

PUTTING IT BLUNTLY: THE CONTROLLED SUBSTANCES ACT PREEMPTS WORKERS' COMPENSATION LAWS THAT REQUIRE INSURERS AND SELF-INSURERS TO PAY FOR YOUR WEED

INTRODUCTION

An employer can often fire an employee for using marijuana legally under state law.¹ But, as of the time of this writing, in one jurisdiction, the same employer, through its insurer (collectively “employer”),² must pay for an employee’s use of medical marijuana to treat an injury compensable under the state workers’ compensation program.³ In other words, in some circumstances, an employer can be forced to supply a drug to some employees even though the use of the same drug led to the termination of other employees in a different context. This outcome is counterintuitive—especially from the employer’s perspective.

The status of medical marijuana laws and their relation to the federal scheme is complicated. The goal of this Article is to outline the prevailing arguments, note their pressure points, and recommend a course of action for the future. To meet this goal, this Article compares different affirmative medical marijuana requirements imposed by states. This comparison will be made by reference to two types of state-imposed requirements: (1) antidiscrimination provisions that prohibit employers from taking adverse employment actions against medical marijuana users based on their status as authorized users and (2) workers’ compensation laws that require

¹ See *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012) (finding the Michigan Medical Marijuana Act did not restrict private employer’s ability to terminate employees for testing positive for marijuana).

² Employers and their insurers will be referred to collectively in this Article as “employer” because, although separate, these entities often challenge medical marijuana workers’ compensation claims together. See *Lewis v. Am. Gen. Media*, 355 P.3d 850, 851 (N.M. Ct. App. 2015) (referring to an employer and its insurer “collectively”).

³ *Vialpando v. Ben’s Auto. Servs.*, 331 P.3d 975 (N.M. Ct. App. 2014) (affirming workers’ compensation judge’s order that an employer and its insurance carrier reimburse employee for costs associated with the purchase of medical marijuana treatment), *cert. denied*, 331 P.3d 924 (N.M. 2014); *Maez v. Riley Indus.*, 347 P.3d 732 (N.M. Ct. App. 2015) (holding medical marijuana constituted reasonable and necessary medical care that supported reimbursement under the New Mexico Workers’ Compensation Act); *Lewis*, 355 P.3d at 851 (holding “medical certification forms and notes of [the] Workers’ authorized health care provider were substantial evidence to support the [Workers’ Compensation Judge’s] conclusion that [the] Worker’s use of medical marijuana constitutes reasonable and necessary medical care”).

employers to reimburse the cost of medical marijuana treatment prescribed to an injured employee. Specifically, this Article argues that the federal regulatory scheme created by the Controlled Substances Act (CSA)⁴ should not preempt antidiscrimination provisions imposed by states that prohibit discrimination based on a workers' status as a medical marijuana user; however, a workers' compensation claim requiring the employer to reimburse the cost of medical marijuana should be preempted under the CSA.

This Article proceeds in three parts. Part I provides a brief background of medical marijuana regulation in the United States, noting its development and current status. Part II introduces the relationship between the federal CSA and various kinds of state medical marijuana laws, arguing that—unlike other medical marijuana laws that “authorize” the drug’s use—antidiscrimination provisions should not be preempted under current preemption doctrine. Part III continues the argument initially developed in Part II by drawing a comparison between antidiscrimination provisions, which *should not* be preempted, and certain workers’ compensation schemes, which *should* be preempted to the extent that they require an employer to reimburse the cost of an employee’s medical marijuana under the state workers’ compensation program. The Author then briefly offers closing remarks and recommendations for the future.

I. BACKGROUND

A. *Marijuana in the United States: A Brief History*

In their seminal article on the history of marijuana in the United States, Professors Bonnie and Whitebread explain that “once a spark of truth ignites the public opinion process, the authority of time will not stay the flames of controversy....[T]he fire may spread....So it has been with marijuana.”⁵

⁴ 21 U.S.C. § 801 (2012).

Marijuana was legal to both grow and consume for most of American history.⁶ In the early 1900s, however, states started legislatively restricting access to marijuana and other drugs.⁷ Between 1907, when California became the first state to outlaw marijuana,⁸ and 1931, twenty two states passed restrictions banning marijuana to various degrees.⁹ At the federal level, the Harrison Act of 1914¹⁰ was the legislative turning point “imposing a stamp of illegitimacy on most narcotics use.”¹¹ While the Harrison Act created a registration and tax mechanism designed to capture all of the importers, producers, and dealers of opium, cocaine, or their derivatives,¹² marijuana fell below the national public policy radar until the Marihuana Tax Act of 1937.¹³ The “uncontroversial” Marihuana Tax Act was “hastily drawn, heard, debated, and passed.”¹⁴ Interestingly, both proponents and opponents believed medical studies should be completed to test marijuana’s medical usefulness,¹⁵ but following “kneejerk responses uninformed by

⁵ Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 974 (1970).

⁶ See Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 748-51 (1998). In general, “[m]arijuana’s recorded use as medicine goes back nearly 5,000 years.” DEL. CODE ANN. tit. 16 § 4901A(a) (West, Westlaw through 80 Del. Laws 2016, ch. 243).

