis added). The Oregon Supreme Court concluded that these two provisions together affirmatively authorize the use of marijuana for medical purposes. *Emerald Steel Fabricators*, 230 P.3d at 525.

<sup>185</sup> *Emerald Steel Fabricators*, 230 P.3d at 537 (Walters, J., dissenting). Preemption analysis starts "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotations omitted). Significantly, the majority in *Emerald Steel Fabricators* did not begin the preemption analysis with this presumption. *See* 230 P.3d at 537.

<sup>186</sup> *See San Diego NORML*, 81 Cal. Rptr. 3d at 483.

<sup>187</sup> *Emerald Steel Fabricators*, 230 P.3d at 543 (Walters, J., dissenting) (explaining that the significant consequence of this reasoning was that the employee was disqualified from the benefits of Oregon's antidiscrimination protections because it would be unreasonable for the employer to accommodate medical marijuana use).

<sup>188</sup> *Id.* at 536; *see also San Diego NORML*, 81 Cal. Rptr. 3d at 478–79 (reasoning that, because the California Medical Marijuana Program addresses medicine, a field historically occupied by the states, the preemption analysis must begin with a presumption against preemption). Applying the implied conflict preemption analysis is the only applicable framework in this context because the CSA states that the federal law will prevail over state law in instances where there is "positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." *See* 21 U.S.C. § 903 (2012); *see supra* note 68 and accompanying text (discussing implied conflict preemption). Because impossibility preemption does not apply here, courts turn to an obstacle preemption analysis. *See supra* notes 68 and accompanying text (explaining that it is not physically impossible to comply with logically inconsistent statutes because a person can abstain from doing the activity that one statute authorizes and the other statute prohibits).

<sup>189</sup> *See* § 903 ("No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."); *see also Wyeth*, 555 U.S. at 567

Given that ninety-nine percent of marijuana-based arrests in the United States are made under state law, the CSA controls an area historically governed by state police powers, namely drug control.<sup>190</sup> Additionally, states have “great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”<sup>191</sup> Furthermore, by writing a savings clause into the CSA, Congress recognized that it was encroaching on an area traditionally governed by states, and this clause significantly narrows the scope of Congress’s intended invalidation of state law.<sup>192</sup>

With this reality in mind, the next step in the implied preemption analysis should be to determine the underlying purpose of the CSA.<sup>193</sup> The U.S. Supreme Court has suggested that the main objective of the CSA was to “conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances” and to “combat[ ] recreational drug abuse.”<sup>194</sup> This purpose is clear by reading the statutory text of the CSA itself, which states that “federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.”<sup>195</sup> State statutes that affirmatively authorize the use of medical marijuana do not undercut the federal government’s ability to combat recreational drug abuse at the federal level.<sup>196</sup> Indeed, the Department of Justice has admitted that it is not within the federal government’s interests to federally prosecute medical marijuana patients who are

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(reasoning that a provision in the Federal Food, Drug, and Cosmetic Act that is nearly identical to 21 U.S.C. § 903 was a savings clause intended to preserve state power).

<sup>190</sup> See MICH. COMP. LAWS ANN. § 333.26422 (West 2001 & Supp. 2014) (“Data from the Federal Bureau of Investigation Uniform Crime Reports and the Compendium of Federal Justice Statistics show that approximately 99 out of every 100 marijuana arrests in the United States are made under state law, rather than under federal law.”).

<sup>191</sup> *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)).

<sup>192</sup> § 903; see *San Diego NORML*, 81 Cal. Rptr. 3d at 479 (explaining that the Compassionate Use Act addresses a field historically occupied by the states and cautions court to narrowly interpret Congress’s intended invalidation of state law).

<sup>193</sup> See *supra* note 68 and accompanying text (explaining that obstacle preemption looks to the purpose of the federal law to determine whether the state statute stands as an obstacle to the full purposes and objectives of Congress); *supra* notes 47 and accompanying text (explaining the purposes behind the state medical marijuana statutes); see also *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144–46 (1963) (explaining that, in order to determine whether a state law stands as an obstacle to the full purposes and objectives of Congress, the purposes and objectives of the state statute at issue must also be identified).

