

CONFLICT AND CONFUSION: THE LEGAL AND CONSTITUTIONAL LANDSCAPE OF PURCHASING A FIREARM IN THE WAKE OF ILLINOIS' LEGALIZATION OF CANNABIS

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INTRODUCTION

Each year, more states move to legalize or decriminalize the use of cannabis.¹ This cannabis legalization zeitgeist has been particularly present in Illinois over the past decade, culminating with Illinois becoming the eleventh state to legalize recreational cannabis on January 1, 2020.²

As more states begin to move in the direction of Illinois and legalize medical or recreational cannabis, confusion will continue to grow surrounding the conflict between federal and state law governing cannabis use. Cannabis is still a Schedule I drug under the federal Controlled Substances Act, meaning it is illegal.³ Further, under federal law, a user of cannabis is not allowed to own a firearm.⁴

Many cannabis users in Illinois and other states who have legalized cannabis for medical or recreational use are confused by this conflict, and

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¹ Illinois lawmakers decided to use the word "cannabis" as opposed to "marijuana" due to the plant's controversial history. Many industry groups are shifting toward the word "cannabis" as opposed to "marijuana" or "pot." See Mariah Woelfel, *Pot? Weed? Marijuana? What Should We Call It?*, NPR - WSIU (Sept. 19, 2019), <https://www.npr.org/local/309/2019/09/19/762044859/pot-weed-marijuana-what-should-we-call-it>. For purposes of this article, the author will primarily use the word "cannabis" instead of "marijuana," and if the term "marijuana" is used, it will be considered interchangeable with the word "cannabis."

² Cannabis Regulation and Tax Act, 2019 Ill. Legis. Serv. P.A. 101-27 (effective June 25, 2019) (H.B. 1438) (West) (to be codified at 410 ILL. COMP. STAT. 705/1-999-99).

³ 21 U.S.C. § 812(c)(c)(10) (2018).

⁴ 18 U.S.C. § 922(g)(3) (2018).

further, how that conflict can affect basic constitutional rights, such as purchasing and owning a firearm.⁵

This article begins by showing the landscape of cannabis regulation over the last century in Illinois, particularly how Illinois began gradually changing its approach to cannabis enforcement in the 1970s, continuing through to legalization of recreational cannabis in 2020. It will then compare Illinois with what other states have done and are currently doing with cannabis legalization and decriminalization. The article then juxtaposes Illinois' legislative cannabis odyssey with the federal setting, where cannabis has been illegal for almost a century. Adding to the conflict with Illinois and federal cannabis law is the federal condition that users of cannabis may not own firearms. The foregoing sets up the context of a massive conflict between Illinois and federal law, and how Second Amendment rights are caught in the crosshairs of that conflict.

The article will then illustrate the confusion inherent with this conflict by showing the legal, practical, and constitutional effects of attempting to purchase a gun in Illinois as a cannabis user despite the federal cannabis ban in place.

Lastly, the article will explore some practical alternatives that could be employed to eliminate the conflict and confusion at hand, and bring a reasonable semblance of federalism into balance with these issues.

I. THE CONFLICT: ILLINOIS CANNABIS LAWS VS. FEDERAL CANNABIS LAWS, AND HOW THOSE LAWS AFFECT PURCHASING A FIREARM

A. Cannabis Legal History and the Legal Landscape at the State and Federal Levels

To better understand the underlying conflict at issue, it is important to understand the dynamics of cannabis laws from both a state and federal level, including Illinois specifically, as well as their respective histories. This section will discuss those histories and the current cannabis landscape at the state and federal levels.

⁵ See, e.g., Eugene Daniel, *Weapons and Weed: Legal Marijuana Causing Confusion Among Gun Control Advocates*, WMBD-TV (Feb. 2, 2020, 10:03 PM), <https://www.centralillinoisproud.com/news/local-news/weapons-and-weed-legal-marijuana-causing-confusion-among-gun-control-advocates/>; Chris Lauterbach, *Illinois' New Marijuana Law Prompts Gun Owner Concerns*, THE TELEGRAPH (Dec. 31, 2019, 1:47 PM), <https://www.thetelegraph.com/news/article/Illinois-8217-new-marijuana-law-prompts-gun-14942005.php>; David Byrnes, *Legal Cannabis Raises Legal Questions on Illinois Gun Ownership*, PATCH (Dec. 31, 2019, 1:24 PM), <https://patch.com/illinois/across-il/legal-cannabis-raises-legal-questions-illinois-gun-ownership>.

1. Illinois' Legislative History with Cannabis

Laws prohibiting or governing the use of cannabis have a long and ever-changing history in Illinois. This section will outline the historical progression of Illinois' cannabis laws leading up to the recently enacted Cannabis Regulation and Tax Act, which allows for recreational use of cannabis in Illinois.

a. Early Illinois Laws Related to Cannabis (1818-1971)

From 1818, when Illinois became a state in the Union, until 1931, state drug laws essentially focused on pharmacists and purveyors of medicines to accurately label the drugs they were selling.⁶

In 1931, Illinois passed the Narcotic Drug Control Law as part of a nationwide trend enacting drug prohibition laws, which prohibited the manufacture, sale, and possession of cannabis, amongst other “habit forming” drugs.⁷ The Narcotic Drug Control Law of 1931 did however contain a section that made its provisions inapplicable to medicines containing cannabis indica or cannabis sativa when combined with other ingredients in medical doses.⁸

Even with the wave of states passing laws criminalizing the manufacture, sale, and possession of cannabis, federal law enforcement did not believe the states were doing enough to curb its use and sale.⁹ In 1930, the autonomous Federal Bureau of Narcotics (FBN) was established, and part of its mission was to carry out a legal crusade against cannabis use.¹⁰

In 1935, partly due to nationwide pressure by the FBN, Illinois passed the Uniform Narcotic Drug Act, which was closely linked with the federal narcotics laws of the time.¹¹ Initially under the Uniform Narcotic Drug Act,

⁶ George N. Leighton & Charles S. Bargiel, *A History of Illinois Drug Control Laws from 1818 to 1975*, 9 J. MARSHALL J. PRAC. & PROC. 148, 149-54 (1975).

⁷ ILL. REV. STAT. ch. 38, § 192a–192w (1931) (Act of July 3, 1931, §§ 1–23 [1931] Ill. Laws 455-60); *see also* Leighton & Bargiel, *supra* note 6, at 153; *see also* Frontline, *Marijuana Timeline*, PBS WSIU, <https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last visited Apr. 2, 2020); *see also* Bruce Rushton, *The War on Weed: Prohibition Costs Illinois Big Bucks*, ILLINOIS TIMES (Feb. 9, 2012), <https://www.illinoistimes.com/springfield/the-war-on-weed/Content?oid=11440556>.

⁸ ILL. REV. STAT. ch. 38, § 192e (1931) (Act of July 3, 1931, § 5 [1931] Ill. Laws 457); *see also* Leighton & Bargiel, *supra* note 6, at 154; *see also* Winston C. Throgmorton, *Broadening the Definition of Cannabis: An Argument for Speciation including Indica and Sativa*, 42 S. ILL. U. L.J. 669 (2018) (analyzing the differentiation between cannabis sativa and cannabis indica).

⁹ Pamela Platt, *Legislative Note - Legal Analysis of Marijuana Legislation in Illinois*, 22 DEPAUL L. REV. 277, 280 (1972).

¹⁰ *Id.* at 279.

¹¹ *Id.* at 280.

a first offense was punishable by a fine of not more than \$1,000¹² or imprisonment in county jail for not more than one year, or both.¹³ After 1937, the following two decades saw amendments to these penalty provisions at almost every semi-annual session of the Illinois General Assembly.¹⁴ In 1945, amendments were made to the Uniform Narcotic Drug Act that made first offenses involving cannabis punishable by a fine not exceeding \$1,000 or imprisonment in the penitentiary¹⁵ for not less than one nor more than five years, or both.¹⁶

Illinois substantially revised the 1935 Act with the Uniform Narcotic Drug Act of 1957, which defined cannabis as a “narcotic drug,” lumping it together with heroin and opium.¹⁷ In 1961, the Uniform Narcotic Drug Act was engrafted into the newly formed Illinois Revised Criminal Code.¹⁸ Outside of some minor amendments, the law remained relatively unchanged until 1971.¹⁹

Despite the FBN’s work from the 1930s through the 1960s to ratchet up the rhetoric surrounding cannabis’ deleterious effects on users and its propensity to lead to crime and other drug usage, the Illinois legislature had been offered conflicting evidence on the effects of cannabis during this time despite laws which reflected the federal government’s position on cannabis.²⁰

b. The Cannabis Control Act of 1971

Before the late 1960s, Illinois, like many other states, had relied heavily on pressures from federal agency actors to align its cannabis laws with federal law, *i.e.*, labeling cannabis a narcotic and providing for fairly harsh punishments.²¹ In the 1960s, legislative attitudes and public opinion in Illinois began moving away from the harsh criminalization of the use of cannabis, and away from federal regulation it once mirrored.²² In 1971, Illinois overhauled its entire statutory scheme involving narcotic drugs,

¹² Consumer Price Index (CPI) Inflation Calculator, BUREAU OF LABOR STATISTICS, <https://data.bls.gov/cgi-bin/cpicalc.pl> (indicating that \$1,000 in July 1935 had the same buying power as \$18,830 in January 2020).

¹³ ILL. REV. STAT. ch. 91, ¶ 179 (1935) (Act of July 8, 1935, § 23, [1935] Ill. Laws 732); *see also* Leighton & Bargiel, *supra* note 6, at 155.

¹⁴ Leighton & Bargiel, *supra* note 6, at 155.

¹⁵ The term “penitentiary” is now officially referred to as the Illinois Department of Corrections.

¹⁶ ILL. REV. STAT. ch. 38, § 192.23 (1945) (Act of July 18, 1945, § 23 [1945] Ill. Laws 686).

¹⁷ ILL. REV. STAT. ch. 38, § 192.28—2.17 (1957) (Act of July 11, 1957, § 2–17 [1957] Ill. Laws 2571); Platt, *supra* note 9, at 281.

¹⁸ Leighton & Bargiel, *supra* note 6, at 158.

¹⁹ *Id.*

²⁰ *See generally* Platt, *supra* note 9.

²¹ Platt, *supra* note 9, at 278.

²² *Id.*

including cannabis.²³ Illinois repealed the Uniform Narcotic Drug Act of 1957, and bifurcated the new statutory regimen into two parts: the Illinois Controlled Substances Act and the Cannabis Control Act.²⁴

Relying on findings which showed that the previous legislation governing cannabis mercilessly and unrealistically drew many individuals into the criminal justice system without success in deterring cannabis use, Illinois separated cannabis from other drugs listed in the Controlled Substances Act.²⁵ By carving out cannabis from the Controlled Substances Act and no longer labeling it a narcotic, Illinois showcased its deviation from federal law, which then – and still as of the writing of this article almost fifty years later – lists cannabis as a Schedule I drug.²⁶ Amendments to the Cannabis Control Act were also made over subsequent years that further mitigated the penalties for possession of cannabis.²⁷

As part of the Cannabis Control Act, the Illinois legislature realigned the penalty structure regarding cannabis in accord with the social norms of the day, and further based them on scientific research on cannabis and its effects.²⁸ Before the Cannabis Control Act, penalties for possession or delivery of cannabis were exacted regardless of the amount of cannabis at issue.²⁹ Under the Cannabis Control Act, courts were given wide latitude with sentencing discretion, more leniency was offered toward possession versus delivery, and penalties were divided into multiple categories based on the amount in possession.³⁰

The Cannabis Control Act also allowed for medicinal use of cannabis, with two conditions for its implementation that prevented its actualization.³¹ The Act gave the Illinois Department of Human Services (DHS) the power to authorize licensed physicians to prescribe cannabis for various medical conditions.³² However, this was simply discretionary authority granted to

²³ ILL. REV. STAT. ch. 56 ½, §§ 701–719 (1971); ILL. REV. STAT. ch. 56 ½, §§ 1100–1603 (1971).

²⁴ *Id.*

²⁵ See ILL. REV. STAT. ch. 56 ½, §§ 701–719 (1971); *People v. Taylor*, 18 Ill. App. 3d 480, 481–82, 309 N.E.2d 595, 596–97 (4th Dist. 1974) (opining that it was the legislative intention of the Cannabis Control Act of 1971 to excise marijuana from the Criminal Code of 1961 so far as penalties were concerned, and to provide the trial courts with wide sentencing discretion where marijuana is concerned); Leighton & Bargiel, *supra* note 6, at 160.

²⁶ 21 U.S.C. § 812(c)(10) (2018); *People v. Sanders*, 47 Ill. App. 3d 180, 182, 361 N.E.2d 884, 885 (3d Dist. 1977) (inferring that cannabis was intended not be a controlled substance in Illinois).

²⁷ Leighton & Bargiel, *supra* note 6, at 161.

²⁸ ILL. REV. STAT. ch. 56 ½, § 701 (1971); Platt, *supra* note 9, at 295.

²⁹ ILL. REV. STAT. ch. 38, § 192.28–38 (1957); Platt, *supra* note 9, at 295.

³⁰ ILL. REV. STAT. ch. 56 ½, §§ 704–707 (1971); Platt, *supra* note 9, at 296; Leighton & Bargiel, *supra* note 6, at 160.

³¹ ILL. REV. STAT. 1971, ch. 56 ½, § 711 (1971), amended by P.A. 80-1426 (effective Jan. 1, 1979) (authorizing cannabis use for medical treatment); see also Claire Thompson, *Medical Marijuana is Already Legal in Illinois*, CHI. READER (Apr. 8, 2010), <https://www.chicagoreader.com/chicago/medical-marijuana-pot-illinois-cannabis-control-act-legalization/Content?oid=1629059>.

³² ILL. REV. STAT. ch 56 ½, § 711 (1979).

DHS; the agency was under no mandate to implement it.³³ Secondly, if DHS were to act (which the agency never did), the Illinois State Police would have had to provide written approval to do so.³⁴ Neither agency put medicinal use of cannabis in motion, and it would take another forty-plus years to see such a regime enacted into Illinois law.³⁵

c. Illinois' Medical Cannabis Laws

Legalization of medical cannabis in Illinois continued to be a goal of the state legislature for many years.³⁶ The Illinois legislature first considered the Compassionate Use of Medical Cannabis Pilot Program Act in 2008, but it was not until August 1, 2013, before the Act was signed into law.³⁷

The legislative findings section of the Compassionate Use of Medical Cannabis Pilot Program Act lists extensive medical evidence purporting to show the therapeutic value of cannabis in various medical conditions.³⁸ The stated purpose of the Act was to protect patients with debilitating medical conditions, as well as their doctors, from arrest, prosecution, and other penalties if they engage in the medical use of cannabis.³⁹ The Act's legislative findings also pointed out that data from the Federal Bureau of Investigation showed that approximately 99 out of every 100 cannabis arrests in the United States are under state law rather than federal law.⁴⁰

On August 12, 2019, the "pilot program" designation of the Act was lifted, making it permanent.⁴¹ It is now called simply the Compassionate Use of Medical Cannabis Program Act.⁴² Along with provisions removing the pilot program designation, new amendments also expanded medical conditions for which cannabis can be prescribed.⁴³ Illinois now has perhaps

³³ *Id.*; Thompson, *supra* note 31.

³⁴ ILL. REV. STAT. ch 56 ½, § 711 (1979); Thompson, *supra* note 31.

³⁵ Thompson, *supra* note 31; Compassionate Use of Medical Cannabis Pilot Program Act, 410 ILL. COMP. STAT. 130/1–130/999 (2014).

³⁶ *See, e.g.*, Compassionate Use of Medical Cannabis Pilot Program Act, S.B. 1381, 96th Gen. Assemb., Reg. Sess. (Ill. 2011).

³⁷ Thompson, *supra* note 31; Compassionate Use of Medical Cannabis Pilot Program Act took effect on January 1, 2014. 410 ILL. COMP. STAT. 130/999 (2014).

³⁸ 410 ILL. COMP. STAT. 130/5(a)-(c) (2018).

³⁹ 410 ILL. COMP. STAT. 130/5(g) (2018).

⁴⁰ 410 ILL. COMP. STAT. 130/5(d) (2018).

⁴¹ Compassionate Use of Medical Cannabis Program Act, 2019 Ill. Legis. Serv. P.A. 101-363 (effective August 9, 2019) (S.B. 2023) (West) (amending 410 ILL. COMP. STAT. 130/1) (deleting "Pilot" preceding "Program").

⁴² *Id.* (amending 410 ILL. COMP. STAT. 130/1).

⁴³ *Id.* (amending 410 ILL. COMP. STAT. 130/10(h)).

the largest and most inclusive list in the U.S. of qualifying medical conditions for which cannabis can be prescribed.⁴⁴

Under the Compassionate Use of Medical Cannabis Program Act, a medical patient who is prescribed medicinal cannabis by her physician must apply for and maintain a registry identification card through the Illinois Department of Public Health (DPH).⁴⁵ This information, as well as any other information pertaining to the patient gathered by other state agencies, including the Illinois State Police (ISP), is considered confidential under the Act, and exempt from the Freedom of Information Act.⁴⁶ However, the DPH and the ISP, among other listed state agencies in the Act, may disseminate the confidential information as necessary for authorized employees to “perform official duties under [the] Act.”⁴⁷ Further, the confidential information kept on the patient may be disclosed between the listed state agencies upon request.⁴⁸ The confidential list may not be combined or linked in any manner with any other list or database except as provided for in the Act.⁴⁹

Fingerprinting and criminal background checks were initially mandated under the Act, but these requirements were dropped with amendments enacted in 2018.⁵⁰ Since that time, Illinois’ medical cannabis program has seen record growth.⁵¹

In November 2019, an amendment to the Act was signed by Illinois’ governor that removed notations on driving records for people registered as qualifying medical cannabis patients or their caregivers.⁵² Before these changes, the cannabis patient’s information was forwarded to the Illinois Secretary of State, the state agency that issues drivers’ licenses.⁵³

⁴⁴ *Id.* See also Andrew Goldstein, *Flying High in the Regulatory State: An Analysis of State Regulatory Systems for the Distribution of Medical Cannabis*, 5 BELMONT L. REV. 253, 263 (2018).