⁷ See Bonnie & Whitebread, *supra* note 5, at 1010 (describing marijuana restrictions before 1932).

⁸ Robert S. Goldsmith et al., *Medical Marijuana in the Workplace: Challenges and Management Options for Occupational Physicians*, *Journal of Occupational and Environmental Medicine*, May 2015, at 519, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4410963/pdf/joem-57-518.pdf>.

⁹ See Bonnie & Whitebread, *supra* note 5, at 1010.

¹⁰ Harrison Narcotics Act of 1914, Pub. L. No. 63-223, 38 Stat. 785, *repealed by* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801-971 (2012)).

¹¹ Bonnie & Whitebread, *supra* note 5, at 987.

¹² See *id.*

¹³ See *id.* at 1010.

¹⁴ *Id.* at 1062.

¹⁵ See Vitiello, *supra* note 6, at 749-51.

scientific study,”¹⁶ Congress followed the lead of the United States Commissioner of Narcotics, Harry J. Anslinger, who argued “[m]arijuana [was] an addictive drug which produce[d] in its users insanity, criminality, and death,” to effectively ban the drug.¹⁷ Even though the Marijuana Tax Act only prohibited “non-medicinal and unlicensed possession or sale of marijuana,”¹⁸ it “imposed such onerous registration and recordkeeping procedures on doctors and wholesale dealers...that it put an end to the market in medical cannabis.”¹⁹ Thirty years later, under the auspices of President Nixon’s “war on drugs,”²⁰ Congress adopted what is now the CSA, which lies at the center of most medical marijuana cases before courts.²¹

B. *The Revolution: Increasing Acceptance and Current Issues*

Like Dr. Sanjay Gupta,²² “I see signs of revolution everywhere.”²³ While only 12 percent of Americans approved of marijuana use in 1969, today that number has increased to 58 percent supporting marijuana legalization in general²⁴ and 77 percent supporting the drug’s medicinal

¹⁶ Bonnie & Whitebread, *supra* note 5, at 1010.

¹⁷ See Vitiello, *supra* note 6, at 749.

¹⁸ JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS 25 (2001).

¹⁹ Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen’s Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673, 686 (2009).

²⁰ See *id.* at 752.

²¹ Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified at 21 U.S.C. § 801 (2012)).

²² Dr. Sanjay Gupta, a practicing neurosurgeon, is an “Emmy ®-award winning chief medical correspondent for CNN.” Dr. Sanjay Gupta, *Full Biography*, CNN, <http://www.cnn.com/profiles/sanjay-gupta-profile#about> (last visited May 5, 2016).

²³ Dr. Sanjay Gupta, *Dr. Sanjay Gupta: It’s Time for a Medical Marijuana Revolution*, CNN (April 20, 2015), <http://www.cnn.com/2015/04/16/opinions/medical-marijuana-revolution-sanjay-gupta/> (noting the increasing approval for medical marijuana).

²⁴ See Jeffrey M. Jones, *In U.S., 58% Back Legal Marijuana Use*, GALLUP (Oct. 21, 2015), <http://www.gallup.com/poll/186260/back-legal-marijuana.aspx>.

use.²⁵ People from all avenues of life are joining the political melee: some are medical marijuana users; some are activists; and others are both. People like Irvin Henry Rosenfeld, a stockbroker and advocate claiming to be one of a few medical marijuana users smoking 12 marijuana cigarettes every day under the auspices of a federal prescription, are rare.²⁶ But others, like the one million medical marijuana users throughout the United States, are much more common.²⁷ Labor organizations have endorsed medical marijuana legislation,²⁸ and even congressional representatives have been more involved in recent years.²⁹ Some Members of Congress, noting support for medical marijuana legalization dating back to 1997, are urging for medicinal legalization, especially for injured soldiers.³⁰ At least one GOP congressman openly admitted that he turned to “medical marijuana to help deal with arthritis pain” while in office.³¹

Amidst the tumultuous political climate lies “one of the most important federalism conflicts in a generation.”³² This is especially true in the context of labor and employment law.

²⁵ See *Majority Now Supports Legalizing Marijuana*, PEW RESEARCH CENTER (April 4, 2013), <http://www.people-press.org/2013/04/04/majority-now-supports-legalizing-marijuana/>.

²⁶ See *Conant v. Walters*, 309 F.3d 629, 649 (9th Cir. 2002) (Kozinski, J., concurring). See also Meghan McRoberts, *Irvin Rosenfeld: Ft. Lauderdale Man Smokes Medical Marijuana Legally for Decades*, WPTV (Oct. 22, 2014), <http://www.wptv.com/news/state/irvin-rosenfeld-ft-lauderdale-man-smokes-medical-marijuana-legally-for-decades>.

²⁷ See *Number of Legal Medical Marijuana Patients*, PROCON (Mar. 1, 2016), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=005889>.

²⁸ See, e.g., Laura Nahmias, *AFL-CIO Backs Medical Marijuana Bill*, POLITICO NEW YORK (June 11, 2014), <http://www.capitalnewyork.com/article/albany/2014/06/8546969/afl-cio-backs-medical-marijuana-bill> (detailing the AFL-CIO’s support of the Compassionate Care Act in New York).

²⁹ See Dr. Sanjay Gupta, *supra* note 23 (noting “politicians have a hard time winning elections on the issue of marijuana but less difficulty losing them”).