<sup>194</sup> *Gonzales v. Raich*, 545 U.S. 1, 9, 12–13 (2005); *Oregon*, 546 U.S. at 272.

<sup>195</sup> 21 U.S.C. § 801(6) (2012).

<sup>196</sup> See *San Diego NORML*, 81 Cal. Rptr. 3d at 481–82 (“The purpose of the CSA is to combat recreational drug use, not to regulate a state’s medical practices.”); see also Cole 2013 Memorandum, *supra* note 70, at 3–4 (explaining that federal prosecutors can—and should—review marijuana cases on a case-by-case basis in order to combat enumerated harms of particular federal concern, none of which refer to medical marijuana use).



authorized to use marijuana under state law.<sup>197</sup> This fact, along with the presumption that Congress did not intend the CSA to supersede the historic police powers exercised by the state, illustrates that courts should conclude that state medical marijuana statutes are not preempted by the CSA.<sup>198</sup> Accordingly, employers should not be permitted to rely on this unsound preemption argument to avoid liability under state disability discrimination laws.<sup>199</sup>

## 2. “Illegal Use of Drugs” Under State Law Does Not Require Consideration of Federal Law

Courts should not construe state definitions of “illegal use of drugs” under state law to incorporate the federal definition.<sup>200</sup> The majority of states with medical marijuana statutes either have no statutory mandate in their disability discrimination statute to incorporate the federal CSA’s definition of “illegal use of drugs” or do not statutorily preclude disability discrimination protection due to the “illegal use of drugs.”<sup>201</sup> Given that there is no statutory requirement to impose the federal definition of illegal drugs to these state statutes, courts should

<sup>197</sup> Cole 2013 Memorandum, *supra* note 70, at 3 (discussing that focusing enforcement efforts on seriously ill individuals is unlikely to be an efficient use of federal resources). Although prosecuting recreational marijuana use at the federal level may not be in the federal government’s best interest, the Cole 2013 Memorandum makes it clear that state medical marijuana statutes do not preclude the federal government from doing so. *See id.* Therefore, state medical marijuana statutes do not stand in the federal government’s way of controlling instances of drug traffic at the federal level. *See id.*

<sup>198</sup> *See San Diego NORML*, 81 Cal. Rptr. 3d at 479 (holding that the CSA does not preempt California’s medical marijuana statute because it is not impossible for both laws to simultaneously be enforced); *Crouse*, 2013 WL 6673708, at \*9 (holding that the state’s medical marijuana statute was not preempted by the CSA based on obstacle preemption); *Beek*, 846 N.W.2d at 539 (holding that the state’s medical marijuana statute acknowledges the CSA and is not an obstacle to the federal law).

<sup>199</sup> *See Emerald Steel Fabricators*, 230 P.3d at 544 (Walters, J., dissenting). The dissenting opinion in *Emerald Steel Fabricators* explains that, absent express preemption, a policy choice by the federal government does not alone establish an implied intent to preempt contrary state law. *See id.* Further, the dissent argues that the majority’s opinion limits Oregon’s legislative authority. *See id.* Ultimately, the dissent reasons that the right of reasonable accommodation for disabled persons who use medical marijuana in compliance with Oregon law is a right that the Oregon legislature intended, and had to power to enact, in passing the Oregon Medical Marijuana Act. *See id.*

<sup>200</sup> *See Sperino*, *supra* note 94, at 565. Under the Federal CSA, any marijuana use—recreational or medical—is an illegal use of drugs. *See* 21 U.S.C. § 812(b)–(c) (2012). A determination that state-sanctioned medical marijuana use is an illegal use of drugs under state law would be detrimental to an employee’s disability discrimination claim because state disability discrimination statutes either statutorily preclude protection for employees using illegal drugs or a court would find that accommodating illegal drug use to be unreasonable. *See supra* notes 99–100, 139 and accompanying text (explaining that many state laws do not incorporate the federal definition of illegal drug use in their discrimination statutes).