⁴⁵ Compassionate Use of Medical Cannabis Program Act, *supra* note 41, at § 55 (amending 410 Ill. Comp. Stat. 130/55)

⁴⁶ 410 ILL. COMP. STAT. 130/145–150 (2018).

⁴⁷ 410 ILL. COMP. STAT. 130/145 (2018).

⁴⁸ *Id.*

⁴⁹ 410 ILL. COMP. STAT. 130/150(a) (2018).

⁵⁰ Robert McCoppin, *Medical Marijuana Popularity Surging in Illinois as Revisions in Law Allow for Greater Access to Patients*, CHI. TRIB. (Oct. 18, 2019, 3:41 PM), <https://www.chicagotribune.com/marijuana/illinois/ct-medical-marijuana-illinois-record-growth-20191018-j2a24a5pmbde7ad7mjzfxilivm-story.html>.

⁵¹ *Id.* (providing that more than 87,000 cannabis patients have qualified in Illinois since stores opened in November 2015, including a spike of almost 37,000 in the state’s fiscal year ending June 30, 2019).

⁵² 410 ILL. COMP. STAT. ANN. 130/60(d) (West 2019), amended by P.A. 101-593, (effective December 4, 2019).

⁵³ *Id.*

d. The 2016 Decriminalization Amendments

A concerted effort to decriminalize possession of small amounts of cannabis began to take shape in the 1970s – largely in metropolitan U.S. cities – in response to the passage of the federal Controlled Substances Act, which lists cannabis as a Schedule I drug.⁵⁴ Several states and cities passed decriminalization of cannabis laws throughout the country.⁵⁵ Efforts at decriminalization largely stalled through the 1980s and 90s, but picked back up in the 2000s, when a wave of states and cities passed decriminalization statutes and ordinances, respectively.⁵⁶

In 2012, the Chicago City Council voted to regulate small amounts of cannabis possession by enforcement of civil versus criminal penalties.⁵⁷ Other Illinois cities followed suit, either officially or as a matter of practice.⁵⁸ Illinois followed Chicago's lead statewide in 2016, when the then-governor signed a cannabis decriminalization bill.⁵⁹ With the 2016 changes, an amount of ten grams or less of cannabis was punishable by a civil fine rather than a criminal misdemeanor charge.⁶⁰

e. The Cannabis Regulation and Tax Act of 2019

Even during the years when Illinois was developing the Compassionate Use of Medical Cannabis Program Act and subsequent decriminalization amendments, there was a push by some lawmakers to make Illinois a state that allowed lawful, recreational use of cannabis.⁶¹ Legalization of cannabis became an issue in the 2018 Illinois gubernatorial race, with democratic

⁵⁴ PATRICK ANDERSON, *HIGH IN AMERICA: THE TRUE STORY BEHIND NORML AND THE POLITICS OF MARIJUANA* (The Viking Press 1981).

⁵⁵ *Id.*

⁵⁶ EMILY DUFTON, *GRASS ROOTS: THE RISE AND FALL OF MARIJUANA IN AMERICA* (Basic Books 2017).

⁵⁷ Kristen Mack, *Chicago City Council Passes Pot Ticket Ordinance*, CHI. TRIB. (Jun. 27, 2012), <https://www.chicagotribune.com/news/ct-xpm-2012-06-27-chi-chicago-city-council-passes-pot-ticket-ordinance-20120627-story.html>.

⁵⁸ See Robert McCoppin & Alicia Fabbre, *New Illinois Pot Laws Won't Go Into Effect for 7 Months. How Will Current Laws Be Enforced Till Then?*, CHI. TRIB. (June 4, 2019, 9:45 AM), <https://www.chicagotribune.com/news/breaking/ct-met-illinois-marijuana-law-enforcement-20190603-story.html> (noting that Joliet, Illinois was an example of a city that issued non-criminal citations for low level cannabis possession).

⁵⁹ Monique Garcia, *Rauner Reduces Punishment for Minor Pot Possession From Jail to Citation*, CHIC. TRIB. (Jul. 29, 2016, 6:08 PM), <https://www.chicagotribune.com/news/breaking/ct-illinois-marijuana-decriminalization-0730-20160729-story.html>.

⁶⁰ 720 ILL. COMP. STAT. 550/4(a) (2018).

⁶¹ Bill Alpert, *Illinois Could Legalize Recreational Marijuana This Week*, BARRON'S (May 30, 2019, 11:11 AM), <https://www.barrons.com/articles/legalizing-recreational-marijuana-illinois-cresco-51559228747>; Trevor Hughes, *Illinois Approves Legal Weed, Expunging Criminal Record for Pot Crimes*, USA TODAY (June 25, 2019, 12:33 PM), <https://www.usatoday.com/story/news/nation/2019/06/25/legal-weed-illinois-approves-recreational-marijuana-criminal-reform/1552697001/>.

candidate J.B. Pritzker making recreational cannabis a platform of his campaign.⁶²

On June 25, 2019, Illinois became the eleventh state to legalize cannabis for adult use when Governor Pritzker signed the Cannabis Regulation and Tax Act (CRTA).⁶³ Illinois was also the first state to legalize cannabis through the legislature as opposed to ballot initiative.⁶⁴

Section 1-7 of the CRTA specifically defines a lawful user, stating that “a person shall not be considered an unlawful user or addicted to narcotics solely as a result of his or her possession or use of cannabis or cannabis paraphernalia in accordance with this Act.”⁶⁵ The CRTA mandates that no personal information of a legal cannabis purchaser can be retained, used, shared, or disclosed without the consent of the purchaser.⁶⁶

The CRTA further expounds on criminal immunities bestowed on lawful cannabis users in Illinois, in part stating that a purchaser of cannabis twenty-one years of age or older is not subject to arrest, prosecution, denial of any right or privilege, or other punishment.⁶⁷

2. Cannabis Laws in Other States

This section will demonstrate how other states have handled legalizing cannabis, as well as how several states are moving in that direction.

a. State Historical Overview

The trend toward decriminalization and legalization of cannabis in the United States began with Oregon, the first state to decriminalize it in 1973.⁶⁸ Starting with California in 1996,⁶⁹ thirty-three states have since legalized

⁶² Mark Brown, *Pritzker Betting the Pot on Legalizing Marijuana in Governor's Race*, CHI. SUN TIMES (Jan. 22, 2018, 3:13 PM), <https://chicago.suntimes.com/2018/1/22/18356116/pritzker-betting-the-pot-on-legalizing-marijuana-in-governor-s-race>.

⁶³ Cannabis Regulation and Tax Act, *supra* note 2 (to be codified at 410 ILL. COMP. STAT. 705/1-999-99).

⁶⁴ Tony Traina, *Young Lawyers Section: What You Need to Know About Illinois' New Cannabis Regulation and Tax Act*, 35 CBA Record 38 (2019).

⁶⁵ 2019 Ill. Legis. Serv. P.A. 101-593, § 1-7 (effective Dec. 4, 2019) (S.B. 1557) (West) (to be codified at 410 ILL. COMP. STAT. 705/1-7).

⁶⁶ Cannabis Regulation and Tax Act, *supra* note 2, at § 10-20 (to be codified at 410 ILL. COMP. STAT. 705/10-20).

⁶⁷ Cannabis Regulation and Tax Act, *supra* note 2, at § 10-25 (to be codified at 410 ILL. COMP. STAT. 705/10-25).

⁶⁸ Noelle Crombie, *Legal Marijuana in Oregon: A Look at the State's Pot History*, OREGONIAN (Nov. 7, 2014), https://www.oregonlive.com/marijuana/2014/11/legal_marijuana_in_oregon_a_lo.html.

⁶⁹ California Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (West 1996).

medical cannabis.⁷⁰ Just like Illinois' law, most of the other states that legalized medical cannabis contained provisions that provide those with prescriptions immunity from arrest, prosecution, or penalty for possession or use of medical cannabis.⁷¹

In 2012, an influx of states began to legalize cannabis outright, starting with Colorado and Washington.⁷² Colorado's regime regulates the sale and use of cannabis in essentially the same manner as alcohol.⁷³ Soon thereafter came California, Alaska, Maine, Nevada, Oregon, and Massachusetts with the legalization of cannabis.⁷⁴

As of January 1, 2020, eleven states and the District of Columbia have fully legalized cannabis for recreational use,⁷⁵ thirty-three states allow medical cannabis, and seventeen states have chosen some form of decriminalization.⁷⁶

b. States Moving Toward Cannabis Legalization

More states could legalize cannabis for recreational use as early as the end of 2020.⁷⁷ In New York, despite a failed attempt to legalize cannabis in 2019, Governor Andrew Cuomo is continuing to push for legalization in 2020.⁷⁸ In New Mexico, Governor Michelle Lujan Grisham is also making

⁷⁰ See Keith Speights, *Timeline for Marijuana Legalization in the United States: How the Dominoes are Falling*, MOTLEY FOOL, <https://www.fool.com/investing/timeline-for-marijuana-legalization-in-the-united.aspx> (last updated Jan. 2, 2020, 1:06 PM).

⁷¹ E.g., N.M. STAT. ANN. § 26-2B-4(A) (West 2019) (“[a] qualified patient shall not be subject to arrest, prosecution or penalty in any manner for the possession of or the medical use of cannabis”); WASH. REV. CODE ANN. § 69.51A.040 (West 2016) (“medical use of marijuana . . . does not constitute a crime and a qualifying patient . . . may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences . . .”).

⁷² Aaron Smith, *Marijuana Legislation Passes in Colorado and Washington*, CNN (Nov. 8, 2012, 11:46 AM), <https://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/index.html>; Speights, *supra* note 70.

⁷³ LAW SUMMARY, OFFICE OF LEGISLATIVE LEGAL SERVICES, *Retail Marijuana*, <https://leg.colorado.gov/sites/default/files/retail-marijuana.pdf> (last updated 9/25/2018).

⁷⁴ Mary Walton, *Cannabis Legalization is Gaining Traction Across the U.S.*, LEGAL READER (June 21, 2019), <https://www.legalreader.com/top-5-things-to-know-about-the-legality-of-cannabis-by-u-s-jurisdiction>.

⁷⁵ *Map of Marijuana Legality by State*, DISA, <https://disa.com/map-of-marijuana-legality-by-state> (last updated May, 2020).

⁷⁶ *State Marijuana Laws in 2019*, GOVERNING, <https://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html> (last updated June 25, 2019).

⁷⁷ German Lopez, *Marijuana Legalization is About to Have a Huge Year*, VOX (Jan. 23, 2020, 8:00 AM), <https://www.vox.com/policy-and-politics/2020/1/23/21076978/marijuana-legalization-2020-ballot-initiatives>.

⁷⁸ Jesse McKinley & Luis Ferré-Sadurní, *Marijuana Will Be Legalized in New York in 2020, Cuomo Vows*, N.Y. TIMES (Jan. 8, 2020), <https://www.nytimes.com/2020/01/08/nyregion/state-of-the-state-cuomo-ny.html>.

an effort to get their legislature to legalize cannabis by the end of 2020.⁷⁹ Connecticut and Rhode Island may also see legalized cannabis bills in their legislatures in 2020.⁸⁰

Other states that may see legalized cannabis in 2020 include Arizona, Arkansas, Florida, Missouri, Montana, North Dakota, and Oklahoma.⁸¹ Idaho, Mississippi, and South Dakota may see medicinal cannabis laws passed in 2020.⁸² Virginia's governor is making cannabis decriminalization one of the top priorities of his 2020 legislative agenda.⁸³

Recent polling from Gallup and the Pew Research Center show ever-expanding public support for cannabis legalization.⁸⁴ The percentage of people supporting its legalization almost doubled over the past twenty years, with the latest polling indicating almost a two-thirds of Americans believe cannabis should be legal.⁸⁵

Interestingly, studies have also shown that cannabis usage and availability have increased since the last decade, despite it being illegal federally.⁸⁶

3. Federal Cannabis Regulation

While many states like Illinois have undergone drastic changes in how they regulate, enforce, and even allow cannabis use, the federal government has remained static from a legislative standpoint for many decades. Cannabis

⁷⁹ Tom Angell, *New Mexico Governor Calls for Marijuana Legalization in 2020*, FORBES (Jan. 15, 2020, 5:50 PM), <https://www.forbes.com/sites/tomangell/2020/01/15/new-mexico-governor-calls-for-marijuana-legalization-in-2020/#557b5557287f>.

⁸⁰ Ebong Udoma & Cassandra Basler, *Connecticut Democrats to Try Again for Marijuana Legalization*, WSHU PUBLIC RADIO (Jan. 22, 2020), <https://www.wshu.org/post/connecticut-democrats-try-again-marijuana-legalization#stream/0>; Katherine Gregg & Patrick Anderson, *Raimondo on Projected Shortfall: 'We Need Some Money'*, PROVIDENCE JOURNAL (Dec. 14, 2019, 10:00 PM), <https://www.providencejournal.com/news/20191214/raimondo-on-projected-shortfall-we-need-some-money>.

⁸¹ Blake Dodge, *Marijuana Legalization 2020: These States Could Legalize Weed in the New Year*, NEWSWEEK (Dec. 27, 2019, 11:57 AM), <https://www.newsweek.com/marijuana-legalization-2020-these-states-could-legalize-weed-in-the-new-year-1479337>; Lopez, *supra* note 77.

⁸² *Id.*; Lopez, *supra* note 77.

⁸³ Daniella Cheslow, *Virginia Governor Makes Marijuana Decriminalization Top of Legislative Agenda*, WAMU, (Jan. 3, 2020) <https://wamu.org/story/20/01/03/virginia-governor-makes-marijuana-decriminalization-top-of-legislative-agenda/>.

⁸⁴ GALLUP, <https://news.gallup.com/poll/1657/illegal-drugs.aspx> (last visited Apr. 2, 2020); Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RESEARCH CENTER (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/>.

⁸⁵ *Id.*; Daniller, *supra* note 84.

⁸⁶ See LISA N. SACCO & KRISTIN FINKLEA, U.S. CONG. RESEARCH SERV., R43164, STATE MARIJUANA LEGALIZATION INITIATIVES: IMPLICATIONS FOR FEDERAL LAW ENFORCEMENT I (2014); Memorandum from James M. Cole, Deputy Attorney Gen., to U.S. Attorneys (June 29, 2011), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>.

remains listed as a dangerous and illegal narcotic.⁸⁷ For many years in the early and mid-twentieth century, the federal enforcement of cannabis was similar to and likely influenced what we saw in Illinois during that time.

In the very early 1970s though, when Illinois began to slightly ease the penalties associated cannabis use, the federal government diverged and labeled cannabis as completely illegal for any use, and then began a decades-long campaign to enforce federal cannabis laws.

In the 2010s, efforts from various fronts were made to ease federal cannabis enforcement to accommodate the ever-growing number of states that were legalizing cannabis for medicinal or recreational means. However, to this day, there is no clear sign from the federal government that cannabis is anything other than what it has been for decades in federal eyes: a completely illegal narcotic.

a. Early Federal Cannabis Enforcement

Before the twentieth century, there was no real effort to police drug use, including cannabis.⁸⁸ Until 1937, the use and growth of cannabis was legal under federal law.⁸⁹ After Prohibition ended, cannabis use began to catch the attention of both Congress and the newly formed Federal Bureau of Narcotics, and a push was being made to make cannabis illegal.⁹⁰

In 1937, the Marihuana Tax Act (MTA) was enacted into law, which unofficially banned cannabis.⁹¹ The MTA provided for strict regulation of high-cost transfer tax stamps on every sale of cannabis.⁹² These stamps in turn were rarely issued by the federal government.⁹³

Over the next few decades, Congress continued to pass legislation aimed at combatting drug use, including cannabis, finally culminating with the Controlled Substances Act of 1970.⁹⁴

⁸⁷ 21 U.S.C. § 812 (2018); *Wilson v. Lynch*, 835 F.3d 1083, 1094 (9th Cir. 2016).

⁸⁸ See LISA N. SACCO, U.S. CONG. RESEARCH SERV., R43749, DRUG ENFORCEMENT IN THE U.S.: HISTORY, POLICY, AND TRENDS 1 (2014).

⁸⁹ *Id.* at 3.

⁹⁰ *Id.* 3-4.

⁹¹ Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937); see also Christopher Ingraham, *'Marijuana' or 'Marihuana'? It's All Weed to the DEA*, WASH. POST, (Dec. 16, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/12/16/marijuana-or-marihuana-its-all-weed-to-the-dea/>, When passing the Marihuana and Tax Act of 1937, Congress used the word "marihuana" with an "h" instead of a "j," which, along with "marijuana," were primarily colloquial terms borrowed from Mexican Spanish, *id.*

⁹² Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937); Sacco, *supra* note 88.