³⁰ See, e.g., Representative Dina Titus, *Puff, Puff, Pass...That Law: The Changing Legislative Environment of Medical Marijuana Policy*, 53 HARV. J. ON LEGIS. 39, 57-58 (2016) (arguing that “the federal government should follow the path set forth by many states in legalizing medical marijuana”).

³¹ Christopher Ingraham, *A GOP Congressman Says He Used Medical Marijuana While in Office*, WASHINGTON POST (May 25, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/05/25/a-gop-congressman-says-he-used-medical-marijuana-while-in-office/>.

³² Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 77 (2015).

Twenty five states, the District of Columbia, and Guam have legalized comprehensive marijuana programs for either medical or recreational purposes (or both), and 17 states allow “low THC, high cannabidiol (CBD)’ products for medical reasons in limited situations or as a legal defense.”³³ But marijuana is illegal under federal law.³⁴ States in recent years, noting a need to provide safe access to medication, have relied on their traditional police powers³⁵ to regulate health and safety within their borders to protect Americans whose only hope for living a normal life is a federally proscribed medicine deemed to have “no currently accepted medical use in treatment,” and no acceptable safe use—even “under medical supervision.”³⁶

Due to the drug’s illegal federal status, employers have had relatively little difficulty terminating medical marijuana-using employees who violate zero-tolerance drug-free workplace policies³⁷—even a lawful activities statute could not protect a worker from termination when he used his medical marijuana while off-duty and in compliance with the state medical marijuana law.³⁸ But employers should not rest on their zero-tolerance laurels. Thus far, in at least one jurisdiction (others could soon follow), an employer may find itself legally capable of firing one employee who tests positive for medical marijuana on the job, but the same employer might be required to reimburse the cost of paying for a different injured employee’s medical marijuana

³³ *State Medical Marijuana Laws*, NCSL (June 8, 2016), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

³⁴ 21 U.S.C. § 812 (2012).

³⁵ See Dean M. Nickles, Note, *Federalism and State Marijuana Legislation*, 91 NOTRE DAME L. REV. 1253, 1254-55 (2016) (noting that states have passed medical marijuana laws under their “police power,” which “protect[s] the health, safety, an welfare of their citizens”); *Gibbons v. Ogden*, 22 U.S. 1, 78 (1824) (police powers include “health laws of every description”).

³⁶ 21 U.S.C. § 812.

³⁷ See *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012) (finding the Michigan Medical Marijuana Act did not restrict private employer’s ability to terminate employees for testing positive for marijuana).

³⁸ See *Coats v. Dish Network, LLC*, 350 P.3d 849, 852-53 (Colo. 2015) (holding “‘lawful’ activity is that which complies with applicable ‘law,’ including state and federal law,” which deems Coats’ medical marijuana use illegal).

when it is prescribed for treatment of a “compensable injury arising out of and in the course of employment.”³⁹

Shortly after the New Mexico Court of Appeals held in *Vialpando v. Ben’s Automotive Services*⁴⁰ that the state Workers’ Compensation Act “authorizes the reimbursement for [injured worker’s] medical marijuana,”⁴¹ a new facet of the medical marijuana debate took center stage. Within days of *Vialpando*, management-side defense firm Jackson Lewis released an advisory warning “[e]mployers...[to]...take note and be cautious when opposing employee’s [workers’ compensation] claims under these state laws.”⁴² The advisory explained that “[t]his case is one of the first court rulings to highlight the fact that although medical marijuana remains illegal under federal law, the federal government’s current position is that it will not oppose state medical and recreational marijuana laws.”⁴³ Since the drafting of this advisory, the Federal Government has gone so far as to defund all Department of Justice activities that “prevent [medical marijuana states enumerated in the Consolidated and Further Continuing Appropriations Act] from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”⁴⁴

³⁹ ARK. CODE ANN. § 11-9-401(a) (West, Westlaw through Second Extraordinary Sess. 2016) (establishing liability for workers’ compensation claims in Arkansas).

⁴⁰ 331 P.3d 975 (N.M. Ct. App. 2014) (affirming workers’ compensation judge’s order that an employer and its insurance carrier reimburse employee for costs associated with the purchase of medical marijuana treatment).

⁴¹ *Id.* at 976.

⁴² Gerald C. Waters, Jr. & Kathryn J. Russo, *Court Affirms Workers’ Compensation Determination Requiring Employer to Reimburse Employee for Costs of Medical Marijuana*, DRUG & ALCOHOL ADVISOR (May 23, 2014), <http://www.lexology.com/library/detail.aspx?g=da8c75be-f48a-463e-a73f-3402d59b7026>.

⁴³ *Id.*

⁴⁴ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, §538, 128 Stat. 2130, 2117 (2015).