<sup>201</sup> *Compare, e.g.*, ALASKA STAT. § 18.80.220 (2012) (providing no statutory mandate to incorporate the CSA’s definition of “illegal use of drugs”), CONN. GEN. STAT. § 46a-60 (2013) (same), and DEL. CODE ANN. tit. 19 § 724 (West 2003 & Supp. 2012) (same), with ARIZ. REV. STAT. ANN. § 41-1463 (2014) (West) (providing no statutory preclusion for disability discrimination protection due to the “illegal use of drugs”); CAL. HEALTH & SAFETY CODE §§ 1290–12926 (West 2007 & Supp. 2014) (same); COLO. REV. STAT. § 24-34-402 (2014) (same).

not feel compelled to “plunge [ ] state laws into the federal . . . morass,” because states may “have made different legislative choices.”<sup>202</sup> It is not a novel concept that state law sometimes provides broader discrimination protection than federal law.<sup>203</sup> Furthermore, greater disability protection for employees under state law is in the spirit of the Americans with Disabilities Act (“ADA”).<sup>204</sup> Accordingly, courts should not consider the federal definition of “illegal use of drugs” when deciding state disability discrimination claims.<sup>205</sup> This will allow employees to state a claim of disability discrimination under state law, and will best balance the competing interests of employers and employees.<sup>206</sup>

*B. State Legislatures Should Amend Their Medical Marijuana Laws to Explicitly Provide Employment Discrimination Protection for Qualified Medical Marijuana Patients*

Although courts can, and should, take action to ensure that qualified patient employees who suffer adverse employment action due to their medical marijuana use can state a prima facie of disability discrimination under state law, state legislatures also ought to take action to ensure that the competing interest of employees and employers are met in the context of a medical marijuana employment discrimination claim.<sup>207</sup> It is unlikely that the federal government will le-

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<sup>202</sup> See Sperino, *supra* note 94, at 565; see also *supra* note 101 (noting that Oregon and Rhode Island are the only two states that explicitly define illegal use of drugs in terms of the Federal CSA).

<sup>203</sup> See Drummonds, *supra* note 94 at 489–90, 500 (explaining that state discrimination laws cover a broader range of discrimination than federal law). In states that have passed medical marijuana laws, qualified medical marijuana use is legal and state sanctioned. See *supra* note 44 (referring to the twenty-four jurisdictions that have legalized medical marijuana use). Therefore, the state definition of illegal use of drugs affords greater disability discrimination protection to qualified medical marijuana patient employees. See *Ross*, 174 P.3d at 214 (Kennard, J., dissenting).

<sup>204</sup> 42 U.S.C. § 12201(b) (2012) (providing that “[n]othing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any . . . law of any State . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter”).

<sup>205</sup> See Sperino, *supra* note 94, at 565 (explaining that courts should not treat interpretations of federal discrimination law to be presumptively applied to state law claims).

<sup>206</sup> See *Bates v. Dura Auto. Sys., Inc.*, 650 F. Supp. 2d 754, 772 n.6 (M.D. Tenn. 2009) (reversed in part on other grounds) (noting that there is clearly a need to balance the health needs of the employee with the legitimate needs of workplace safety); *Hickox*, *supra* note 57, at 1043–44 (explaining the defenses that employers can raise after an employee has stated a claim for disability discrimination due to medical marijuana use).

<sup>207</sup> *Roe*, 257 P.3d at 599 (Chambers, J., dissenting) (arguing that the Washington legislature should take action to ensure that the interests of patient employees are met); see Elizabeth Hurwitz, Comment, *Out of the Shadows, into the Light: Preventing Workplace Discrimination Against Medical Marijuana Users*, 46 U.S.F.L. REV. 249, 250 (2011) (arguing that California should amend the California Compassionate Use Act to explicitly require employers to accommodate off-duty, off-premises medical marijuana use by qualified patient employees). In 2011, in *Roe v. TeleTech Customer Care Management*, the Washington Supreme Court’s dissent bemoans the outcome of the case that prohibits employees from using medical marijuana regardless of whether the marijuana was consumed “on site” or whether the “the medical marijuana affects the employee’s job performance, or whether the

galize medical marijuana use in the near future<sup>208</sup> and, therefore, state legislatures need to take action to ensure that disabled citizens are afforded protection for their use of a state-sanctioned therapeutic remedy.<sup>209</sup> The majority of state medical marijuana laws do not speak to employment law or discrimination protections for medical marijuana patients.<sup>210</sup> These states should instead emulate the medical marijuana statutes recently passed by several states by amending their laws to provide statutory employment discrimination protection for qualified medical marijuana patients.<sup>211</sup>