⁹³ CHARLES F. LEVINTHAL, DRUGS, SOCIETY, AND CRIMINAL JUSTICE 58 (Boston: Prentice Hall, 3d Edition 2011).

⁹⁴ Sacco, *supra* note 88 at 5.

b. The Controlled Substances Act of 1970

During his first term, President Richard Nixon made his “war on drugs” a significant policy platform of his administration.⁹⁵ Part of his plan was to implement a comprehensive federal drug law to increase drug control and enforcement.⁹⁶ His efforts led to the Controlled Substances Act of 1970 (CSA).⁹⁷

The CSA amended the Public Health Service Act, with the purpose of providing “increased research into, and prevention of, drug abuse and drug dependence.”⁹⁸ The CSA aimed to provide for treatment and rehabilitation to drug abusers and drug dependent individuals, as well as increased enforcement authority over drug abuse.⁹⁹ In creating the CSA, Congress found that the substances controlled within the CSA “have a substantial and detrimental effect on the health and general welfare of the American people.”¹⁰⁰ In controlling these drugs, the CSA distributes substances amongst five schedules based on medical use, potential for abuse, and safety or dependence liability.¹⁰¹ Drugs are scheduled based on 8 factors: (1) actual or relative potential for abuse; (2) scientific evidence of its pharmacological effect; (3) the state of current scientific knowledge regarding the drug; (4) its history or pattern of abuse; (5) the scope, duration and significance of abuse; (6) risks to the public health; (7) physical or physiological dependence liability; and (8) whether the substance is an immediate precursor of a substance already controlled by the CSA.¹⁰²

Schedule I drugs are considered to have the highest risk for abuse.¹⁰³ Drugs listed on Schedule I include cannabis, heroin, and ecstasy,¹⁰⁴ and are stated to have no currently accepted medical use.¹⁰⁵

Despite placing cannabis on Schedule I, Congress in fact was presented with information in 1970 that refuted many of the arguments for keeping it there.¹⁰⁶ Two years after the enactment of the CSA, the National Commission on Marihuana and Drug Abuse, also called the Shafer Commission, called

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*; Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

⁹⁸ Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

⁹⁹ *Id.*

¹⁰⁰ 21 U.S.C. § 801(2) (2018).

¹⁰¹ 21 U.S.C. § 812 (2018).

¹⁰² 21 U.S.C. § 811(c)(1)-(8) (2018).

¹⁰³ Michael Gabay, *The Federal Controlled Substances Act: Schedules and Pharmacy Registration*, U.S. NATIONAL LIBRARY OF MEDICINE (May 29, 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3839489/>.

¹⁰⁴ 21 U.S.C. § 812(b) (2018).

¹⁰⁵ 21 U.S.C. § 812(b)(1)(B)&(C) (2018).

¹⁰⁶ Ira P. Robbins, *Guns N' Ganja: How Federalism Criminalizes the Lawful Use of Marijuana*, 51 U.C.D. L. REV. 1783, 1793-94 (2018) (particularly footnote 47 therein).

for the decriminalization of cannabis, but the findings were ignored by the Nixon Administration.¹⁰⁷

In 1973, President Nixon authorized the creation of the Drug Enforcement Administration (DEA), a federal agency with the dedicated purpose of enforcing the CSA.¹⁰⁸ The DEA has since reported that cannabis is responsible for serious impairments in learning, memory, thinking and problem-solving, perception, and driving abilities.¹⁰⁹ The DEA has also reported that long-term effects attributed to cannabis use are listed as dependence and withdrawal associated with addiction.¹¹⁰ The DEA also maintains that cannabis smokers experience health problems such as bronchitis, emphysema, and bronchial asthma and extended use can cause a suppressed immune system and lead to the common withdrawal symptoms.¹¹¹

Substances can be added to CSA schedules, transferred between schedules, or removed from control of the CSA altogether by the DEA, or by Congressional action in the absence of Executive Branch action.¹¹² In 2011, the governors of Rhode Island and Washington petitioned the DEA to initiate proceedings to repeal regulations placing cannabis on Schedule I.¹¹³ These governors maintained that cannabis has an accepted medical use, that it is safe for use under medical supervision, and that it has a relatively low potential for abuse.¹¹⁴ The DEA presented the appropriate material to the Department of Health and Human Services (HHS) and requested that HHS provide recommendation based on scientific and medical data.¹¹⁵ HHS responded with binding recommendations that cannabis remain on Schedule I, thereby ending proceedings to reschedule.¹¹⁶ In order to reschedule any drug as anything other than Schedule I it must have some currently accepted medical use.¹¹⁷

Five factors are considered in making the determination of accepted medical use: (1) the drug's chemistry is known and reproducible; (2) there

¹⁰⁷ Gabriel G. Nahas & Albert Greenwood, THE FIRST REPORT OF THE NATIONAL COMMISSION ON MARIHUANA, *Signal of Misunderstanding or Exercise in Ambiguity* (1974); NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, *Drug Use in America: Problem in Perspective* (1973); see also Robbins, *supra* note 106, at 1793-94.

¹⁰⁸ Exec. Order No. 11727, 3 C.F.R. § 785 (1971-1975).

¹⁰⁹ DRUGS OF ABUSE, DRUG ENFORCEMENT ADMINISTRATION, 74 (2017).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Controlled Substances Act, 21 U.S.C. § 811(a) (2018); *All. for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1133 (D.C. Cir. 1994).

¹¹³ OFFICE OF DRUG CONTROL, SCHEDULE OF CONTROLLED SUBSTANCES: MAINTAINING MARIJUANA IN SCHEDULE I OF THE CONTROLLED SUBSTANCES ACT, 2 (2016).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ OFFICE OF DRUG CONTROL, SCHEDULE OF CONTROLLED SUBSTANCES: MAINTAINING MARIJUANA IN SCHEDULE I OF THE CONTROLLED SUBSTANCES ACT, 5 (2016).

¹¹⁷ *Id.*

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.¹¹⁸ In its evaluation, HHS concluded that there is insufficient scientific evidence demonstrating a currently accepted medical use, citing to factor 3.¹¹⁹ The same determination was made in prior petitions to reschedule in 1992 and 2001, and the DEA continues to maintain cannabis as a Schedule I drug due to the purported high potential for abuse.¹²⁰

The 1980s saw more resources granted for enforcement of federal cannabis laws, as well as increased punishments for cannabis-related offenses.¹²¹ The 1990s and early 2000s essentially saw a continuation of this trend.¹²²

c. Cannabis Enforcement During the Obama Administration

During the Obama Administration many changes began to emerge on the approach of federal cannabis enforcement. Of note were three Department of Justice (DOJ) policies aimed at non-interference with states who had implemented medical cannabis regimes or outright legalization of cannabis.

The first such DOJ policy directive came from Deputy Attorney General David Ogden in October 2009.¹²³ The Ogden Memo served to first recognize the limited investigative and prosecutorial resources the DOJ possessed, as well as to recognize the broad prosecutorial discretion of U.S. Attorneys; and second, in light of those limited resources, to advise DOJ officials not expend what resources were available on investigation or prosecution of individuals who were in compliance with state medical cannabis laws.¹²⁴ The Ogden Memo did however stress that enforcement should still be implemented against significant cannabis traffickers, as well as those in unlawful possession of firearms.¹²⁵

The Ogden Memo was seen by many states with comprehensive medical cannabis laws as a “green light” to continue forward without federal

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See Sacco, *supra* note 88; see also Eric Schlosser, *Marijuana and the Law*, THE ATLANTIC (Sept. 1994), <https://www.theatlantic.com/magazine/archive/1994/09/marijuana-and-the-law/308958/>.

¹²² See RYAN S. KING & MARC MAUER, *THE WAR ON MARIJUANA: THE TRANSFORMATION OF THE WAR ON DRUGS IN THE 1990s*, HARM REDUCTION JOURNAL vol. 3:6 (Feb. 9, 2006).

¹²³ Memorandum from David W. Ogden, Deputy Attorney Gen., to Selected United States Attorneys (Oct. 19, 2009), <https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.

¹²⁴ *Id.*

¹²⁵ *Id.* See also 18 U.S.C. § 922(g)(3) (barring drug users from possessing firearms).

interference, but it also prompted more questions regarding the DOJ's overall position on enforcement going forward.¹²⁶ In June 2011, Deputy Attorney General James Cole issued a policy directive attempting to clarify any confusion from the Ogden Memo.¹²⁷ The Cole Memo reiterated many of the directives issued in the Ogden Memo, particularly urging U.S. Attorneys to be mindful of using limited DOJ resources against individuals complying with their respective state's medical cannabis laws.¹²⁸ The Cole Memo did however point out the increased use, cultivation, sale, and distribution of medical cannabis in those states since the issuance of the Ogden Memo, and that the Ogden Memo "was never intended to shield such activities from federal law enforcement action and prosecution, even where those activities purport to comply with state law."¹²⁹

Likely in response to some of the further questions generated from attempting to reconcile the Ogden and Cole Memos, as well as the fact that two states had legalized recreational cannabis since the publication of the Cole Memo, Deputy Attorney General Cole issued a second directive in August 2013.¹³⁰ Generally, the second Cole Memo stated the federal government's priorities when enforcing the CSA in states that had legalized cannabis.¹³¹ These priorities included preventing cannabis distribution to minors, preventing revenue from going to cartels, preventing diversion to states where cannabis remained illegal, preventing violence and drugged driving, and preventing use or possession on federal property.¹³² Outside of the listed priorities, the memo directed federal departments to leave cannabis regulation to local law enforcement agencies.¹³³ The reasoning behind the position was that state laws which authorize cannabis production, distribution, and possession impliedly implement enforcement schemes to address any threat their laws can pose on "public safety, public health, and other law enforcement interests."¹³⁴

It seems clear that the Obama Administration was attempting to mitigate the overall federal enforcement of the CSA as it pertained to individual cannabis users in compliance with their respective state laws. However, when administrations change, so too can many overarching policy directives.

¹²⁶ Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 881 (2013).

¹²⁷ Cole, *supra* note 86.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*; see also Luke C. Waters, *A Sticky Situation: The Unconstitutional Qualification of the Right to Bear Arms by the Federal Government Against Law-Abiding Medical Marijuana Patients*, 6 BELMONT L. REV. 115, 135-37 (2019).

¹³¹ Cole, *supra* note 86.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

d. Cannabis Landscape in the Trump Administration

In January 2018, Attorney General Jeff Sessions rescinded the second Cole Memo, along with five other guidance memos concerning federal cannabis policy.¹³⁵ The Sessions Memo formally stated the intention to rescind the second Cole Memo, as well as to “guide investigative and prosecutorial discretion in accordance with all applicable laws, regulations, and appropriations.”¹³⁶ The intended effect of the memo was to return to following the laws enacted by Congress when pursuing federal prosecution of cannabis-related activities.¹³⁷ Sessions’s reasoning for the rescission was that the Cole Memo undermined the ability of state and federal law enforcement from enforcing the laws in place.¹³⁸ Following the Sessions Memo and the rescission of the Cole Memos, states choosing to legalize cannabis were back in uncharted territory as to what enforcement policies to rely upon.¹³⁹

In February 2019, Attorney General Sessions was replaced by William Barr.¹⁴⁰ Since becoming Attorney General, Barr has signaled a different and more lenient approach to federal cannabis enforcement than his predecessor, and has even stated he would re-instate the Cole Memo policy.¹⁴¹ Attorney General Barr has stated that allowing states to set their own cannabis policies would be better than the current regime, which he described as an “intolerable” conflict between state and federal laws.¹⁴²

In 2018, a bi-partisan bill was introduced that would allow federal recognition of state laws that have legalized cannabis.¹⁴³ This bill, the Strengthening the Tenth Amendment Through Entrusting States (STATES) Act, would amend the CSA to allow exemption from federal enforcement to individuals and businesses in compliance with their respective state’s

¹³⁵ Travis Copenhaver, *Lessons from the Cole Memo in the Wake of Jeff Sessions*, CANNABIS LEGAL GROUP (Jan. 11, 2018), <https://michigan-marijuana-lawyer.com/lessons-cole-memo-wake-jeff-sessions/>.

¹³⁶ Memorandum from Jefferson B. Sessions III, Attorney Gen., to U.S. Attorneys (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Copenhaver, *supra* note 135.

¹⁴⁰ The United States Department of Justice, *Meet the Attorney General*, <https://www.justice.gov/ag/staff-profile/meet-attorney-general> (last visited Mar. 18, 2020).

¹⁴¹ Sara Brittany Somerset, *Attorney General Barr Favors a More Lenient Approach to Cannabis Prohibition*, FORBES (Apr. 15, 2019, 5:00 AM), <https://www.forbes.com/sites/sarabrittany Somerset /2019/04/15/attorney-general-barr-favors-a-more-lenient-approach-to-cannabis-legalization/#74fec79dc4c8>.

¹⁴² *Id.*

¹⁴³ Strengthening the Tenth Amendment Through Entrusting States Act, S. 3032, 115th Cong. (2018).

cannabis laws.¹⁴⁴ As of June 2018, President Trump has indicated he will likely support the STATES Act.¹⁴⁵

e. Congressional Withholding of Funding for Federal Medical Cannabis Enforcement: The Rohrabacher-Blumenauer Amendment

In 2001, Congressman Maurice Hinchey first introduced legislation that would prohibit the DOJ from expending appropriated funds to enforce the CSA against states implementing and furthering their own medical cannabis laws.¹⁴⁶ This appropriations bill amendment (later called the “Rohrabacher-Farr Amendment” and now the “Rohrabacher-Blumenauer Amendment”¹⁴⁷) was voted on and did not pass in the House of Representatives six separate times over ten years before it finally was passed in a bi-partisan manner and became law in 2014.¹⁴⁸ Because it is a rider, it must consistently be re-authorized by Congress or it will not remain law.¹⁴⁹

When the Rohrabacher-Blumenauer Amendment was up for renewal in 2017, President Trump signed it into law despite strong urging from Attorney General Sessions not to do so.¹⁵⁰

¹⁴⁴ *Id.*

¹⁴⁵ John Wagner & Colby Itkowitz, *Trump Says He “Probably” Will Support Bill to Protect States That Have Legalized Marijuana*, WASH. POST (June 8, 2018, 9:29 PM), https://www.washingtonpost.com/politics/trump-say-he-probably-will-support-bill-to-protect-states-that-have-legalized-marijuana/2018/06/08/23fe0884-6b24-11e8-bea7-c8eb28bc52b1_story.html.

¹⁴⁶ H. Amdt. 196 to H.R. Res. 2500, 107th Cong. (2001).

¹⁴⁷ The amendment was originally sponsored by Democratic Congressman Maurice Hinchey, and Republican Congressman Dana Rohrabacher later signed on as a co-sponsor. Following Congressman Hinchey’s retirement, Democratic Congressman Sam Farr signed on with Congressman Rohrabacher as co-sponsor. Following Congressman Farr’s retirement, Democratic Congressman Earl Blumenhauer signed on as co-sponsor. See Allayne Sherer, *First Major Victory in the Fight to End Federal Interference: U.S. House Votes to End Federal Funding for Federal Cannabis Enforcement*, AMERICANS FOR SAFE ACCESS (May 31, 2014), https://www.safeaccessnow.org/first_major_victory_in_the_fight_to_end_federal_interference; Alicia Wallace, *44 In Congress Support Effort to Keep DOJ Handcuffed in Medical Cannabis States*, THE CANNABIST (Apr. 10, 2017, 6:51 PM), <https://www.thecannabist.co/2017/04/10/doj-medical-cannabis-states-rohrabacher-amendment-letter-congress/76993/>; Tom Angell, *Federal Medical Marijuana Amendment Author Dies at 79*, MARIJUANA MOMENT (Nov. 24, 2017), <https://www.marijuanamoment.net/federal-medical-marijuana-amendment-author-dies-79/>.

¹⁴⁸ Consolidated and Further Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 § 538 (2014); see also Evan Halper, *Congress Quietly Ends Federal Government’s Ban on Medical Marijuana*, L.A. TIMES (Dec. 16, 2014, 4:00 AM), <https://www.latimes.com/nation/la-na-medical-pot-20141216-story.html>; see also H. Amdt. 748 to H.R. Res. 4660, 113th Cong. (2014).

¹⁴⁹ See, e.g., Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 § 542, 129 Stat. 2242, 2332-33 (2015); see also Waters, *supra* note 130, at 142 (2018).

¹⁵⁰ Christopher Ingraham, *Jeff Sessions Personally Asked Congress to Let Him Prosecute Medical-Marijuana Providers*, WASH. POST (June 13, 2017, 6:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2017/06/13/jeff-sessions-personally-asked-congress-to-let-him-prosecute-medical-marijuana-providers/>.

In December 2019, the Rohrabacher-Blumenauer Amendment was renewed through the signing of the fiscal year 2020 omnibus spending bill, which makes it effective through September 30, 2020.¹⁵¹

f. What Does the Future Hold for Cannabis in the Federal Realm?

While efforts are seemingly being made frequently to assuage federal enforcement of cannabis against those in states that have legalized it for medicinal or recreational means, as seen from the tenure of Attorney General Sessions, there can be no certainty as to what the future holds for federal enforcement of cannabis. Currently under the CSA, possession of a small amount of cannabis can lead to a misdemeanor conviction, and a second offense is a felony that carries with it a mandatory minimum prison sentence of fifteen days and a maximum sentence of two years.¹⁵² Further under the CSA, and depending on the amount involved, distributing or dispensing cannabis, or possessing it with intent to do so, can lead to penalties from five years to life in prison.¹⁵³

Until cannabis is removed entirely from Schedule I of the CSA, or the federal government decides it will indeed enforce this law equally across the states as written, there will remain conflict between federal and state law regarding cannabis use, as well as other rights that are affected by using cannabis in compliance with a particular state's cannabis laws, such as purchasing and owning a firearm.