Within a year after *Vialpando*, the New Mexico Court of Appeals twice reaffirmed its position that medical marijuana is an authorized medical treatment under the state medical marijuana program. In *Maez v. Riley Industrial*,⁴⁵ the Court held that medical marijuana constituted reasonable and necessary medical care that supported reimbursement under the Workers' Compensation Act.⁴⁶ A few months later in *Lewis v. American General Media*,⁴⁷ citing *Vialpando* and *Maez*, the Court held that “medical certification forms and notes of [the] Worker’s authorized health care provider were substantial evidence to support the [Workers’ Compensation Judge’s] conclusion that [the] Worker’s use of medical marijuana constitutes reasonable and necessary medical care.”⁴⁸ Following the Court’s cue, the New Mexico Workers’ Compensation Administration established a reimbursement process for medical marijuana use in workers’ compensation cases.⁴⁹ Under the new rules, a worker will be reimbursed for up to “230 units (1 unit is approximately 1 gram dry weight equivalent) per calendar quarter” of medical marijuana, at a cost of \$12.02 per unit, when prescribed by an authorized healthcare professional—provided that only the worker is reimbursed for the out of pocket cost of medical cannabis, the worker retains an itemized receipt of the marijuana purchase, which was procured from a licensed producer, and the claimant does not seek reimbursement for drug paraphernalia as defined under the CSA.⁵⁰

⁴⁵ 347 P.3d 732 (N.M. Ct. App. 2015).

⁴⁶ *See id.* at 738.

⁴⁷ 355 P.3d 850 (N.M. Ct. App. 2015).

⁴⁸ *Id.* at 850.

⁴⁹ Aileen O’Catherine, *New Mexico Worker’ Compensation Administration Establishes Reimbursement Process for Medical Marijuana Use in Work Comp Cases*, Quarterly Bulletin, STATE OF NEW MEXICO WORKERS’ COMPENSATION ADMINISTRATION (Fall 2015), <http://www.workerscomp.state.nm.us/research/bulletins/fall2015.pdf>.

⁵⁰ *See* N.M. CODE R. § 11.4.7.9(D) (2016), available at <http://www.workerscomp.state.nm.us/pdf/rules/rule7.pdf>; *Fee Schedule and Billing Instructions*, NEW MEXICO WORKERS’ COMPENSATION ADMINISTRATION (Jan. 1, 2016),

In response to these sudden changes, “business owners [and insurers] concerned with violating federal law”⁵¹ panicked because Congress has condemned “marijuana as contraband for any purpose,”⁵² but under New Mexico’s Workers’ Compensation Act employers must reimburse injured workers’ medical marijuana treatment. As previously mentioned, courts throughout the country have held that private employers are free to terminate employees who test positive for marijuana,⁵³ and they are not required to accommodate medicinal marijuana use.⁵⁴ Prior to *Vialpando*, employers assumed that similar rules applied for the same reasons in the workers’ compensation context.⁵⁵ Following *Vialpando*, its progeny, and growing acceptance of medical marijuana in general,⁵⁶ “insurers are receiving requests to pay for medical marijuana,”⁵⁷ newspapers are reporting that “[m]edical marijuana poses challenges for the workers compensation industry,”⁵⁸ and, adding to the confusion, health care solutions and risk

<http://www.workerscomp.state.nm.us/pdf/NewMexicoPFS2016.pdf> (outlining medical cannabis fee schedule). See also 21 U.S.C. § 863(d) (2012) (defining “drug paraphernalia” as “any equipment, product, or material of any kind which is primarily intended or designed for...introducing marijuana...into the human body”).

⁵¹ Andy Lyman, *House Says No to Workers’ Comp for Medical Pot*, NM POLITICAL REPORT (Feb. 10, 2016), <http://nmpoliticalreport.com/31382/house-says-no-to-workers-comp-for-medical-pot-nmleg/>.

⁵² *Gonzales v. Raich*, 545 U.S. 1, 22, 27 (2005) (holding Congress can regulate “intrastate manufacture and possession of marijuana” under the CSA).

⁵³ *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012) (finding the Michigan Medical Marijuana Act did not restrict private employer’s ability to terminate employees for testing positive for marijuana).

⁵⁴ *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 204 (Cal. 2008) (finding state prosecution exemption law “does not require employers to accommodate the use of illegal drugs,” including marijuana).

⁵⁵ See *Vialpando v. Ben’s Auto. Servs.*, 331 P.3d 975, 976 (N.M. Ct. App. 2014) (employer attempting to argue that it would violate federal law for the court to order reimbursement of medical marijuana costs under the state Workers’ Compensation Act).

⁵⁶ Jeffrey M. Jones, *In U.S., 58% Back Legal Marijuana Use*, GALLUP (Oct. 21, 2015), <http://www.gallup.com/poll/186260/back-legal-marijuana.aspx>.

⁵⁷ Lori Lovgren, *Emerging Issues in Workers Compensation: Medical Marijuana*, NATIONAL COUNCIL ON COMPENSATION INSURANCE (2013), <http://www.casact.org/community/affiliates/case/0913/NCCI.pdf>.