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employer can reasonably accommodate the employee's medical use." *Roe*, 257 P.3d at 599 (Chambers, J., dissenting). Because of the result of the majority's opinion, the dissent "urge[s] the legislature to thoughtfully review and improve the [Washington Medical Use of Marijuana Act]." *See id.*

<sup>208</sup> *See supra* note 41 (discussing the various failed petitions to reschedule marijuana as a Schedule II substance under the CSA). Furthermore, in the event that marijuana is rescheduled under federal law, this may not have the effect of federally legalizing medical marijuana because just because a drug can be prescribed does not mean that it will be federally approved to be prescribed. *See* Kevin A. Sabet, *Much Ado About Nothing: Why Rescheduling Won't Solve Advocates' Medical Marijuana Problem*, 58 WAYNE L. REV. 81, 87 (2012); Claire Frezza, Note, *Medical Marijuana: A Drug Without a Medical Model*, 101 GEO. L.J. 1117, 1118–19 (2013). Significantly, for non-Schedule I controlled substances, the CSA and the Food and Drug Administration (FDA) work together to ensure that prescribed medications meet exacting standards of quality, safety, and efficacy. Sabet, *supra* at 88. Drugs that consist of raw plant material like marijuana are unable to meet the FDCA's exacting standards because these drugs vary significantly in their composition, can be contaminated, and cannot be administered in reproducible doses. *Id.* The Federal Drug Administration has never approved raw plant materials listed in Schedule II for prescription. *Id.* Therefore, if the FDA does not approve marijuana for prescription, medical marijuana use would remain illegal under federal law despite the drug's non-Schedule I status under the CSA. *Id.* It has been argued that, coupled with rescheduling, a new federal agency outside of the FDA should be established to administer and prescribe marijuana. Frezza, *supra* at 1138.

<sup>209</sup> *See* Hurwitz, *supra* note 207, at 250. One proposal argues that California should amend the California Compassionate Use Act to explicitly require employers to accommodate off-duty, off-premises medical marijuana use by qualified patient employees. *See id.* Such an amendment would provide a civil cause of action for any person who has suffered such discrimination. *Id.* at 260. Moreover, this amendment would balance the interests of the employer by precluding any safety sensitive employees from using medical marijuana as well as precluding accommodations should the employee be unable to perform their essential duties. *Id.* at 260–61. Although this proposed amendment passed a vote in the Senate Judiciary Committee on April 5, 2011, it has since died due to inactivity. *See Current Bill Status S.B. No. 129*, LEGINFO.CA.GOV, available at [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_0101-0150/sb\\_129\\_bill\\_20120201\\_status.html](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0101-0150/sb_129_bill_20120201_status.html), archived at <http://perma.cc/9SGG-3EDC> (last visited Oct. 10, 2014). Nonetheless, this illustrates movement among the state legislatures to adopt such explicit statutory protections for qualifying patient employees. *See* Hurwitz, *supra* note 207, at 250.

<sup>210</sup> *See* Michael D. Moberly & Charitie L. Hartsig, *Smoke—and Mirrors? Employers and the Arizona Medical Marijuana Act*, 47 ARIZ. ATT'Y 30, 30 (July/Aug. 2011), available at <http://www.realaw.com/files/oldwebsite/publications/smokeandmirrors.pdf>, archived at <http://perma.cc/J96S-5637> (explaining that most state medical marijuana laws do not directly address the employment issues implicated by the use of marijuana for medical purposes).

<sup>211</sup> *See* ARIZ. REV. STAT. ANN. § 36-2813 (2014) (West); CONN. GEN. STAT. ANN. § 21a-408p (2013); DEL. CODE ANN. tit. 16 § 4905A (West 2003 & Supp. 2012); 410 ILL. COMP. STAT. § 130/40 (2013 & Supp. 2014); ME. REV. STAT. tit. 22, § 2423-E(2) (2004 & Supp. 2013); *see also* Hurwitz, *supra* note 207, at 250 (arguing that California should adopt explicit statutory protections against employment discrimination for medical marijuana patients).