B. Gun Laws Affecting Cannabis Users

The foregoing has established, in the words of Attorney General Barr, the “intolerable conflict” between the federal regulation of cannabis and Illinois’ starkly different cannabis laws. This section will discuss a brief background of relevant gun laws, federally and at the state level in Illinois, particularly how they relate to the competing federal and Illinois cannabis laws. To do so, a brief primer on the Second Amendment, relevant case law related to it, and the Gun Control Act is warranted and will be discussed.

This section will also discuss laws at both the federal level and in Illinois related to purchasing a firearm, from either a registered gun dealer or a private seller, in the context of being a lawful cannabis user in Illinois.

¹⁵¹ Consolidated Appropriations Act, Pub. L. No. 116-93, 133 Stat. 2317 (2019).

¹⁵² Controlled Substances Act, 21 U.S.C. § 844(a) (2018).

¹⁵³ Controlled Substances Act, 21 U.S.C. § 841 (2018).

1. The Right to Bear Arms: The Second Amendment and District of Columbia v. Heller

The Second Amendment to the U.S. Constitution guarantees the fundamental right to “a well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.”¹⁵⁴ For many years, arguments that the right guaranteed was an individual right restricting the government from infringing on firearm possession competed with the belief that the intent was only to restrict governmental interference with state self-defense via the military.¹⁵⁵ The competing arguments were decided upon by the U.S. Supreme Court in 2008 with the landmark gun rights decision of *District of Columbia v. Heller*.¹⁵⁶

The *Heller* case presented a constitutional challenge to a ban on handguns in Washington D.C. under the Second Amendment.¹⁵⁷ The plaintiff, Heller, was a police officer whose handgun registration was denied.¹⁵⁸ The state’s denial rested upon a D.C. ban making it a crime to carry an unregistered firearm, but also prohibiting the registration of handguns.¹⁵⁹ The ban also provided that lawfully owned firearms had to be kept unloaded and disassembled, or bound by a trigger lock or similar device.¹⁶⁰ Heller sought to enjoin the city from enforcing the registration ban, licensing requirement “insofar as it prohibited carrying within the home,” and the trigger lock requirement on handguns within the home.¹⁶¹ Heller argued that the Second Amendment protects an individual right to possess firearms and that the D.C. law amounted to a total ban on handguns.¹⁶² He also argued that the requirement to keep firearms nonfunctional within the home violated his Second Amendment rights.¹⁶³

Relying on history and tradition of the Second Amendment during the time of the Constitutional Convention,¹⁶⁴ the Court held that the Second Amendment protects an individual right to possess a firearm independent from the military, and traditional lawful uses of firearms, such as self-defense within the home.¹⁶⁵

¹⁵⁴ U.S. CONST. amend. II.

¹⁵⁵ *Second Amendment*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/second_amendment (last visited Feb. 28, 2020).

¹⁵⁶ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹⁵⁷ *Id.* at 574.

¹⁵⁸ *Id.* at 575.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 575-76.

¹⁶² *Id.* at 576.

¹⁶³ *Id.*

¹⁶⁴ *Second Amendment*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/second_amendment (last visited Feb. 28, 2020).

¹⁶⁵ *District of Columbia v. Heller*, 554 U.S. 570, 623-26 (2008).

Notwithstanding the proclamation of an important individual right, the Supreme Court stated after *Heller* that “[i]t is important to keep in mind that *Heller* . . . recognized that the right to keep and bear arms is not ‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’”¹⁶⁶ Since *Heller*, many questions have arisen regarding the reach of Second Amendment protection.¹⁶⁷ Despite the broad right defined in *Heller*, lower courts have shown a willingness to uphold regulations banning firearms on government property,¹⁶⁸ bans on juvenile possession of handguns,¹⁶⁹ and concealed carry permits.¹⁷⁰ Case law since *Heller* has reinforced the idea that gun safety laws are constitutional and necessary to protect other constitutional freedoms, such as safe assembly in public without fear of gun violence.¹⁷¹

2. The Gun Control Act of 1968

Following the assassination of President Kennedy in 1963, the general nationwide rise of crime in the mid-to-late 1960s, and then culminating with the assassinations of Martin Luther King, Jr. and Robert F. Kennedy, Congress was pushed to enact significant gun control legislation in the late 1960s.¹⁷² The result was the Gun Control Act of 1968 (GCA), and its passage marked the first significant gun control law in thirty years.¹⁷³

The GCA currently makes it “unlawful for any person who is an unlawful user of or addicted to any controlled substance” to possess any firearm or ammunition.¹⁷⁴ An “unlawful user” is not defined by the GCA.¹⁷⁵ As originally enacted in 1968, the GCA did not mention cannabis or any

¹⁶⁶ *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)).

¹⁶⁷ *Second Amendment*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/second_amendment (last visited Feb. 28, 2020).

¹⁶⁸ *See United States v. Dorosan*, 350 Fed. App’x. 874 (5th Cir. 2009) (unpublished per curiam decision).

¹⁶⁹ *See United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009).

¹⁷⁰ *See Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012).

¹⁷¹ *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742 (2010); *see also The Supreme Court & the Second Amendment*, GIFFORDS LAW CENTER, <https://lawcenter.giffords.org/gun-laws/the-second-amendment/the-supreme-court-the-second-amendment> (last visited Feb. 28, 2020).

¹⁷² Olivia B. Waxman, *How the Gun Control Act of 1968 Changed America’s Approach to Firearms – And What People Get Wrong About That History*, TIME (Oct. 25, 2018, 11:52 AM), <https://time.com/5429002/gun-control-act-history-1968/>.

¹⁷³ Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968); *see also* Federal Firearms Act of 1938, Pub. L. No. 75-785, 52 Stat. 1250 (1938) (providing that gun control measure required federal licensure to those selling firearms, and prohibited the sale of firearms to “prohibited persons,” such as convicted felons).

¹⁷⁴ Gun Control Act, 18 U.S.C. § 922(g)(3) (2018).

¹⁷⁵ *See* Gun Control Act, 18 U.S.C. § 921 (2018).

connection between using cannabis and owning a firearm.¹⁷⁶ Later that same year, an amendment was added to the GCA which prohibited “marihuana” users from owning firearms.¹⁷⁷ Interestingly, no other drug was mentioned in the GCA’s firearm prohibition section.¹⁷⁸ It would take almost twenty years before the GCA was amended to encompass unlawful users of or addicts to any controlled substance in its firearm prohibition scope.¹⁷⁹

The confusion over whether cannabis users in states that have legalized it for medicinal or recreational use are included within the scope of “unlawful users” has led lower courts to fashion their own test to define “unlawful user.”¹⁸⁰ The test examines the regularity of the drug use and the contemporaneous possession of the drug and firearm.¹⁸¹ The problem presented by this test is that it does not regard whether the use is in fact unlawful in that state.¹⁸² Therefore, it can be said that the test is really examining whether the possession or use of a drug is unlawful under the CSA.¹⁸³ Cannabis being listed as a Schedule I substance under the CSA prevents users from possessing firearms under the GCA.¹⁸⁴ This interpretation is consistent with the intent of the GCA.¹⁸⁵ The GCA hoped to make it more difficult for “drug addicts, muggers, deranged individuals,” and the like to procure firearms.¹⁸⁶ Congressional intent behind the restriction in the GCA was to “keep firearms out of the hands of presumptively risky people,” like drug users.¹⁸⁷ Therefore, despite state law deeming cannabis users lawful, they still federally forfeit their right to firearm possession.¹⁸⁸

3. *The ATF, Federal Firearms Dealer Sales, and ATF Form 4473*

When a United States citizen chooses to exercise her Second Amendment rights lawfully, she must purchase a gun in accordance with both

¹⁷⁶ See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 922(f), 82 Stat. 197, 231 (1968).

¹⁷⁷ See Gun Control Act of 1968, Pub. L. No. 90-618, § 922(g), 82 Stat. 1213, 1221 (1968) (prohibiting any “unlawful user of or addicted to marihuana” from possessing a firearm).

¹⁷⁸ *Id.*

¹⁷⁹ See Firearm Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449, 452 (1986).

¹⁸⁰ See *United States v. Purdy*, 264 F.3d 809, 812-13 (9th Cir. 2001); see also *United States v. Turnbull*, 349 F.3d 558, 561 (8th Cir. 2003); see also *United States v. Augustin*, 376 F.3d 135, 139 (3d Cir. 2004).

¹⁸¹ *Id.*

¹⁸² Robbins, *supra* note 106, at 1805.

¹⁸³ *Id.*

¹⁸⁴ 18 U.S.C. § 922(g)(3) (2018).

¹⁸⁵ 132 Cong. Rec. H1689-03 (1986).

¹⁸⁶ *Id.*

¹⁸⁷ Robbins, *supra* note 106, at 1803-04 (see particularly footnote 82 therein, specifically citing to *Willis v. Winters*, 253 P.3d 1058, 1065 (Or. 2011) (en banc) (note that the footnote incorrectly cites to the California Supreme Court, rather than the Oregon Supreme Court)).

¹⁸⁸ Gun Control Act, 18 U.S.C. § 922(g)(3) (2018).

federal and state guidelines.¹⁸⁹ Each state in the nation has its own guidelines on the sale of firearms that differ from one another.¹⁹⁰ However, all of these state guidelines must coincide with the federal GCA.¹⁹¹ The primary purpose of the GCA is to establish a system that regulates the interstate commerce of firearms by “strengthening Federal controls.”¹⁹² To this end, the GCA aimed to enhance state regulations and to encourage the states to better equip themselves with tough gun control laws.¹⁹³ With the passing of the GCA, the DOJ’s Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) was born.

The ATF’s mission is to “[protect] the public from crimes involving firearms, explosives, arson, and the diversion of alcohol and tobacco products; regulate[s] lawful commerce in firearms and explosives; and provide[s] worldwide support of law enforcement, public safety, and industry partners.”¹⁹⁴ Central to the ATF is the need to provide a federal system that oversees individual gun sales in the entirety of the country to ensure community safety.¹⁹⁵ The foundation of this nationwide regulatory scheme relies on ATF Form 4473.¹⁹⁶

When a citizen wishes to purchase a firearm from a federally licensed dealer, that purchaser must provide said dealer certain personal information, show photo identification, and pass a background check.¹⁹⁷ These requirements are outlined in Section 922(a)(6) of the GCA, creating a scheme to ensure that all firearms sales in the United States are legal.¹⁹⁸ To best execute this scheme, the ATF created ATF Form 4473.¹⁹⁹ ATF Form 4473 is titled “Firearms Transaction Record” and requires firearm purchasers to answer numerous questions regarding their personal information, criminal

¹⁸⁹ See generally, Giffords Law Center, *Licensing: State by State*, <https://lawcenter.giffords.org/gun-laws/state-law/50-state-summaries/licensing-state-by-state/> (last updated Nov. 8, 2019).

¹⁹⁰ *Id.*

¹⁹¹ See generally, U.S. CONST. art. VI, cl. 2; see also Gun Control Act, 18 U.S.C. § 921–931 (2018); see also Giffords Law Center, *Preemption of Local Laws*, <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/> (last visited Feb. 28, 2020).

¹⁹² See *Oefinger v. Zimmerman*, 601 F. Supp. 405, 412 (W.D. Pa. 1984), *aff’d*, 779 F.2d 43 (3d Cir. 1985), and *aff’d sub nom.* *Appeal of Oefinger*, 779 F.2d 43 (3d Cir. 1985) (holding that the Gun Control Act did not exclusively preempt state legislation pertaining to possession and dealing in firearms).

¹⁹³ *Id.*

¹⁹⁴ Bureau of Alcohol, Tobacco, Firearms and Explosives, *About ATF*, <https://www.atf.gov/about> (last visited May 27, 2020).

¹⁹⁵ *Id.*

¹⁹⁶ U.S. DEPT. OF JUSTICE, *Firearms Transaction Record*, <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.

¹⁹⁷ See *Abramski v. United States*, 573 U.S. 169, 171 (2014), (holding that defendant’s misstatement as to actual buyer, on Alcohol, Tobacco, Firearms and Explosives (ATF) Form 4473 for gun sales, constituted material misrepresentation); see also, 18 U.S.C. § 922(a)(6) (2018).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*; see also U.S. DEPT. OF JUSTICE, *Firearms Transaction Record*, <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.

record, and whether they have had a history of illegal substance use and/or abuse.²⁰⁰ The form's stated purpose is to give licensed firearm dealers a glimpse into the purchaser's life and to alert dealers in the event that a purchaser answers affirmatively to a "red flag" question on the form.²⁰¹ The form states:

The information and certification on this form are designed so that a person licensed under 18 U.S.C. § 923 may determine if he/she may lawfully sell or deliver a firearm to the person identified in Section A, and to alert the transferee/buyer of certain restrictions on the receipt and possession of firearms.²⁰²

Thus, Section 922 of the GCA gives licensed gun dealers great deference in determining whether the purchaser of the firearm is lawful.²⁰³ Firearm dealers are tasked with reviewing the purchaser's answers to determine whether the sale will be lawful both federally and in the state that the purchase is occurring.²⁰⁴ If a purchaser is determined to have lied on her ATF form 4473, the consequences of such untruthfulness can result in a felony and is punishable by up to ten years in prison and a \$250,000 fine.²⁰⁵

In his March 2018 directive, Attorney General Sessions instructed federal prosecutors to "enhance prosecution of cases involving false statements on ATF Form 4473," which he specifically referred to as "lie-and-try cases."²⁰⁶ However, according to a September 2018 U.S. Government Accountability Office (GAO) report, almost no prosecutions for lying on the ATF form followed.²⁰⁷

Pursuant to Section 923(g) of the GCA, firearm dealers must keep "records of importation, production, shipment, receipt, sale, or other disposition of firearms at his place of business for such period... as the Attorney General may... prescribe."²⁰⁸ Keeping record of each ATF Form

²⁰⁰ U.S. DEPT. OF JUSTICE, *Firearms Transaction Record*, <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ 18 U.S.C. § 924 (2018); *see also* Joe Davidson, *Lying to Buy a Gun? Don't Worry About the Feds*, WASH. POST (Sept. 11, 2018, 4:01 PM), <https://washingtonpost.com/politics/2018/09/11/lying-buy-gun-fear-not-feds/>.

²⁰⁶ Memorandum from Jefferson B. Sessions III, Attorney Gen., to U.S. Attorneys (Mar. 12, 2018), https://www.justice.gov/file/1042736/download?utm_medium=email&utm_source=govdelivery.

²⁰⁷ U.S. GEN. ACCOUNTING OFFICE, *GAO-18-440: Few Individuals Denied Firearms Purchases Are Prosecuted and ATF Should Assess Use of Warning Notices in Lieu of Prosecutions* (Sept. 2018), <https://www.gao.gov/assets/700/694290.pdf>; *see also* Jose Pagliery, *Gun Form Liars May Go on to Commit Gun Crimes, Internal ATF Research Suggest*, CNN (Dec. 21, 2018, 7:47 AM), <https://www.cnn.com/2018/12/21/us/gun-form-liars-atf-invs/index.html>.

²⁰⁸ 18 U.S.C. § 923(g) (2018).

4473 is included in these requirements.²⁰⁹ Interestingly enough, once an ATF Form 4473 is filled out and the sale of a firearm is complete, the forms are not sent to the ATF until twenty years after the purchase of the firearm.²¹⁰ Thus, firearm dealers must hold record of every ATF Form 4473 completed by firearm purchasers for at least twenty years after the purchase of the gun.²¹¹ During this twenty-year period however, the DOJ may inspect a firearm dealer's records annually to ensure that the ATF Forms 4473 are being properly stored, pursuant to the statute.²¹²

Dan Eldridge, a federally licensed Illinois firearms dealer and president of Illinois' firearms dealers' association, FFL-IL, affirms this process by stating that when an Illinois resident wishes to purchase a firearm she must first apply for and obtain a Firearm Owners Identification (FOID) card issued by the state of Illinois.²¹³ Upon receiving her FOID card and presenting it to a firearms dealer, the dealer will perform a background check through the ISP's "Firearm Transfer Inquiry Program," or "FTIP Portal."²¹⁴ Once the background check is completed, the purchaser will fill out an ATF Form 4473 and that form is to be kept at the gun shop for twenty years following the date of firearm transfer.²¹⁵ After the twenty-year period, the ATF Form 4473 is shipped to the local ATF office in the state, and then later shipped to the ATF's primary storage facility in Martinsburg, West Virginia.²¹⁶ Eldridge also confirms that the ATF performs an inspection of his records at least once per year.²¹⁷

One of the most important questions on ATF Form 4473 is question 11(e), which asks, "Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?"²¹⁸ Under the call of the question, a warning is indicated in bold letters reminding applicants that, "The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medical or recreational purposes in the state where you reside."²¹⁹

²⁰⁹ *Id.*

²¹⁰ U.S. DEPT. OF JUSTICE, *Firearms Transaction Record*, <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.

²¹¹ *Id.*

²¹² 18 U.S.C. § 923(g)(1)(C) (2018).

²¹³ Email from Dan Eldridge, President of Illinois' Firearms Dealers' Ass'n, to William Glasscock, J.D. Candidate, Southern Illinois University School of Law (Feb. 26, 2020, 18:35 CST) (on file with author).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ U.S. DEPT. OF JUSTICE, *Firearms Transaction Record*, <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.