⁵⁸ Stephanie Goldberb, *Medical Marijuana a Growing Workers Comp Challenge*, BUSINESS INSURANCE (July 9, 2015, 11:14 A.M.), <http://www.businessinsurance.com/article/20150709/NEWS08/150709846/1243>.

management firms are publishing reports claiming to analyze “the impact of medical marijuana” legalization while admitting the “lack of direction [from the Federal Government] is resulting in a range of disparate decisions about who is required to pay for medical marijuana in workers compensation cases.”⁵⁹

In an attempt to settle the issue, the House of the New Mexico Legislature, at the behest of insurance companies worried about violating federal law, signed off on a bill that would “bar insurance companies and employers from having to reimburse costs of workers’ compensation medical marijuana.”⁶⁰ Notably, New Mexico’s attempt to bar employees from receiving reimbursement is not unique. Alaska,⁶¹ Arizona,⁶² Delaware,⁶³ the District of Columbia,⁶⁴ Illinois,⁶⁵ Massachusetts,⁶⁶ Michigan,⁶⁷ Montana,⁶⁸ New Jersey,⁶⁹ Oregon,⁷⁰ Rhode Island,⁷¹

⁵⁹ See Jack Green & Patricia Ostrowski, *The Impact of Marijuana Legalization on Workers Compensation*, INTEGRO (June 2015), http://integrogroupp.com/uploads/white_papers/2015-06_Impact-Marijuana-Legalizationon-WC.pdf. See also Benjamin Link, *How Will the Changing Legal Status of Marijuana Impact Your Workers’ Compensation Claims?*, MODERN MEDICAL (2015), http://www.modernmedical.com/wp-content/uploads/2015/01/How_Will_the_Changing_Legal_Status_of_Marijuana_Impact_Your_WC_Claims.pdf.

⁶⁰ Lyman, *supra* note 51.

⁶¹ See ALASKA. STAT. ANN. § 17.37.040(c) (West, Westlaw through Reg. Sess. 2016).

⁶² See ARIZ. REV. STAT. ANN. § 36-2814(A)(1) (West, Westlaw through Second Reg. Sess. 2016).

⁶³ See DEL. CODE ANN. tit. 16 § 4907A(a)(1) (West, Westlaw through 80 Del. Laws 2016, ch. 243).

⁶⁴ See D.C. CODE § 7-1671.12 (West, Westlaw through May 11, 2016).

⁶⁵ See 410 ILL. COMP. STAT. ANN. 130/40(d) (West, Westlaw through 2016 Reg. Sess.).

⁶⁶ See MASS. ANN. LAWS ch. 94C App., § 7(B) (West, Westlaw through Ch. 115 of the 2016 2nd Annual Sess.).

⁶⁷ See MICH. COMP. LAWS ANN. § 333.26427(c)(1) (West, Westlaw through 2016 Reg. Sess.).

⁶⁸ See MONT. CODE ANN. § 39-71-407(6)(c) (West, Westlaw through 2015 Sess.).

⁶⁹ See N.J. STAT. ANN. § 24:6I-14 (West, Westlaw through L. 2016, c.2).

⁷⁰ See OR. REV. STAT. ANN. § 475B.413(1) (West, Westlaw through 2016 Reg. Sess.).

⁷¹ See R.I. GEN. LAWS ANN. § 21-28.6-7(b)(1) (West, Westlaw through ch. 32 of the Jan. 2016 Sess.).

Vermont,⁷² and Washington⁷³ all have statutory provisions that state employers cannot be compelled by workers' compensation laws to reimburse the cost of medical marijuana for injured workers. Workers, businesses, and insurers have a lot riding on whether reimbursements for medicinal marijuana can be required under state workers' compensation programs. If New Mexico's scheme survives, it could impact workers' compensation throughout the country.

II. THE BATTLEFRONT: FEDERAL, STATE, AND LOCAL LAWS

Part II introduces the relationship between the CSA and various kinds of state medical marijuana laws, arguing that—unlike other medical marijuana laws that “authorize” the drug's use—antidiscrimination provisions should not be preempted under current preemption doctrine.

A. *The Federal Scheme*

There are two federal laws that appear most often in medical marijuana cases: the Americans with Disabilities Act (ADA)⁷⁴ and the CSA.⁷⁵ Title I of the ADA, which applies to private employers, governmental entities, employment agencies, and labor unions,⁷⁶ prohibits discrimination against a “qualified individual on the basis of disability.”⁷⁷ Someone is a “qualified individual” so long as he or she, “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”⁷⁸ The ADA defines a disability as a “physical or mental impairment that substantially

⁷² See VT. STAT. ANN. tit. 18 § 4474c(b) (West, Westlaw through Law No. 74 of the Adjourned Sess. 2016).

⁷³ See WASH. REV. CODE ANN. § 69.51A.060(2) (West, Westlaw through Special Sess. and Laws 2016, chs. 1 & 2).

⁷⁴ 42 U.S.C. § 12101 (2012).

⁷⁵ 21 U.S.C. § 801 (2012).

⁷⁶ See 42 U.S.C. § 12111 (2012).

⁷⁷ § 12112(a).

⁷⁸ § 12111(8).

limits one or more major life activities,”⁷⁹ “a record of such an impairment,”⁸⁰ or “being regarded as having such an impairment.”⁸¹ Furthermore, “[d]iscrimination under the ADA encompasses not only adverse actions motivated by prejudice and fear of disabilities, but also includes failing to make reasonable accommodations for a plaintiff’s disabilities.”⁸² Employers must “make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an ‘undue hardship’ on the operation of the employer’s business.”⁸³

Undue hardship aside, there is an exception to the accommodation requirement for those plaintiffs engaged in the illegal use of drugs as defined by the CSA.⁸⁴ The CSA established five “schedules of controlled substances.”⁸⁵ It was enacted in 1970 to “conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances,” with particular emphasis on “prevent[ing] the diversion of drugs from legitimate to illicit channels.”⁸⁶ Marijuana is a Schedule I drug, which means it has “a high potential for abuse,” “no currently accepted medical use in treatment in the United States,” and no acceptable safe use—even “under medical

⁷⁹ § 12102(1)(A).