Such statutory amendments would balance the competing interests of the employer and employee.<sup>212</sup> On one hand, these amendments would provide a private right of action for qualifying patient employees who have been discriminated against by their employers due to their off-duty, state-sanctioned use of medical marijuana.<sup>213</sup> Furthermore, these statutory amendments would allow qualifying patient employees to bring successful wrongful termination claims because there would be a clear, statutory public policy to forbid an employer from discharging an employee based on the employee's medical marijuana use.<sup>214</sup> On the other hand, state legislatures can ensure that these amendments protect employers' concerns regarding possible loss of productivity and third-party liability that may arise if an employees' job performance is impaired due to medical marijuana use.<sup>215</sup> By explicitly prohibiting an employee's ability to use medical marijuana on-site or during employment hours, these amendments can protect employers' legitimate interest in ensuring that their employees are able to perform essential job functions.<sup>216</sup> In sum, all states with medical marijuana legislation should move to adopt antidiscrimination provisions because they balance the interests of both employees and employers and, moreover, provide significant clarity to an unclear area of the law.<sup>217</sup>

## CONCLUSION

In states where medical marijuana has been legalized, medical marijuana patients currently are forced to make an impossible choice: continue receiving the benefits of marijuana use in the treatment of their debilitating disability and

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<sup>212</sup> See Moberly & Hartsig, *supra* note 210, at 30 (explaining that the Arizona provision to its Medical Marijuana act that explicitly protects patient employees from discrimination equally balances the competing interests of employers and employees by allowing termination if the employee is under the influence during work hours or if the employer would lose federal funding by maintaining employment of the patient employee); Hurwitz, *supra* note 207, at 260–61 (reasoning that employers' interests would be balanced against the protection that such statutes provide to employees because there are several defenses that employers can raise after an employee has stated a claim for disability discrimination due to medical marijuana use).

<sup>213</sup> See *Savage v. Maine Pretrial Servs., Inc.*, 58 A.3d 1138, 1143 (Me. 2013) (holding that Maine's medical marijuana statute provides a private right of action to bring a discrimination claim). This statute reads that an "employer . . . may not refuse to . . . employ . . . or otherwise penalize a person solely for that person's status as a qualifying patient." ME. REV. STAT. tit. 22, § 2423-E(2) (2004 & Supp. 2013).

<sup>214</sup> See *Roe*, 257 P.3d at 594–95.

<sup>215</sup> See Moberly & Hartsig, *supra* note 210, at 30; Hurwitz, *supra* note 207, at 260.

<sup>216</sup> CONN. GEN. STAT. § 21a-408p(b) (3) (2013) ("Nothing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours."); see also Hurwitz, *supra* note 207, at 260 (explaining that the proposed California amendment would not cause risks to employers because it did not grant a blanket right to use marijuana to all workers at all times).

<sup>217</sup> See Moberly & Hartsig, *supra* note 210, at 30; Hurwitz, *supra* note 207, at 260.

become unemployed, or continue their employment without medical marijuana treatment and try to endure their chronic pain. It is unlikely that voters and legislators intended to impose such a cruel situation on medical marijuana patients when enacting these state laws. Therefore, states should provide protection to those medical marijuana patients who suffer adverse employment action because of activities that the state authorizes. This would further the purpose of these medical marijuana statutes, which is to promote the health, safety, and welfare of citizens. At the judicial level, courts should dismiss employers' arguments that federal law precludes states from applying state discrimination laws. Medical marijuana patients should be able to state a claim under state disability discrimination statutes. At the legislative level, state legislatures ought to amend their current medical marijuana statutes to afford statutory employment discrimination protection to qualified patients. These solutions will best balance the competing interests of employees and employers. It is high time that states protect disabled employees from suffering employment discrimination due to their use of a state-sanctioned, therapeutic remedy.

ELIZABETH RODD