²¹⁹ *Id.*

Because question 11(e) asks firearm purchasers to indicate whether they are users of federally illegal substances, a conflict is created between the federal scheduling of cannabis as an illegal drug and the states that have passed laws legalizing the medical or recreational use of cannabis, such as Illinois.²²⁰ Specifically, it raises the question of whether lawful users of cannabis in a state that has legalized medical or recreational consumption of the drug must forfeit their constitutional rights to purchase guns, and thus “bear arms.”

Illinois residents who wish to exercise their Second Amendment rights and their right to use cannabis pursuant to the CRTA or Illinois’ medical cannabis laws leave many residents puzzled.²²¹ Eldridge’s response when asked what advice he would give to an Illinois resident that requests to purchase a firearm but also legally consumes cannabis pursuant to Illinois law, answered, “What we would not do would be to encourage them to lie on a federal form. We do tell people that MMJ [medical marijuana] cards are disqualifying.”²²² Even though Eldridge explains to customers that having a medical cannabis card disqualifies them from purchasing a gun, he explains that his business never asks the purchaser whether they have a medical cannabis card.²²³ Instead, salesmen at Eldridge’s dealership, after reminding customers that medical cannabis cards disqualify them from purchasing a gun, will simply ask the purchaser whether they wish to continue with the sale.²²⁴

The ATF made clear the federal government’s position on continuing to enforce the federal ban on firearm possession by cannabis users via written policy in 2011.²²⁵ This policy, titled, “Open Letter to All Federal Firearms Licensees,” dictated to firearms sellers to refuse any transaction to a person they have “reasonable cause to believe” is a cannabis user, even if that person is in compliance with her state’s cannabis laws or answered “no” to question 11(e) of ATF Form 4473.²²⁶

The reasons for disqualifying medical cannabis cardholders are expressed in the 2016 Ninth Circuit case of *Wilson v. Lynch*.²²⁷ Wilson, the

²²⁰ *Id.*

²²¹ See Daniel, *supra* note 5.

²²² Email from Dan Eldridge, *President of Illinois’ Firearms Dealers’ Ass’n*, to William Glasscock, J.D. Candidate, Southern Illinois University School of Law (Feb. 26, 2020, 18:35 CST) (on file with author).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Open Letter from Arthur Herbert, Assistant Dir. of Enf’t Programs and Services, Bureau of Alcohol, Tobacco, Firearms & Explosives, to All Fed. Firearms Licensees (Sept. 21, 2011) (on file at <https://perma.cc/WJX6-FN6X>).

²²⁶ *Id.*

²²⁷ See *Wilson v. Lynch*, 835 F.3d 1083, 1092 (9th Cir. 2016) (holding that medical cannabis card holder’s Second Amendment rights were not infringed because she could still possess a firearm and

plaintiff in the case, was a lawful holder of a state medical cannabis registry card in Nevada. However, when Wilson attempted to purchase a firearm and began filling out the ATF Form 4473, the dealer instructed her to leave question 11(e) blank because he knew that Wilson was a medical cannabis card holder.²²⁸ As a result, the dealer refused to sell Wilson the firearm and she filed suit alleging a violation of her Second Amendment rights.²²⁹ The court held that Wilson's Second Amendment rights were not infringed upon because she had still the right to purchase a firearm if she forfeited her medical cannabis card.²³⁰

While *Wilson* gives insight into the issue between medical cannabis users and their Second Amendment rights, it fails to address the very real conflict between legal recreational users of cannabis who do not have medical cannabis cards and their Second Amendment rights. Some news outlets seem to suggest that if a legal recreational cannabis user were to lie on the ATF Form 4473, it would be unlikely that the person lying on the form would ever face any consequences by the federal government.²³¹ Joe Davidson, a columnist for the Washington Post writes, "If you lied to buy a firearm, fear not the feds. Your chances of being prosecuted by the Justice Department for falsifying information to illegally buy a gun are almost zero."²³² Davidson cites to the GAO study referenced above that showed only twelve out of 12,710 ATF investigations were actually prosecuted by the U.S. Attorney's Office.²³³

4. Illinois Gun Ownership in the Wake of the CRTA

To legally own a gun in Illinois, one must be issued a valid FOID card by the ISP.²³⁴ Illinois is one of only a handful of states that require residents to obtain a registration card to own a firearm.²³⁵ Part of the FOID card application approval process requires the applicant to not have used or been addicted to a controlled substance in the prior year.²³⁶

Following the passing of the CRTA, confusion at the state level arose concerning Illinois' regulation of gun ownership, especially in light of the

could acquire a new one if she gave up her cannabis card; this holding is also seen as upholding the ATF's Open Letter to All Federal Firearms Licensees, discussed *supra* note 225).

²²⁸ *Id.* at 1089.

²²⁹ *Id.*

²³⁰ *Id.* at 1093.

²³¹ Davidson, *supra* note 205.

²³² Davidson, *supra* note 205.

²³³ U.S. GEN. ACCOUNTING OFFICE, *supra* note 207; *see also*, Davidson, *supra* note 205.

²³⁴ *See generally*, Illinois Firearm Owners Identification Card Act, 430 ILCS 65/0.01–65/16-3 (2018).

²³⁵ Lauterbach, *supra* note 5; *see also* Giffords Law Center, *Licensing: State by State*, <https://lawcenter.giffords.org/gun-laws/state-law/50-state-summaries/licensing-state-by-state/> (last updated Dec. 16, 2019).

²³⁶ 430 ILL. COMP. STAT. 65/8(d) (2018); *see also* 430 ILL. COMP. STAT. 65/1.1 (2018).

CRTA’s lawful cannabis user designation and criminal immunities provisions.²³⁷ To address this confusion, the ISP issued a policy statement on December 31, 2019, stating that the agency would not revoke FOID cards based solely on a person’s legal use of cannabis.²³⁸ The ISP also stated the following: “Pursuant to both State and Federal law, a person who is addicted to or a habitual user of narcotics is not permitted to possess or use firearms.”²³⁹ A FOID card will therefore be revoked by the ISP where it is demonstrated that an individual is addicted to or is a habitual user of cannabis.²⁴⁰ The policy statement did not mention what parameters define “habitual” use of cannabis, or how the ISP would determine that a FOID card holder was a “habitual user.”²⁴¹

5. *Transfers of Firearms by Private Sellers – Federally and in Illinois*

On the federal front, an unlicensed person may transfer or sell a firearm to another unlicensed individual residing in the same state, provided she has no reason to believe the buyer is prohibited by law from possessing firearms, such as the buyer being a user of cannabis.²⁴² There is no federal recordkeeping requirement pertaining to the transfer of a gun between two unlicensed individuals.²⁴³ Therefore, ATF Form 4473 is not used for a private sale.²⁴⁴ A person cannot directly transfer a firearm to a person residing in another state, but can transfer the gun to an FFL located in the state of the

²³⁷ David Byrnes, *Legal Cannabis Raises Legal Questions on Illinois Gun Ownership*, PATCH (Dec. 31, 2019, 1:24 PM), <https://patch.com/illinois/across-il/legal-cannabis-raises-legal-questions-illinois-gun-ownership>.

²³⁸ Illinois State Police, FACEBOOK (Dec. 31, 2019) <https://www.facebook.com/IllinoisStatePolice/posts/2811094682275175> (“The Illinois State Police will not revoke Firearm’s Owner’s Identification Cards based solely on a person’s legal use of adult use cannabis. Pursuant to both State and Federal law, a person who is addicted to or a habitual user of narcotics is not permitted to possess or use firearms. Accordingly, the ISP will revoke FOID cards where it is demonstrated that an individual is addicted to or is a habitual user of cannabis. The ISP would also revoke or deny the FOID cards of those who violate certain provisions of the Cannabis Regulation and Tax Act. The use of cannabis is still considered to be illegal by the Federal government and the purchase of a firearm from a federally licensed firearms dealer is governed by Federal law.”); *see also*, Derek Barichello, *State Police: Recreational Marijuana Purchases Should Not Affect FOID Card Status*, NORTHWEST HERALD (Jan. 3, 2020), <https://www.nwherald.com/2020/01/01/state-police-recreational-marijuana-purchases-should-not-affect-foid-card-status/av8hbze/> (last visited April 28, 2020).

²³⁹ Illinois State Police, FACEBOOK (Dec. 31, 2019) <https://www.facebook.com/IllinoisStatePolice/posts/2811094682275175>

²⁴⁰ Staff Article, HEART OF ILL.-ABC (Dec. 31, 2019, 2:18 PM), <https://hoiabc.com/2019/12/31/isp-clarifies-foid-rules-regarding-legal-marijuana-use/>.

²⁴¹ Byrnes, *supra* note 237.

²⁴² U.S. DEPT. OF JUSTICE, *Best Practices: Transfers of Firearms by Private Sellers*, (2013) <https://www.atf.gov/file/58681/download>.

²⁴³ *Id.*

²⁴⁴ *Id.*

person receiving the firearm.²⁴⁵ Unlike a sale through an FFL, private sales are not subject to a background check on the federal side.²⁴⁶

In Illinois, the private gun transfer regime is more complicated. When an individual wants to transfer or sell a gun to another person, the seller must contact the ISP to determine if the buyer's FOID card is valid.²⁴⁷ In the case of a transfer at a gun show, the seller must request the ISP to conduct a background check, in addition to determining the validity of the buyer's FOID card.²⁴⁸ The private seller must keep a record of the transaction for ten years.²⁴⁹ These requirements are not applicable to gift transfers within a family.²⁵⁰

C. Leading Toward Confusion: A Brief Take on Preemption

As stated in the foregoing sections, a clear and intolerable conflict exists between federal and Illinois cannabis policy, especially in the context of attempting to exercise Second Amendment rights while also complying with Illinois' medical or recreational cannabis laws. The general legal thought regarding this conflict is that the Supremacy Clause in Article VI of the U.S. Constitution does not allow the states to legalize something that the federal government has banned, i.e., cannabis.²⁵¹

The conventional scholarly wisdom is that state medical and recreational cannabis laws have been preempted by the CSA under Article VI's preemption doctrine, specifically under the doctrine of conflict preemption.²⁵² One of the nation's leading preemption scholars has explained the doctrine as follows:

If state law purports to authorize something that federal law forbids or to penalize something that federal law gives people an unqualified right to do, then courts would have to choose between applying the federal rule and

²⁴⁵ *Id.*

²⁴⁶ *Id.*; see also Magan Crane, *How Background Checks and 'Red Flag' Gun Laws Work*, PBS (Aug. 22, 2019, 5:53 PM), <https://www.pbs.org/newshour/nation/how-background-checks-and-red-flag-gun-laws-work>.

²⁴⁷ 430 ILL. COMP. STAT. ANN. 65/3(a-10) (West 2019).

²⁴⁸ 430 ILL. COMP. STAT. ANN. 65/3(a-5) (West 2019).

²⁴⁹ 430 ILL. COMP. STAT. ANN. 65/3(b) (West 2019).

²⁵⁰ 430 ILL. COMP. STAT. ANN. 65/3(a-15)(2) (West 2019).

²⁵¹ Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1419, 1439 (2009)

²⁵² *Id.*; Dean M. Nickles, *Federalism and State Marijuana Legislation*, 91 NOTRE DAME L. REV. 1253, 1257-58 (2016). See also *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983) (discussing the three types of preemption).

applying the state rule, and the Supremacy Clause requires them to apply the federal rule.²⁵³

If medical or recreational cannabis laws, like those in Illinois, are judicially deemed preempted by the CSA, those cannabis laws would be null and void, and thus unenforceable.²⁵⁴

It has been argued that in the 2005 decision of *Gonzales v. Raich* the U.S. Supreme Court found that the CSA preempted California's medical cannabis law.²⁵⁵ Arguably, conflict preemption was the preemptive effect Congress intended the CSA to have.²⁵⁶ Given the large number of states that have passed medical or recreational use cannabis laws since the *Raich* decision, this continued imbalance strikes at the heart of the conflict and confusion at issue with the dueling federal and state cannabis laws. Furthermore, this conflict presents some very large ramifications for citizens attempting to exercise their Second Amendment right to purchase and own a firearm.

II. THE CONFUSION: ATTEMPTING TO RECONCILE THE CONFLICT BY ANALYZING THE LEGAL, PRACTICAL, AND CONSTITUTIONAL EFFECTS OF PURCHASING A FIREARM IN ILLINOIS AS A CANNABIS USER.

A. Can I Buy A Gun, or Can't I?

In Illinois, when someone wishes to avail themselves of legal cannabis – whether because it was prescribed by a physician or simply for recreational purposes – and simultaneously decides to purchase, and thus then own, a firearm, what are the legal and practical effects of doing, or attempting to do so? Is it illegal, and if so, will the person be prosecuted or even incarcerated? Will the person be denied the purchase of the firearm, as well as forfeit present and future ownership of firearms? These are some of the questions that are lending to the confusion in the wake of Illinois' cannabis legalization scheme in the face of a federal government that still lists cannabis as an

²⁵³ Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 261 (2000); *see also* Mikos, *supra*, note 251, at 1439-40.

²⁵⁴ *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992); *see also* Mikos, *supra*, note 251, at 1440.

²⁵⁵ 545 U.S. 1 (2005); *see also* Mikos, *supra* note 251, at footnote 73; *see also* U.S. v. Oakland Cannabis Buyers' Co-op, 532 U.S. 483 (2001); *see also* Brian W. Walsh, *Doing Violence to the Law: The Over-federalization of Crime*, 20 FED. SENT'G R. 295, n.16 (2008) (reporting that the *Raich* Court held that the CSA preempted California's medical cannabis law); *but see* Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 Iowa L. Rev. 1449, 1490 (2006) (arguing that *Raich* did not declare California's medical cannabis law invalid on preemption grounds).

²⁵⁶ Nickles, *supra* note 252, at 1258.

illegal narcotic, the use of which will ostensibly negate the right to purchase a firearm.

Two obvious and seemingly simple solutions to the conflict are as follows: use cannabis and forego gun ownership, or do not use cannabis and be able to buy a gun. There is a sound argument that one can simply “just say no” to cannabis, and gun rights will not be affected at all, even if one’s healthcare provider is prescribing cannabis for medicinal purposes.

But is it really that simple of a balancing act? The foregoing may sound like a practical plan for many people, but others may argue they have a right to use cannabis per Illinois law, and exercise their Second Amendment rights too. To many Americans, personal gun ownership is a bedrock of the Second Amendment that is enshrined in the Constitution. Should an Illinois citizen have to forego one right over another? And if a person’s physician is prescribing cannabis as medication, should that person have to forego his Second Amendment rights?

The next section discusses the legal and practical effects of exercising, or attempting to exercise, these rights simultaneously. The section thereafter will discuss the constitutional issues in play regarding this issue.

B. The Legal and Practical Effects of Purchasing a Gun in Illinois as a Medical or Recreational Cannabis User

As stated above, the straightforward, rudimentary legal and practical method to successfully comply with the conflicting state and federal laws at issue is to either choose cannabis, or choose to purchase a gun, but not both. But as stated, doing so may not be a plausible option for many Illinois residents. Further, the conflict discussed lends to mass confusion which creates a less-than-ideal landscape in a state that continues to be at the forefront of progressive cannabis policy.

This section will explore the legal and practical effects of attempting to purchase a firearm in Illinois if you use cannabis. The section will first discuss the legal and practical effects from the FFL versus private sale of firearms perspective, and then discuss the same effects when comparing medical and recreational cannabis users.

1. FFL Versus Private Gun Sales

When a cannabis user is buying a gun from an FFL and is truthful on ATF Form 4473, particularly question 11(e) regarding cannabis use, the

buyer will most certainly be denied the purchase.²⁵⁷ FFLs are instructed by the ATF to terminate the sale at that juncture.²⁵⁸ But what happens if the cannabis-using buyer lies on question 11(e)? Will that person truly face prosecution? What is expected of the FFL in terms of truth-seeking and being a human lie detector? And if that lie is detected by the FFL and the FFL continues the transaction, is the FFL at any risk? This section aims to address these questions.

The ATF specifically instructs FFLs to not provide information on required records, including Form 4473, that the FFL knows is false or that the FFL has reason to believe is false.²⁵⁹ FFL-Illinois President Dan Eldridge confirms this instruction.²⁶⁰

In the case of a cannabis user lying on Form 4473 as to his cannabis use, the FFL would have to know the response is a lie or have reason to believe it is a lie. Knowing the purchaser is lying could come from personal knowledge, e.g., the FFL personally knows the buyer and has firsthand knowledge that the person is a cannabis user.²⁶¹ What would encompass appropriate criteria for the FFL to have reason to believe the purchaser is lying? No true guidance exists in this aspect, so the rational explanation would be a reasonableness test.²⁶² One obvious example could include the buyer smelling of burnt cannabis.²⁶³ Otherwise, the “test” is highly subjective, and the judgment call rests with the FFL.

If an FFL knows or has reason to believe a gun purchaser is a cannabis user and proceeds with the sale, the FFL has committed a crime, and if convicted, would be a felon and therefore lose his license.²⁶⁴ Further, if the

²⁵⁷ Herbert, *supra* note 225; Email from Dan Eldridge, President of Illinois’ Firearms Dealers’ Ass’n, to William Glasscock, J.D. Candidate, Southern Illinois University School of Law (Feb. 26, 2020, 18:35 CST) (on file with author).