⁸⁰ § 12102(1)(B).

⁸¹ § 12102(1)(C).

⁸² *Talyor v. Phoenixville Sch. I Dist.*, 184 F.3d 296, 306 (3d Cir. 1999).

⁸³ *Facts About the Americans with Disabilities Act*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N (last modified Sept. 9, 2008), <https://www.eeoc.gov/facts/fs-ada.html>.

⁸⁴ § 12114 (providing that “a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs”); § 12210(d) (defining “illegal use of drugs” as “the possession or distribution of which is unlawful under the Controlled Substances Act”).

⁸⁵ 21 U.S.C. § 812(a) (2012).

⁸⁶ *Gonzales v. Raich*, 545 U.S. 1, 12-13 (2005).

supervision.”⁸⁷ Medical marijuana plaintiffs seeking protection under the ADA will lose their cases as a result of this “illegal use of drugs” exception.⁸⁸

B. *State Medical Marijuana Laws Protecting Authorized Users*

In contrast to the federal proscription of marijuana use, states have intervened to “ensure that [the] seriously ill...have the right to obtain and use marijuana for medical purposes.”⁸⁹ States have passed explicit antidiscrimination provisions to protect medical marijuana users in the workplace,⁹⁰ but whether these provisions are enforceable remains an open question due to their recent enactment. This Article asserts that these provisions are enforceable and should not be preempted by the CSA. But it is important to note that courts that have addressed the questions of termination and accommodation in states without explicit antidiscrimination protection have sided with employers.⁹¹ The main state laws relevant to this Article affecting medical marijuana users in the workplace come in four general forms: prosecution immunity provisions, non-accommodation provisions, lawful activities statutes, and antidiscrimination provisions.

1. *Prosecution Immunity Provisions*

California has a common prosecution immunity statute, which “ensure[s] that patients...who obtain and use marijuana for medical purposes...are not subject to criminal prosecution or sanction.”⁹² An alternative wording adopted by some states immunizes patients

⁸⁷ § 812(b).

⁸⁸ *See James v. City of Costa Mesa*, 700 F.3d 394, 397 (9th Cir. 2012) (recognizing “that the plaintiffs are gravely ill,” but holding “that the ADA defines ‘illegal drug use’ by reference to federal, rather than state, law, and federal law does not authorize the plaintiffs’ medical marijuana use”).

⁸⁹ CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West, Westlaw through 2016 Reg. Sess.).

⁹⁰ *See, e.g.*, DEL. CODE ANN. tit. 16, § 4905A(a)(3) (West, Westlaw through 80 Del. Laws 2016, ch. 243) (“[A]n employer may not discriminate against a person in hiring, termination, or any term or condition of employment”).

⁹¹ *See, e.g.*, *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 208 (Cal. 2008) (holding “plaintiff cannot state a cause of action...based on defendant’s refusal to accommodate his use of marijuana.”).

from being “subject to arrest, prosecution or penalty in any manner, or den[ied]...any right or privilege, including any civil penalty,” for using medical marijuana as permitted by state law.⁹³

Employee plaintiffs who have relied on this language have been unsuccessful when challenging their termination for medical marijuana use. In *Ross v. RagingWire Telecommunications, Inc.*,⁹⁴ plaintiff Gary Ross, who used medical marijuana to alleviate back pain, was terminated from his “lead systems administrator” position when he tested positive for marijuana.⁹⁵ He brought a claim under the California Fair Employment and Housing Act (FEHA), which prohibited hiring and firing based on “a disability or medical condition.”⁹⁶ Upholding the employer’s refusal to accommodate Mr. Ross, the California Supreme Court explained that there is “no reason to conclude the voters intended to speak so broadly, and in a context so far removed from the criminal law, as to require employers to accommodate marijuana use.”⁹⁷ Courts confronted with similarly worded statutes agree that medical marijuana statutes exempting users from criminal penalties are limited to providing the enumerated protections, which include immunity from prosecution, not accommodation.⁹⁸

2. *Non-Accommodation Provisions*

Many states have enacted non-accommodation provisions, most of which are worded broadly, which makes them vague and open to sweeping interpretation. Once again, California’s

⁹² CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(B) (West, Westlaw through 2016 Reg. Sess.).

⁹³ ARIZ. REV. STAT. ANN. § 36-2811(B) (West, Westlaw through Second Reg. Sess. 2016).

⁹⁴ 174 P.3d 200 (Cal. 2008).

⁹⁵ *Id.* at 203.

⁹⁶ *Id.* at 203-04.

⁹⁷ *Id.* at 207.