²⁵⁸ Herbert, *supra* note 225; Email from Dan Eldridge, President of Illinois’ Firearms Dealers’ Ass’n, to William Glasscock, J.D. Candidate, Southern Illinois University School of Law (Feb. 26, 2020, 18:35 CST) (on file with author).

²⁵⁹ U.S. DEPT. OF JUSTICE, *Federal Firearms Licensee Quick Reference & Best Practices Guide*, (2010), <https://www.jefferson-texas.com/wp-content/uploads/2013/12/ATF-FFL-QuickReference-and-Best-Practices-Guide1.pdf>.

²⁶⁰ Email from Dan Eldridge, President of Illinois’ Firearms Dealers’ Ass’n, to William Glasscock, J.D. Candidate, Southern Illinois University School of Law (Feb. 26, 2020, 18:35 CST) (on file with author).

²⁶¹ See, e.g., NATIONAL SHOOTING SPORTS FOUNDATION, *ATF Q&A: 4473 Forms*, (2017), <https://www.nssf.org/faq/atf-qa-4473-forms-12/> (discussing FFL instructions from the ATF where the FFL has reasonable cause to believe the transferee is disqualified by law to complete the firearm purchase).

²⁶² *Id.*

²⁶³ Email from Dan Eldridge, President of Illinois’ Firearms Dealers’ Ass’n, to William Glasscock, J.D. Candidate, Southern Illinois University School of Law (Feb. 26, 2020, 18:35 CST) (on file with author) (FFL-IL President Dan Eldridge stated that he refuses firearms sales to those who smell like they were recently smoking cannabis, just as he would also refuse a sale to someone who was visibly intoxicated and smelled of alcohol).

²⁶⁴ 18 U.S.C. § 922(d) (2018).

gun is later used in a crime, and the FFL knew or had reason to know that the buyer was a prohibited purchaser, the FFL could face civil liability.²⁶⁵

If the purchaser lies on Form 4473 regarding his cannabis use, as stated earlier, he opens himself up to criminal liability, facing up to ten years in prison and up to a \$250,000 fine.²⁶⁶ As discussed *supra*, the odds of that person being prosecuted though are virtually nil. The reasoning for the lack of prosecution for this perjury rests not just with limited DOJ resources, but with the practicality of proving the person is a cannabis user. The ATF would have to have some form of cannabis detection mechanism when reviewing or auditing the Forms 4473 (which is possible, as discussed below with medically prescribed cannabis users). Realistically, the FFL is going to rely on the word of the applicant barring any personal knowledge or overt warning signs indicating cannabis use.²⁶⁷ There is very little practical way for the FFL, and then later the ATF or the FBI, to prove deception on question 11(e) of Form 4473.²⁶⁸

The federal restriction on purchasing a gun as a cannabis user still applies to private firearm transactions, despite an ATF Form 4473 not being completed or kept on file.²⁶⁹ However, the practical effect of a prosecution in the realm of a private sale becomes even more unlikely. By law, the private seller should still not sell a gun to a person that the seller knows is a cannabis user, but without a federal reporting requirement, it is virtually impossible for federal law enforcement to know this. It should be noted that the same liability exposure discussed above regarding FFLs also applies to private transferors in cases where the transferred firearm is later used in a crime.²⁷⁰

²⁶⁵ Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7903 (2018).

²⁶⁶ 18 U.S.C. § 924 (2018).

²⁶⁷ See, e.g., Kevin Landers, *Dealers, Federal Officials, Rely on Honor System When It Comes to Buying a Gun*, WBNS-10TV (Aug. 13, 2019, 4:25 PM), <https://www.10tv.com/article/dealers-federal-officials-rely-honor-system-when-it-comes-buying-gun-2019-sep> (stating, “But neither the ATF nor the FBI has any way to prove if you’re telling the truth, it’s your word they rely on.”); Also, compare this scenario with lying about cannabis use on ATF Form 4473 with lying on another question where the deception is more easily provable, such as whether one is a felon or not. On June 5, 2019, a federal district judge in Memphis sentenced a defendant to ten years imprisonment for lying on ATF Form 4473 about his felon status. The defendant was a felon and lied about it on Form 4473 in attempt to purchase a firearm. A background check revealed the felony, and the ATF gave the defendant a chance to return the gun. He refused to do so and was convicted. See U.S. DEPT. OF JUSTICE, *Judge Sentences Convicted Felon for Making False Statements on Federal Background Check Form While Attempting to Purchase a Firearm*, Press Release, June 6, 2019, <https://www.atf.gov/news/pr/judge-sentences-convicted-felon-making-false-statements-federal-background-check-form-while>.

²⁶⁸ Landers, *supra* note 267.

²⁶⁹ 18 U.S.C. § 922(g) (2018); see also Herbert, *supra* note 225; see also Robert T. Luttrell, III, *Firearms or Marijuana? Federal Law Says You Can’t Have One with the Other*, MCAFEE & TAFT (Sept. 24, 2018), <https://www.mcafeetaft.com/firearms-or-marijuana-federal-law-says-you-cant-have-one-with-the-other/>.

²⁷⁰ Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7903 (2018).

2. Medical vs. Recreational Cannabis Users

While medical cannabis cardholders have the option of being untruthful on the ATF form, lying might not be in their best interests (even more so than recreational users). Perjury aside, this is because when a medical cannabis patient registers to receive her MMJ card, her information is placed in a database that flags the individual as a medical cannabis user.²⁷¹ Police agencies such as the ISP can see this information in their databases.²⁷² FFL-IL President Dan Eldridge, in his article titled, “Marijuana and Firearms Owner ID Cards in Illinois – What You Need to Know,” suggests that a registered Illinois medical cannabis card holder will be blocked from purchasing a gun for this reason.²⁷³ When an individual completes ATF Form 4473, he is consenting to a National Instant Criminal Background Check (NICS).²⁷⁴ When a medical cannabis cardholder undergoes this background check, it may show that the MMJ cardholder is disqualified from obtaining a firearm due to her medical cannabis card status.²⁷⁵

It could be argued that this restriction on medical cannabis patients might make sense due to the nature of their underlying conditions warranting the prescription of cannabis. The Compassionate Use of Medical Cannabis Program Act is the guiding force in regulating medical cannabis patients.²⁷⁶ Under the Act, a requirement for obtaining a medical cannabis card is that the applicant exhibits a “debilitating medical condition.”²⁷⁷ Conditions such as glaucoma, severe fibromyalgia, traumatic brain injury, seizures, post-traumatic stress disorder (PTSD) and terminal illnesses are some of the conditions that qualify a patient for a medical cannabis registry card.²⁷⁸ Arguably, these medical conditions are of a nature that might make it unsafe to purchase or own a firearm, regardless of the fact that the patient is a medical cannabis user. Thus, it could be argued that some medical cannabis patients are rightfully barred from purchasing a firearm in Illinois. However, this is a very controversial argument, and one not likely to gain any momentum in Illinois given the state’s ever-progressive policy shifts toward cannabis use. Further, a medicinal cannabis user could argue that his cannabis is being prescribed as a therapeutic medicine by a physician, and that he is

²⁷¹ 410 ILL. COMP. STAT. 130/70 (2018).

²⁷² 410 ILL. COMP. STAT. 130/145 (2018).

²⁷³ Dan Eldridge, *Marijuana and Firearms Owners ID Cards in Illinois - What You Need to Know*, THE TRUTH ABOUT GUNS (Jan. 8, 2020), <https://www.thetruthaboutguns.com/marijuana-and-firearms-owner-id-cards-in-illinois-what-you-need-to-know/>

²⁷⁴ 18 U.S.C. § 922(t)(1)(A) (2018); *see also* 27 C.F.R. § 478.102 (2019); *see also* Eldridge, *supra* note 273.

²⁷⁵ Eldridge, *supra* note 273.

²⁷⁶ 410 ILL. COMP. STAT. 130/1-999 (2018).

²⁷⁷ 410 ILL. COMP. STAT. 130/30(a)(6) (2018).

²⁷⁸ 410 ILL. COMP. STAT. 130/10(h) (2018).

being discriminated against by not being allowed to purchase a gun based on his medical condition that warranted the cannabis prescription.²⁷⁹

Recreational cannabis users, however, will not face this issue because the CRTA forbids the state from keeping any sort of database or records of recreational purchases.²⁸⁰ Section 10-20(a) of the CRTA states:

To protect personal privacy, the Department of Financial and Professional Regulation shall not require a purchaser to provide a dispensing organization with personal information other than government-issued identification to determine the purchaser's age, and a dispensing organization shall not obtain and record personal information about a purchaser without the purchaser's consent.²⁸¹

Because of this, recreational users do not have to worry about a background check disclosing that they have purchased cannabis from an Illinois dispensary, unlike medical cannabis patients. Knowing that their purchases have not been recorded, and that neither the ISP nor the federal government have access to the information, recreational cannabis users may have more of an incentive to be untruthful when filling out their ATF Forms 4473 if they want to exercise both rights.

Furthermore, as discussed above, neither medical nor recreational cannabis users must undergo a federal or Illinois background check when purchasing a gun via a private transfer unless that gun is purchased at a gun show, in which case the ISP would run a background check.²⁸² In that gun show purchase scenario in Illinois, the medical cannabis user could be flagged and thus denied the firearm.

It should be noted that the foregoing analysis is in absolutely no way advocating that anyone should ever lie, let alone commit perjury – a federal crime. In fact, the author unequivocally believes that no one should be untruthful when engaging in the purchase of a firearm. Certain realities exist however, and therefore were discussed.

C. Constitutional Issues When Purchasing a Gun in Illinois as a Medical or Recreational Cannabis User

Confusion is one by-product of the conflict between state and federal cannabis regulation, but equally concerning are the serious constitutional

²⁷⁹ *Contra* Wilson v. Lynch, 835 F.3d 1083 (9th Cir. 2016) (possibly refuting this argument entirely).

²⁸⁰ Eldridge, *supra* note 273.

²⁸¹ Cannabis Regulation and Tax Act, *supra* note 2, at § 10–20 (to be codified at 410 ILL. COMP. STAT. 705/10-20(a)).

²⁸² 430 ILL. COMP. STAT. 65/3(a-5) (2018); U.S. Dept. of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Best Practices: Transfers of Firearms by Private Sellers*, <https://www.atf.gov/file/58681/download>.

issues implicated by the incompatible scheme. The current conflict resurfaces some pre-existing issues and stirs up some new ones. Pre-existing issues that are central to the conflict at issue include cannabis's continued classification as a Schedule I substance under the CSA,²⁸³ thereby rendering a user of cannabis an unlawful user within the meaning of the GCA,²⁸⁴ resulting in the claims that lawful cannabis users have been deprived of the fundamental right to bear arms under the Second Amendment.²⁸⁵ Critics argue this result is unconstitutional because the denial of a cannabis user's right to bear arms is both over-inclusive and under-inclusive,²⁸⁶ and additionally, that the rationale for cannabis's continued placement as a Schedule I substance is based on outdated and invalid evidence.²⁸⁷

Another constitutional concern focuses on a foundational principle that the United States is built upon: federalism.²⁸⁸ The stark contrast between federal and state law has elicited mass confusion²⁸⁹ and presents unprecedented federalism issues.²⁹⁰ Not only do federal and state law stand in express disagreement, as discussed at length *supra*, but states have varying degrees of the legality of cannabis.²⁹¹ For example, some states retain complete bans on cannabis, others permit medical use only, while others allow recreational use, while the federal government stays with a consistent answer: no use of cannabis is lawful.²⁹² Although the DEA is the federal agency responsible for enforcing controlled substances in all states, it is the states which enforce the majority of drug crimes.²⁹³ The federal government's continued refusal to recognize any lawful use of cannabis in the face of Illinois' and other states' progressive decriminalization of

²⁸³ See 21 U.S.C. §§ 801–802 (2018).

²⁸⁴ See 18 U.S.C. § 922(g)(3) (2018).

²⁸⁵ *Heller*, 554 U.S. at 630. *District of Columbia v. Heller*, 554 U.S. 630 (2008).

²⁸⁶ Robbins, *supra* note 106, at 1787.

²⁸⁷ Philip M. Boffey, *What Science Says About Marijuana*, N.Y. TIMES (Jul. 30, 2014), http://www.nytimes.com/2014/07/31/opinion/what-science-says-about-marijuana.html?_r=0.

²⁸⁸ U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people.”); see also *McCulloch v. Maryland*, 17 U.S. 316 (1810).

²⁸⁹ Robbins, *supra* note 106, at 1801-02.

²⁹⁰ Erwin Chemerinsky, *Introduction: Marijuana Laws and Federalism*, 58 B.C. L. Rev. 857, 859 (2017).

²⁹¹ See *Map of Marijuana Legality by State*, DISA, <https://disa.com/map-of-marijuana-legality-by-state> (last updated: Jan. 2020); see also *State-by-State Marijuana Policies*, CANNABIS IND., <https://thecannabisindustry.org/ncia-news-resources/state-by-state-policies/> (last visited: Feb. 26, 2020).

²⁹² 21 U.S.C. § 812 (b)(1)(A)-(C) (2018); see also, Robbins, *supra* note 106, at 1808; see also John Vigoritto, *Creating Constitutional Cannabis: An Individual State's Tenth Amendment Right to Legalize Marijuana*, 46 U. TOL. L. REV. 221, 224 (2014).

²⁹³ See Sacco, *supra* note 86; see also Vigoritto, *supra* note 292, at 242; see also Jessica Bulman-Pozen and Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1283-84 (2009).

cannabis draws in allegations that the federal government has deprived states of their ability to engage in novel social and economic experiments.²⁹⁴

Now, with the added concern of Illinois citizens having their firearm applications denied if they answer “yes” to whether they are “unlawful user[s] of, or addicted to, marijuana,”²⁹⁵ combined with the federally licensed gun dealers’ fear of making the sale, federalism is undeniably affected. Two central concerns related to federalism implicated by the current conflict between federal law and Illinois law as it relates to cannabis regulation are the infringement of states’ freedom to exercise their legislative power to allow experimentation, and the anti-commandeering doctrine, which prohibits the federal government from compelling state actors to enforce federal laws. Personal views of federalism aside, the neutral take-away is that something must give way, because the conflicting schemes cannot continue to co-exist without significant issues, and more importantly, citizens deserve to understand the precise ramifications of exercising their “rights.”

1. Standard of Review for Second Amendment Challenges

In light of the GCA’s purpose to prevent crime and increase public safety by denying guns to presumptively risky users, in conjunction with states’ recognition of the medical benefits²⁹⁶ and lack of violent tendencies inherent in the use of recreational cannabis,²⁹⁷ the GCA is arguably both over- and under-inclusive. To understand the issue between the means and the ends, a brief overview of the standard of review applied to Second Amendment challenges is necessary.

The Second Amendment confers upon citizens the right to bear arms, but that right is not absolute.²⁹⁸ The landmark decision of *District of Columbia v. Heller*, discussed earlier, states that “[l]ike most rights, the right

²⁹⁴ *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) (“[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”); see also Denise C. Morgan & Rebecca E. Zietlow, *The New Party Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347, 1352-53 (2005); see also Vigoritto, *supra* note 292, at 246; see also Robbins, *supra* note 106, at 1813.

²⁹⁵ U.S. DEPT. OF JUSTICE, *Firearms Transaction Record*, <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.

²⁹⁶ Jeremy Berke and Skye Gould, *States Where Marijuana is Legal*, BUS. INSIDER (Jan. 1, 2020, 7:41 AM), <https://www.businessinsider.com/legal-marijuana-states-2018-1; Marijuana Laws by State in 2020: A Legal Weed Map and Short Guide to Regulation>, O. BERK (Aug. 1, 2019), <https://www.oberk.com/marijuanalawsbystatein2020>.

²⁹⁷ See, e.g., Trevor Bennett et al., *The Statistical Association Between Drug Misuse and Crime: A Meta-Analysis*, 13 *Aggression & Violent Behavior* 107 (2008).

²⁹⁸ See U.S. Const. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed”); see also *Heller*, 554 U.S. at 628 (deeming the core protection of the Second Amendment as ‘to the home, where the need for defense of self, family, and property is most acute’); see, e.g., 18 U.S.C. § 922(t) (2018) (limiting the right to those who can pass a background check).

secured by the Second Amendment is not unlimited.”²⁹⁹ Justice Scalia, writing for the majority, went on to state that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.”³⁰⁰ The *Heller* decision did not set out a standard of scrutiny to use in assessing gun regulations, but Justice Scalia expressed severe disagreement with Justice Breyer’s suggestion that the Court adopt a traditional level of scrutiny or adopt an interest-balancing approach.³⁰¹ However, the interest-balancing approach appears to be the test that most closely mirrors the test that the federal courts currently use to rule on Second Amendment challenges.³⁰²

The two-step test first asks whether the challenged law burdens conduct protected by the Second Amendment.³⁰³ If the court concludes in the affirmative, the inquiry proceeds to the second steps and asks whether the regulation in question passes constitutional muster under any appropriate level of scrutiny.³⁰⁴

The first step is not as straightforward as the question appears. Depending on the circuit, the question focuses on either the safe harbor set out in *Heller*,³⁰⁵ or whether the regulation is “longstanding” and presumptively lawful.³⁰⁶ If the circuit applies the latter as opposed to the former, and the answer is in the affirmative, then the inquiry ends.³⁰⁷

At step two, the standard of scrutiny is unclear. Most constitutional claims are given rational basis, intermediate scrutiny, or strict scrutiny,³⁰⁸ but *Heller* did not set forth a standard.³⁰⁹ The typical standard courts apply to Second Amendment challenges considers “the nature of the conduct being

²⁹⁹ *Heller*, 554 U.S. at 626.