⁹⁸ *See, e.g.,* *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 436 (6th Cir. 2012) (upholding termination for medical marijuana use because “the statute never expressly refers to employment, nor does it require or imply the inclusion of private employment”).

statute is instructive: “[n]othing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment.”⁹⁹

A few states have interpreted this type of law very liberally. The Washington State law does not require accommodation “of any *on-site* medical use of cannabis.”¹⁰⁰ The Washington Supreme Court read this language to exclude off-site users from protection as well. In *Roe v. TeleTech Customer Care Management (Colorado) LLC*,¹⁰¹ the plaintiff was offered a position contingent on passing a drug screening, which she failed because of her medical marijuana.¹⁰² Although the legislature amended the state’s medical marijuana statute specifically to exclude from accommodation only “on-site” use, the Court held that “the statute’s explicit statement against an obligation to accommodate *on-site* use does not require reading into MUMA an implicit obligation to accommodate *off-site* medical marijuana use.”¹⁰³ Because of this interpretation, states seeking to protect their medical marijuana-using employees might need to be more explicit by enacting specific language mandating accommodation or protecting from discrimination. Although some states have taken this approach,¹⁰⁴ there is some authority that

⁹⁹ CAL. HEALTH & SAFETY CODE § 11362.785(a) (West, Westlaw through 2016 Reg. Sess.).

¹⁰⁰ WASH. REV. CODE ANN. § 69.51A.060(4) (West, Westlaw through June 30, 2016) (emphasis added), *amended by* WASH. REV. CODE ANN. § 69.51A.060(4) (West, Westlaw through Special Sess. and Laws 2016, chs. 1 & 2) (retaining “on-site” language).

¹⁰¹ 257 P.3d 586 (Wash. 2011).

¹⁰² *See Id.* at 589.

¹⁰³ *Id.* at 591 (emphasis added).

¹⁰⁴ *See* DEL. CODE ANN. tit. 16, § 4905A(a)(3) (West, Westlaw through 80 Del. Laws 2016, ch. 243) (stating an “employer may not discriminate against a person in hiring, termination, or any term or condition of employment...based on...(a)[t]he person’s status as a [medical marijuana] card holder; or (b) [a] registered qualifying patient’s positive drug test for marijuana components”). *See also* NEV. REV. STAT. ANN. § 453A.800(3) (West, Westlaw through Spec. Sess. 2015) (maintaining that “the employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana,” even though

holds affirmative statutory language will be preempted by the CSA,¹⁰⁵ which will be discussed below.¹⁰⁶

3. *Lawful Activities Statutes*

The distinction between accommodating on-site and “off-duty” medical marijuana use came to the fore in the summer of 2015. The Colorado Constitution maintains that employers are not required to accommodate medical marijuana use,¹⁰⁷ but a different state law proscribed terminating an employee “engaging in any lawful activity off the premises...during nonworking hours.”¹⁰⁸ In *Coats v. Dish Network, LLC*,¹⁰⁹ the question then became what was meant by “lawful activity.” Unlike in *Roe*, where the Washington court refused to *imply* a requirement to accommodate, the court here faced a *specific statutory requirement* that the employer respect an employee’s non-working time so long as the employee was not doing something illegal. Therefore, the Colorado Supreme Court had to determine whether a “lawful activity” referred to activity that is lawful under state or federal law (or both). Upholding the employer’s decision to terminate an employee that used medical marijuana off the premises and during non-work hours, the Court chose the latter interpretation: “Nothing in the language of the statute limits the term ‘lawful’ to state law. Instead, the term is used in its general unrestricted sense, indicating that a ‘lawful’ activity is that which complies with applicable ‘law,’ including state and federal law.”¹¹⁰

employers are not required to “modify the job or working conditions of a person who engages in the medical use of marijuana”).

¹⁰⁵ See *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 230 P.3d 518, 529 (Or. 2010) (finding because “[Oregon law] affirmatively authorizes the use of medical marijuana, federal law preempts that subsection”).

¹⁰⁶ See *infra* Part II.C.2.

¹⁰⁷ See COLO. CONST. ART. XVIII, § 14.

¹⁰⁸ COLO. REV. STAT. ANN. § 24-34-402.5 (West, Westlaw through Reg. Sess. 2016).

¹⁰⁹ 350 P.3d 849 (Colo. 2015).

Illinois only recently began dispensing medical marijuana on November 9, 2015.¹¹¹ The Illinois “lawful products” statute, similar to the Colorado law discussed above, prohibits employment discrimination “because the individual uses lawful products off the premises.”¹¹² It remains to be seen whether Illinois courts, in interpreting the Illinois statute, will follow in the footsteps of the Colorado Supreme Court in *Coats*.

4. *Antidiscrimination Provisions*

Given that state courts refuse to protect employees from termination because some medical marijuana laws only exempt the user from criminal punishment, other laws expressly state employers need not accommodate, and “lawful activities” statutes only cover activities that are legal under state and federal law, then the question is whether and to what extent more explicit protections are enforceable. What happens if a law specifically forbids an employer from discriminating based on a person’s status as a medical marijuana user or requires the employer to make reasonable accommodations for such users?¹¹³ This Article focuses on the former, but the ability to enforce either law hinges on whether they can be preempted by the CSA.