³⁰⁰ *Id.* at 626-27.

³⁰¹ *Id.* at 634.

³⁰² See *Powell v. Tompkins*, 783 F.3d 332, 347-48 (1st Cir. 2015) (compiling cases from all federal circuit courts, except for the Eleventh Circuit). The Eleventh Circuit has now adopted the framework as well. See *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng’rs*, 788 F.3d 1318, 1324 (11th Cir. 2015).

³⁰³ *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013) (citing *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)); see also, *United States v. Jiminez*, 895 F.3d 228, 232 (2d Cir. 2018).

³⁰⁴ *GeorgiaCarry.Org, Inc.* 788 F.3d at 1324.

³⁰⁵ *Heller*, 554 U.S. at 626.

³⁰⁶ See Jordan E. Pratt, *A First Amendment-Inspired Approach to Heller’s Schools and Government Buildings*, 92 NEB. L. REV. 537, 562 (2014) (“While most of the federal circuits have settled on a bifurcated scope-scrutiny framework for dealing with Second Amendment challenges, they disagree on where to place *Heller*’s ‘presumptively lawful regulatory measures’ on that framework. Some circuits treat them as categorical exceptions that either presumptively or conclusively burden conduct that falls completely outside the scope of the Second Amendment”).

³⁰⁷ *Id.*

³⁰⁸ Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine*, 43 CONN. L. REV. 1059, 1076-90 (2011); see generally, *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

³⁰⁹ See *Heller*, 554 U.S. at 634 (noting that Justice Breyer, in dissent, “criticized [the majority] for declining to establish a level of scrutiny for evaluating Second Amendment restrictions”).

regulated and the degree to which the challenged law burdens the right.”³¹⁰ To illustrate, in light of *Heller*’s holding of the core right of self-defense, the Fourth Circuit distinguished between firearm possession in the home and possession outside of the home:

We assume that any law that would burden the “fundamental,” core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny. But, as we move outside the home, firearm rights have been more limited, because public safety interests often outweigh individual interests in self-defense.³¹¹

Several courts also consider whether the firearm restriction at issue only regulates “time, place, and manner,” and if so, then intermediate scrutiny, rather than the most stringent scrutiny, is applied.³¹²

2. Applying Scrutiny: Does Section 922(g)(3) of the GCA Pass Constitutional Muster?

The argument that Section 922(g)(3) of the GCA is over- and under-inclusive is based on the grounds that it encompasses the casual and medical use of cannabis, while failing to include those who are more likely to exercise violence.³¹³ Critics point to data that should relieve cannabis from its placement in the most restrictive category under the CSA: “The vast gap between antiquated federal law enforcement policies and the clear consensus of science that marijuana is far less harmful to human health than most other banned drugs and is less dangerous than the highly addictive but perfectly legal substances known as alcohol and tobacco.”³¹⁴ Additionally, “substances in Schedules II and III currently have accepted medical uses, despite also having a high potential for abuse and risk of developing dependence,” including cocaine, methamphetamine, and anabolic steroids.³¹⁵

The counterargument is that the Second Amendment is simply irrelevant because the core right only applies to “law-abiding” citizens, and

³¹⁰ *E.g.*, *Kolbe v. Hogan*, 813 F.3d 160, 179 (4th Cir. 2011); *Nat’l Rifle Ass’n of Am. v. ATF*, 700 F.3d 185, 195 (5th Cir. 2012).

³¹¹ *United States v. Masciandro*, 638 F.3d 458, 470 (4th Cir. 2010) (citing *Heller*, 554 U.S. at 625).

³¹² *United States v. Mazzeola*, 614 F.3d 85, 97 (3d Cir. 2010) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Courts often borrow from first amendment jurisprudence; when a law places a content-neutral, “time, place, and manner” restriction on public speech only intermediate scrutiny is warranted. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

³¹³ Robbins, *supra* note 106, at 1787.

³¹⁴ Boffey, *supra* note 287.

³¹⁵ Robbins, *supra* note 106, at 1791 (citing 21 C.F.R. §§ 1308.12-13 (2018) and 21 U.S.C. § 812(b)(4)-(5) (2018) (explaining that Schedule IV and V drugs have an: (a) “low potential for abuse” relative to drugs listed in Schedules I, II, and III; (b) “currently accepted medical use”; and (C) “limited [potential for] physical ... or psychological dependence”).

under the Supremacy Clause, federal law wins out, leaving challengers without a claim.³¹⁶ Further, even if a cannabis user has a *prima facie* Second Amendment challenge, Section 922(g)(3) of the GCA does not severely burden the individual's Second Amendment right because the user is not absolutely prohibited from possessing a firearm. Rather, the cannabis user is only prohibited from acquiring a new firearm, and even then, the prohibition is removed once she gives up her medical card or stops recreationally using cannabis.³¹⁷

3. Illinois: Pick a Right, Any Right, Just Don't Pick Cannabis and Guns Together...Maybe

Did Illinois really legalize cannabis? Ask a legal recreational user of cannabis who is seeking to purchase a gun, and the answer may be "I don't know" depending on her understanding and awareness of applicable Illinois law and the CSA.³¹⁸ Consider the following, as discussed earlier: Section 1-7 of the CRTA defines unlawful user as follows:

For the purposes of this Act and to clarify the legislative findings on the lawful use of cannabis, a person shall not be considered an unlawful user or addicted to narcotics solely as a result of his or her possession or use of cannabis or cannabis paraphernalia in accordance with this Act.³¹⁹

A plausible interpretation is that mere possession or use of cannabis is not enough to deem a person an unlawful user.³²⁰ Further, the Illinois law is straightforward as it relates to concerns of the federal government accessing personal information regarding recreational users of cannabis, stating that dispensaries are prohibited from disclosing *any personal information* of a purchaser:

³¹⁶ *Wilson v. Holder*, 7 F. Supp. 3d 1104, 1117 (D. Nev. 2014), *aff'd sub nom. Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016), and *cert. denied sub nom. Wilson v. Sessions*, 137 S.Ct. 1396 (2017).

³¹⁷ *See Wilson v. Lynch*, 835 F. 3d 1083, 1092 (9th Cir. 2016) (holding that medical cannabis card holder's second amendment rights were not infringed because she could still possess a firearm and could acquire a new one if she gave up her cannabis card.).

³¹⁸ Amanda Vinicky, *5 Myths About Legal Marijuana*, WTTW (Jan. 8, 2020, 9:08 PM), <https://news.wttw.com/2020/01/08/5-myths-about-legal-marijuana>.

³¹⁹ 2019 Ill. Legis. Serv. P.A. 101-593, § 1-7 (effective Dec. 4, 2019) (S.B. 1557) (West) (to be codified at 410 ILL. COMP. STAT. 705/1-7).

³²⁰ *But see* Chris Coffey, *What to Know: Legal Marijuana & Firearm Permits*, NBC CHICAGO (Jan. 8, 2020, 6:51 PM), <https://www.nbcchicago.com/news/local/what-to-know-legal-marijuana-firearm-permits/2198492/> (quoting Dan Eldridge, president of Federal Firearms Licensees of Illinois: "You should know that you are not a legal purchaser of a firearm in Illinois or in any state if you're using cannabis").

To *protect personal privacy*, the Department of Financial and Professional Regulation shall not require a purchaser to provide a dispensing organization with personal information *other than government-issued identification* to determine the purchaser's age, and a dispensing organization shall not obtain and record personal information about a purchaser without the purchaser's consent...*Any identifying or personal information of a purchaser obtained or received in accordance with this Section shall not be retained, used, shared or disclosed for any purpose except as authorized by this Act.*³²¹

The big issue is reconciling the seemingly straightforward Illinois law with question 11(e) on ATF Form 4473, which asks:

Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance. Warning: The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medical or recreational purposes in the state where you reside.³²²

Ironically, this question seems relatively straightforward: if you use cannabis, no matter the nature of the use, you are an unlawful user within the meaning of federal law.³²³ The blurry answer leads to serious federalism concerns.³²⁴

a. Illinois and Federal Cannabis Regulation: Direct Conflict or Mere Disagreement?

Based on the above comparison between the two laws, on the one hand, it is tempting to conclude that Illinois and Federal law are in direct conflict. The argument is evidenced by the fact that Section 922(g)(3) of the GCA operates to prohibit an individual from exercising the constitutional right to possess a firearm due to the individual's lawful use of cannabis.³²⁵ However, it is not that simple. Rather, the relationship between the federal ban on cannabis and Illinois's law is better characterized as "logically inconsistent," "a decision not to criminalize—or even to expressly decriminalize—conduct

³²¹ 2019 Ill. Legis. Serv. P.A. 101-593, § 1-7 (effective Dec. 4, 2019) (S.B. 1557) (West) (to be codified at 410 ILL. COMP. STAT. 705/1-7) (emphasis added).

³²² U.S. DEPT. OF JUSTICE, *Firearms Transaction Record*, <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download> (emphasis added).

³²³ See Coffey, *supra* note 320.

³²⁴ See TODD GARVEY, U.S. CONG. RESEARCH SERV., R42398, THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS 1 (2012).

³²⁵ Robbins, *supra* note 106, at 1820.

for purposes of the law within one sphere does nothing to alter the legality of that same conduct in the other sphere.”³²⁶ The CSA states:

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.³²⁷

The general trend among courts in interpreting the latter provision is that CSA will only preempt state law if it is “physically impossible” to comply with both state and federal law.³²⁸ Still, the argument remains that by allowing the federal government to interfere through the denial of firearms to lawful users of cannabis within the meaning of the Illinois statute through potential criminalization, the legislature is stripping the state of its authority to experiment with new policy, taking all meaning away from federalism.³²⁹

Whether a state has the goal of cultivating revenue, decreasing incarceration, or both, Congress’ continued across-the-board ban on any use of cannabis arguably hinders states in exercising their full capability in achieving their goal through the legalization of cannabis. Compliance with state law does not render a citizen immune to federal criminal prosecution under the CSA.³³⁰ Even though states cannot be forced to expend their resources to combat cannabis use, the federal government is free to expend its own.³³¹

Citizens who are aware of their status as “unlawful users” of a controlled substance within the meaning of CSA have more than enough reasons to be apprehensive when it comes to taking advantage of their state’s legalization of cannabis. Not only can they be criminally prosecuted under federal law and denied their right to a firearm, but they also run the risk of being denied federally assisted housing or losing their jobs.³³²

The result of this apprehension is to deprive states of their full ability to experiment in effort to achieve the best economic status and social environment for their citizens. The deprivation is not from Congress’ express

³²⁶ Garvey, *supra* note 324.

³²⁷ 21 U.S.C. § 903 (2018) (emphasis added).

³²⁸ See, e.g., *Emerald Steel Fabricators, Inc., v. Bureau of Labor and Industries*, 348 Ore. 159 (2010) (en banc); *but see County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798 (2008) (holding that a state law conflicts with the CSA only where it is impossible to comply with both the state and federal law.).

³²⁹ See TODD GARVEY & BRIAN T. YEH, U.S. CONG. RESEARCH SERV., R43034, STATE LEGALIZATION OF RECREATIONAL MARIJUANA: SELECTED LEGAL ISSUES 1 (2014).

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

denial of states' ability to legislate without regard to cannabis, but rather its continuing threat of possible ramifications of a citizen's exercise of an "apparent" state endowed right.

b. A Potential Run-In with the Anti-Commandeering Doctrine

The anti-commandeering doctrine is the consistently re-affirmed holding that state actors are not required to enforce federal acts or regulatory programs.³³³ This concept is derived from "the basic structure of government established under the Constitution."³³⁴ Justice O'Connor, writing for the majority in *New York v. United States*, stated "[I]n providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."³³⁵ In sum, Congress cannot force states to enact regulations or prohibit certain activities, Congress must legislate its own federal laws.³³⁶

The interplay between the state and federal governments as it relates to the sale of firearms to "legal" cannabis users under Illinois law is distinguishable from leading Supreme Court cases³³⁷ due to the fact that Congress has expressly criminalized cannabis through the CSA.³³⁸ For example, in *Murphy v. National Collegiate Athletic Association*, New Jersey sought to legalize sports gambling within certain places, including casinos and horseracing tracks, but a federal law, the Professional and Amateur Sports Protection Act (PASPA), made it unlawful for a state to authorize sports gambling schemes.³³⁹ PASPA was enacted in 1992, and its most important provision - at issue in *Murphy* - was the provision that makes it "unlawful" for a State or any of its subdivisions to "sponsor, operate, advertise, promote, license or authorize by law or compact... a lotter, sweepstakes, or other betting gambling, or wagering scheme based ... on competitive sporting events."³⁴⁰ In parallel, Section 3702(2) of PASPA makes it unlawful for a person to sponsor, operate, advertise, or promote"

³³³ *Prigg v. Pennsylvania*, 41 U.S. 539 (1842); *New York v. United States*, 595 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997); *Nat'l Fed. of Ind. Business v. Sebelius*, 567 U.S. 519 (2012); *Murphy v. Nat'l Collegiate Athletic Assoc.*, 138 S. Ct. 1461 (2018).

³³⁴ *Murphy v. Nat'l Collegiate Athletic Assoc.*, 138 S. Ct. 1461, 1476 (2018).

³³⁵ *New York v. United States*, 595 U.S. 144, 166 (1992).

³³⁶ Wilson, Elser, Maskowitz, Edelman, & Dicker, LLP, *U.S. Supreme Court Defends State Sovereignty via Anti-Commandeering Doctrine*, NAT'L LAW REV (May 29, 2018), <https://www.natlawreview.com/article/us-supreme-court-defends-state-sovereignty-anti-commandeering-doctrine>.

³³⁷ *Prigg*, 41 U.S. 539; *New York v. United States*, 595 U.S. 144 (1992); *Printz*, 521 U.S. 898; *Sebelius*, 567 U.S. 519; *Nat'l Collegiate Athletic Assoc.*, 138 S. Ct. 1461.

³³⁸ Controlled Substances Act, 21 U.S.C. § 812(c) (2018) (listing cannabis as a Schedule I drug).

³³⁹ See generally *Nat'l Collegiate Athletic Assoc.*, 138 S. Ct. 1461; Professional and Amateur Sports Protection Act of 1992, Pub. L. 102-559, 106 Stat. 4227.

³⁴⁰ *Nat'l Collegiate Athletic Assoc.*, 138 S. Ct. at 1470.

those same gambling schemes, but only if this is done “pursuant to the law or compact of a governmental entity.”³⁴¹ In 2011, New Jersey approved an amendment to its state constitution to make it lawful for the legislature to authorize sports gambling.³⁴² New Jersey declared it was not authorizing or licensing sports gambling but merely repealing the law prohibiting gambling.³⁴³ The Court found that the effect of the federal statute, PASPA, was to prohibit modification or repeal of state-law prohibitions on private conduct, and therefore constituted an impermissible commandeering of New Jersey’s regulatory power.³⁴⁴

Another illustration of a successful anti-commandeering challenge is *Printz v. United States*.³⁴⁵ At issue in *Printz* was the Brady Handgun Violence Prevention Act, which contained a provision that directed state law enforcement officers to participate in administration of a federal scheme that compelled law enforcement officials to perform background checks on prospective handgun purchasers.³⁴⁶ The Court found that this command violated basic principles of dual sovereignty and that Congress cannot simply circumvent prohibitions against commands of state legislation by instead demanding state officials to enforce federal law.³⁴⁷

In comparison, Congress has made the manufacture, distribution, and possession of cannabis unlawful at the federal level.³⁴⁸ Despite the across-the-board federal ban on any use of cannabis, states have been legalizing and decriminalizing it for over twenty years. This contrast only lays the foundation for explaining how the anti-commandeering issue arises now that Illinois has fully legalized cannabis. To fully understand the anti-commandeering issue as it relates to the issue of this article one must be cognizant of: 1) the previously stated contrast between federal and state law on the legality of cannabis; 2) the ATF form’s apparent denial of a firearm to an “unlawful user” of cannabis under federal law even though “lawful” within that state’s jurisdiction; and 3) the likelihood that without the “active cooperation of state law enforcement, the vast majority of offenses in legalization states... [would] go unprosecuted.”³⁴⁹

Briefly stated, Illinois has legalized both recreational and medicinal cannabis, but the ATF form to apply for a firearm explains to those state law abiding citizens that under federal law they are an unlawful user. Federal law

³⁴¹ *Id.*

³⁴² *Id.* at 1471.

³⁴³ *Id.* at 1472.

³⁴⁴ *Id.* at 1484-85.

³⁴⁵ *Printz*, 521 U.S. 898.

³⁴⁶ *Id.* at 902.

³⁴⁷ *Id.* at 935.

³⁴⁸ See Controlled Substances Act, 21 U.S.C. §§ 812(c) & 841(a) (2018).

³⁴⁹ Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 2-3 (2015).

does not have the resources to keep an eye out on every prospective firearm owner's possible cannabis use, their response on the ATF form, or the gun store owner's response to a "yes" answer to question 11(e) on ATF Form 4473.³⁵⁰ Regardless of the federal law enforcement's insufficient resources to enforce its own laws, Congress cannot compensate by forcing state officials to enforce federal drug laws.³⁵¹

Illinois's legalization of cannabis and the potential consequences to users as it relates to their ability to obtain a firearm is in its infancy stages, and therefore it remains to be seen as to how enforcement will take shape. Whether the anti-commandeering doctrine argument is successful or misplaced, it is worth recognizing as yet another constitutional issue that arises under the continuing conflict between federal and state cannabis laws.

III. EXPLORING PRACTICAL ALTERNATIVES TO THE CONFLICT.

The confusion created by conflicting federal and state regulation of cannabis is evident. Some practical considerations exist that could work to resolve the conflict. Those will be discussed in this section, as well as potential shortcomings thereto.

A. Regulating Cannabis Like Alcohol and Tobacco and Removing it From Schedule 1 of the CSA

The Regulate Marijuana Like Alcohol Act (RMLAA), H.R. 420, was introduced in the House on January 9, 2019, by Oregon Congressman Earl Blumenauer.³⁵² The purpose of the RMLAA is to provide for a new stance on cannabis regulation.³⁵³ The RMLAA proposes removing cannabis in any form from all schedules, as well as removing penalty provisions referring to cannabis under the CSA.³⁵⁴ The RMLAA also proposes changes to the Federal Alcohol Administration Act that would make it unlawful to import

³⁵⁰ See Mikos, *supra* note 251, at 1464-65; David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 633 (2013) (stating that as of 2008, state law enforcement agents outnumbered federal law enforcement agents 765,000 to 120,000).

³⁵¹ Coan, *supra* note 349, at 3.

³⁵² Regulate Marijuana Like Alcohol Act, H.R. Res. 420, 116th Cong. (2019) (note this is the same Congressman that is currently a co-sponsor of the amendment that withholds certain federal funding to the DOJ for cannabis enforcement, the Rohrabacher-Blumenauer amendment, discussed *supra* in this article); also note the bill number, "420," a tongue-in-cheek reference to April 20 (or 4/20), a date cannabis enthusiasts celebrate the plant "extra hard." See Tom Angell, *New Congressional Marijuana Bill Is Actually Numbered H.R. 420*, FORBES (Jan. 9, 2019, 4:22 PM), <https://www.forbes.com/sites/tomangell/2019/01/09/new-congressional-marijuana-bill-is-actually-numbered-h-r-420/#7edcb1d52e60>.

³⁵³ Regulate Marijuana Like Alcohol Act, H.R. Res. 420, 116th Cong. (2019)

³⁵⁴ *Id.*

cannabis into the U.S. or for any person importing to sell, offer or deliver for sale, contract to sell, or ship, imported cannabis.³⁵⁵ Likewise, unless issued a permit, it would be unlawful to cultivate, produce, manufacture, package, or warehouse cannabis, or to engage in resale.³⁵⁶ Violations of these provisions would result in criminal fines.³⁵⁷

The RMLAA proposes procedures for the issuance of cannabis permits, including who would be eligible for a permit, permit holder disqualification, revocation suspension and annulment, and types of applications and permits.³⁵⁸ The RMLAA also proposes the addition of cannabis to certain legal authorities relating to intoxicating liquors, including the Wilson Act, the Webb-Kenyon Act, and the Victims of Trafficking and Violence Protection Act of 2000.³⁵⁹ The Act would give the Food and Drug Administration (FDA) the same authority to regulate cannabis as the FDA has with alcohol.³⁶⁰ Functions relating to federal agency oversight of cannabis would be shifted from the DEA to the newly named “Bureau of Alcohol, Tobacco, Marijuana, Firearms and Explosives.”³⁶¹ Overall, the RMLAA would decriminalize cannabis at the federal level by removing it from the CSA and transfer enforcement away from the DEA and to the FDA and the ATF.³⁶²

Since being introduced in the House, the bill has since been referred to multiple committees, including the Committees on the Judiciary and on Energy and Commerce, Ways and Means, Natural resources, and Agriculture.³⁶³ The last actions seen were referrals to multiple subcommittees with the final move occurring in February 2019, where it was referred to Subcommittees on Conservation and Forestry.³⁶⁴

Therefore, the potential outcome of implementing a different regulatory scheme pertaining to cannabis remains unknown. However, legislation such as the RMLAA, as the name indicates, would allow the federal government to regulate cannabis like alcohol. Proponents argue the methods currently used by the alcohol and tobacco industries are suitable for cannabis regulation because they have demonstrated the ability of the federal and state

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ Regulate Marijuana Like Alcohol Act, H.R. Res. 420, subtitle C, § 221, 116th Cong. (2019); *see also* 21 C.F.R. § 328 (2019).

³⁶¹ Regulate Marijuana Like Alcohol Act, H.R. Res. 420, subtitle C, § 222, 116th Cong. (2019).

³⁶² Andrew Blake, *Regulate Marijuana Like Alcohol Act Reintroduced in the ‘Most Pro-Cannabis Congress in History,’* WASH. TIMES (Jan. 10, 2019), <https://www.washingtontimes.com/news/2019/jan/10/regulate-marijuana-alcohol-act-reintroduced-most-p/>.

³⁶³ Regulate Marijuana Like Alcohol Act, H.R. Res. 420, 116th Cong. (2019) (*see* <https://www.congress.gov/bill/116th-congress/house-bill/420/all-actions-without-amendments>).

³⁶⁴ *Id.*

governments to govern cohesively and achieve a state goal, contrary to the current way cannabis is being regulated.³⁶⁵ Implementing this policy would only be possible if cannabis is removed from the list of Schedule I drugs under the CSA. So long as cannabis is included on Schedule I, states are unable to create a more accommodating regulatory system like that pertaining to alcohol and tobacco.

B. Withholding Funding for Enforcement

As stated before, the Rohrabacher-Blumenauer Amendment was enacted to prohibit the DOJ from using appropriated funds to restrict state medical cannabis programs.³⁶⁶ The Ninth Circuit has interpreted the amendment to prohibit the DOJ from spending funds from relevant appropriations acts for the prosecution of those engaged in conduct complying with their state medical cannabis laws.³⁶⁷ The result of the amendment was a limit on the federal government's ability to enforce the federal cannabis prohibition by imposing spending restrictions on law enforcement activities.³⁶⁸ Following the initial amendment, Congress passed the Blumenauer-Norton amendment which expanded the initial restriction on DOJ appropriated funds to apply to state legalized recreational cannabis.³⁶⁹ While this amendment is effective in explaining how the federal government will refrain from enforcing its cannabis policies, this is not a practical long-term solution.

First, the Amendment leaves the solution to the mercy of congressional appropriations, which can be easily changed, and the confusion restored, upon changes in congressmen and presidents.³⁷⁰ Therefore, the Amendment doesn't serve as a practical long-term, permanent solution. Second, that long-term instability would have retroactive effects, making its seemingly clear current application ineffective. As stated by the Ninth Circuit in *U.S. v. McIntosh*, the Amendment "does not provide immunity from federal prosecution for federal marijuana offenses" because the current restriction on spending could easily be restored tomorrow or at any point, allowing the government to prosecute individuals who committed offenses while the government lacked funding.³⁷¹

³⁶⁵ Robbins, *supra* note 106, at 1784-85.

³⁶⁶ See footnotes 145-150 herein.

³⁶⁷ United States v. McIntosh, 833 F.3d 1163, 1178 (9th Cir. 2016).

³⁶⁸ Jeff Vanderslice, *Alive Again: The Two-Pronged Strategy for Federal Marijuana Policy Reform*, CATO INST. (June 28, 2019, 12:18 PM), <https://www.cato.org/blog/alive-again-two-pronged-strategy-federal-marijuana-policy-reform>.

³⁶⁹ *Id.*

³⁷⁰ See Waters, *supra* note 130, at 142.

³⁷¹ *McIntosh*, 833 F.3d at 1179; see also Michael H. Sampson and Zachary S. Roman, *Tenth Circuit Decision Clears the Way for Further Judicial Consideration of Application of Recently Re-Enacted*

Despite some of the shortcomings and long-term insecurity of an alternative like consistently re-enacting the Rohrabacher-Blumenauer/Rohrabacher-Norton Amendments, such an approach does achieve at least short-term alleviation of the conflict at issue.

C. The STATES Act

As stated earlier, the bi-partisan STATES Act would amend the CSA and prevent federal enforcement with those in compliance with their particular state's medical or recreational cannabis laws.³⁷² The STATES Act would allow the states to tailor their own cannabis regulations to their respective needs, thus making federal law only applicable in limited circumstances.³⁷³ The STATES Act would therefore eliminate much, if arguably not all, the conflict between Illinois' cannabis laws and federal cannabis laws.³⁷⁴

This bill seems to have the support of the President, and further has the support of Attorney General Barr.³⁷⁵ In addition to its large amount of bi-partisan support, the STATES Act has endorsements from such diverse organizations as the American Civil Liberties Union and the Koch brothers-funded Americans for Prosperity.³⁷⁶ Enacting the STATES Act thus may be a viable and popular alternative.

D. Cooperative Federalism

Another possible solution to the conflict could include a form of cooperative federalism, like the kind implemented with the Clean Water Act (CWA).³⁷⁷ Cooperative federalism has been defined as “a partnership between the States and the Federal Government, animated by a shared

Rohrabacher-Farr Amendment, REED SMITH (Dec. 27, 2019), <https://www.reedsmith.com/en/perspectives/2019/12/tenth-circuit-decision-clears-the-way-for-further-judicial-consideration>.

³⁷² S. 3032, 115th Congress (2d Sess. 2018).

³⁷³ *Id.*; see also Joshua M. Divine, *Statutory Federalism and Criminal Law*, 106 VA. L. REV. 127, 164 (2020).

³⁷⁴ See Marc Adesso, Pirjin Laser & Alex Mills, *An Overview of Industrial Hemp Law in the United States*, 22 U.D.C. L. REV. 85 (2019).

³⁷⁵ Wagner & Itkowitz *supra* note 145; Blair Miller, *AG Barr Indicates Support for STATES Act Marijuana Bill, Calls Current System 'Intolerable,'* DENVER CHANNEL (April 10, 2019, 3:05 PM), <https://www.thedenverchannel.com/news/politics/ag-william-barr-indicates-support-for-states-act-marijuana-bill-calls-current-system-intolerable>.

³⁷⁶ Sabrina Eaton, *Rep. Dave Joyce Introduces Bill That Would Let States Decide Their Own Marijuana Laws*, (June 7, 2018), https://www.cleveland.com/metro/2018/06/rep_dave_joyce_introduces_bill.html.

³⁷⁷ See Susan F. Mandiberg, *A Hybrid Approach to Marijuana Federalism*, 23 LEWIS & CLARK L. REV. 823 (2019).

objective.”³⁷⁸ Put another way, cooperative federalism “allows federal and state laws to solve problems jointly rather than conflict with each other.”³⁷⁹

With the CWA, states regulate but the federal government has discretion to step in if a state fails to comply with EPA mandates.³⁸⁰ If a similar approach were implemented for cannabis regulation, state law would govern within the legalized state rather than the CSA.³⁸¹ The CSA would “supplement state law only when states defer to federal law or fail to satisfy federal requirements.”³⁸²

Of course, there are many complex considerations with this type of hybrid enforcement policy. Such a system requires the federal government to approve state policies and would require those in the cannabis industry at the state level to obtain permits.³⁸³ Violation of such permits would expose individuals, corporations, partnerships, and state and local governments to administrative, civil and criminal enforcement.³⁸⁴ Similarly, the EPA requires regulated entities to comply with reporting requirements and enables the federal government to engage in administrative inspections and criminal searches, and gives authority to seek compliance orders, injunctions, and civil and criminal sanctions against state violators.³⁸⁵

Despite complexities in a cooperative federalism approach to cannabis regulation, state governments would be better equipped to adopt their policies without fear of federal violation. Similarly, those acting within the scope of applicable state law would not fear federal prosecution.³⁸⁶

E. Exercise Preemption

One seemingly obvious alternative would be for the federal government to attempt to exercise their preemption powers and simply declare state cannabis laws invalid.³⁸⁷ While no federal court opinion has addressed such

³⁷⁸ *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

³⁷⁹ Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 116 (2015).

³⁸⁰ Mandiberg, *supra* note 377, at 827.

³⁸¹ *Id.* at 827; *see also* Chemerinsky et al., *supra* note 379, at 119.

³⁸² Mandiberg, *supra* note 377, at 827.

³⁸³ *Id.* at 828.

³⁸⁴ *Id.*; *see also* 33 U.S.C. § 1319 (2018).

³⁸⁵ Mandiberg, *supra* note 377, at 828.; *see also* 33 U.S.C. § 1318(a)(B)(ii) (authorizing EPA to conduct inspections); 33 U.S.C. § 1319(a) (authorizing compliance orders); 33 U.S.C. § 1319(b) (authorizing civil actions for injunctive relief); 33 U.S.C. § 1319(c) (authorizing criminal actions); 33 U.S.C. § 1319(d) (authorizing civil penalties); 33 U.S.C. § 1319(g) (authorizing administrative penalties).

³⁸⁶ Mandiberg, *supra* note 377, at 830.

³⁸⁷ *See, e.g.*, Letter from the Former Administrator of the Drug Enforcement Administration, to Eric Holder, Former Attorney Gen. (1973-2007) (Sept. 9, 2013), available at <https://books.google.com/books?id=QjkoKtov9xIC&pg=PA119&lpg=PA119&dq=Letter+from+the+Former+Administrator+of+the+Drug+Enforcement+Administration+September+9,+2013&source=bl&ots=0RVFT5ue>

a broad preemption argument, several state courts have ruled against government officials making similar sweeping preemption arguments against states with medical cannabis laws.³⁸⁸ The U.S. Supreme Court in fact denied certiorari when it was sought in such cases.³⁸⁹

Further, attempting such a broad preemption maneuver to invalidate Illinois' cannabis laws would not only be extremely unpopular in a state where legal cannabis is favored by over sixty percent of residents,³⁹⁰ but would likely see the state proceed to court to defend its legal cannabis regimes, possibly on an anti-commandeering challenge.³⁹¹ However, even if states like Illinois were successful in such a hypothetical challenge, it would not change the fact that cannabis is still illegal federally and thus could still be enforced by federal law enforcement. Thus, the conflict would technically remain. Regardless, such a bold preemption move by the federal government would indicate where it truly stands on this conflict.

CONCLUSION

Illinois' cannabis laws are in direct conflict with federal law, and this conflict creates "debilitating instability and uncertainty," particularly when an Illinois resident simultaneously wishes to avail herself of the state's cannabis laws and her Second Amendment rights.³⁹²

yw&sig=ACfU3U3E7ZaPf8uaad0SbKiqOfhJR-X_cA&hl=en&sa=X&ved=2ahUKEwiYscPR14bpAhWKWM0KHX0IC-QQ6AEwAHoECAkQAQ#v=onepage&q=Letter%20from%20the%20Former%20Administrators%20of%20the%20Drug%20Enforcement%20Administration%20September%209%2C%202013&f=false. This was a letter sent from former DEA administrators to Attorney General Holder stating, *inter alia*, that states that passed recreational cannabis laws were in direct conflict with federal law and called on the Attorney General Holder to live up to his oath of office and challenge the state cannabis laws based on preemption grounds, *id*.

³⁸⁸ See, e.g., *Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 461, 481-83 (Cal. Ct. App. 2008), cert. denied, 129 S.Ct. 2380 (2009); *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355 (2007), cert. denied, 129 S.Ct. 623 (2008); see also Chemerinsky et al., *supra* note 379, at 101.

³⁸⁹ *Id*.

³⁹⁰ See, e.g., Joseph Bustos, *Poll Shows 84 Percent Think Illinois is on Wrong Track; 66 Percent Want Legal Weed*, BELLEVILLE NEWS DEMOCRAT (March 6, 2018), <https://www.bnd.com/news/local/article203697284.html>; GLOBAL STRATEGY GROUP ON BEHALF OF THINK BIG ILLINOIS, *Survey Findings: Illinois Voters' Support Legalizing Marijuana* (May 20, 2019), <https://localtvwgad.files.wordpress.com/2019/05/e238b-thinkbigpublicreleasememof05.11.195b35d.pdf>; SIU CARBONDALE PAUL SIMON PUBLIC POLICY INSTITUTE, *Illinoisans Keen on Marijuana Decriminalization, Legalization* (March 27, 2017), https://paulsimoninstitute.siu.edu/_common/documents/opinion-polling/simon-institute-poll/2017/march-27-psppi-simon-poll-marijuana.pdf; Tina Sfondeles, *Six in Ten Illinoisans Want Recreational Pot Treated 'Just Like Alcohol,' Poll Shows*, CHI. SUN TIMES (May 20, 2019, 2:47 PM), <https://chicago.suntimes.com/2019/5/20/18632868/illinois-recreational-pot-marijuana-poll>.

³⁹¹ See Chemerinsky et al., *supra* note 379, at 119.

³⁹² See Chemerinsky et al., *supra* note 379, at 119.

Illinois has shown a novel pattern of adapting to societal, medical, and criminal justice standards concerning governing cannabis and its use. Other states have done the same, and many more are moving in that direction. While both the Executive and Legislative branches have signaled varying degrees of mitigating the enforcement of cannabis in recent years, as long as cannabis is a Schedule I substance under the CSA, confusion will continue to mount as Illinois residents weigh which rights they must choose under this conflicting regime. Particularly, the right to purchase and thus own a gun is at the heart of this conflict.

It is apparent that this conflict exists and is not only causing much confusion, but it is signaling an unwillingness on the part of the federal government to at the very minimum work with states to develop some kind of solution. There are many alternatives that could alleviate this conflict and thus restore a semblance of federalism to this issue. Hopefully, something can be done soon at the federal level to end the intolerable conflict. The citizens of Illinois deserve it.