C. *Preemption: The CSA Does Not Preempt State-Imposed Antidiscrimination Provisions*

Under the Constitution’s Supremacy Clause,¹¹⁴ “state laws that ‘interfere with, or are contrary to’ federal law” will be invalidated.¹¹⁵ Issues of federal supremacy always begin “with the assumption that the historic police powers of the States [are] the clear and manifest purpose

¹¹⁰ *Id.* at 852.

¹¹¹ See *Illinois Growers Get Green Light to Ship Marijuana to Stores*, CHICAGO TRIBUNE, Nov. 7, 2015, <http://www.chicagotribune.com/news/local/breaking/ct-illinois-medical-marijuana-20151106-story.html>.

¹¹² 820 ILL. COMP. STAT. ANN. 55/5 (West, Westlaw through 2016 Reg. Sess.).

¹¹³ Delaware and Nevada, respectively, have enacted such laws. See *supra* note 104.

¹¹⁴ U.S. CONST. art. VI, cl. 2.

¹¹⁵ *Hillsborough Cnty., Florida v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985).

of Congress.”¹¹⁶ These historic police powers include “health laws of every description.”¹¹⁷ States have been asserting their police powers in an effort to regulate medical marijuana,¹¹⁸ and “[w]orkers’ compensation laws, which protect the economic well-being of a state’s citizens, have long been considered valid exercises of a state’s police powers.”¹¹⁹ Preemption is a purposive inquiry: “[t]he purpose of Congress is the ultimate touchstone in every preemption case.”¹²⁰

Congress can state its preemptive intent expressly¹²¹ or impliedly, either by preempting an entire field¹²² or creating an “actual” conflict between state and federal law.¹²³ Section 903 of the CSA states in no uncertain terms that the CSA should not be understood as “indicating an intent on the part of the Congress to occupy the field in which that provision operates..., unless there is a *positive conflict* between” the CSA and “State law so that the two cannot consistently stand together.”¹²⁴ Such “actual,” “positive” conflicts exist either “where it is ‘impossible...to comply with both state and federal requirements’ or where state law ‘stands as an obstacle to the

¹¹⁶ Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

¹¹⁷ Gibbons v. Ogden, 22 U.S. 1, 78 (1824).

¹¹⁸ COLO. REV. STAT. ANN. § 12-43.3-102 (West, Westlaw through Second Reg. Sess. 2016) (“[T]his article shall be deemed an exercise of the police powers of the state [of Colorado] for the protection of the economic and social welfare and health, peace, and morals of the people of this state.”). See generally Nickles, *supra* note 35 (surveying language utilized by state medical marijuana statutes).

¹¹⁹ Liberty Mut. Ins. Co. v. Whitehouse, 868 F. Supp. 425, 433 (D. R.I. 1994).

¹²⁰ Altria Group, Inc. v. Good, 555 U.S. 70, 76 (2008) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

¹²¹ Jones v. Rath Packing Co., 430 U.S. 519, 538 (1977) (demonstrating express preemption in the context of the Fair Packaging and Labeling Act).

¹²² Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (explaining that congress has preempted the field when “the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject”).

¹²³ See Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (describing “actual” conflicts).

¹²⁴ 21 U.S.C. § 903 (2012) (emphasis added).

accomplishment and execution of the full purposes and objectives of Congress.”¹²⁵ Since Congress disclaimed any attempt to preempt the field, the Supreme Court acknowledged Congress’s intent that the states play a role in regulating controlled substances.¹²⁶ Therefore, physical impossibility preemption and obstacle preemption are the only two ways a state law prohibiting discrimination against marijuana users based on their status can be preempted.

1. *Physical Impossibility Preemption*

It is not physically impossible to comply with both state law and the CSA unless a state were to *require* a citizen to do something “specifically forbidden by the CSA.”¹²⁷ Short of a requirement, it would be possible to comply with both state and federal law by abstaining from the federally proscribed activity. The CSA only forbids manufacturing, distributing, dispensing, or possessing a controlled substance with the intent to do one of these aforementioned acts.¹²⁸ Therefore, a state would have to require citizens specifically to manufacture, distribute, dispense, or possess marijuana with the intent to commit such acts for the CSA to preempt the state law under the physical impossibility prong.¹²⁹ Even courts that have preempted marijuana laws agree there is no physical impossibility preemption.¹³⁰ Therefore, if the CSA is to preempt an antidiscrimination medical marijuana law, it must be through obstacle preemption.

2. *Obstacle Preemption*

¹²⁵ *Id.*

¹²⁶ *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006) (“The CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its pre-emption provision.”).

¹²⁷ *See Chemerinsky et al.*, *supra* note 32, at 106 (noting that Justice Scalia has interpreted the CSA in this manner).

¹²⁸ 21 U.S.C. § 841 (2012).

¹²⁹ *See Chemerinsky et al.*, *supra* note 32, at 106.

¹³⁰ *See Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 528 (Or. 2010) (“[A] person can comply with both laws by refraining from any use of marijuana....”).

When addressing obstacle preemption in the context of medical marijuana, it is important to note that “[n]either the United States Supreme Court, nor any federal appellate court, nor the United States Department of Justice has yet opined on Congress’s intent to preempt state marijuana reforms.”¹³¹ In *Gonzales v. Raich*,¹³² the Supreme Court spoke in broad terms, claiming the “CSA designates marijuana as contraband for *any* purpose,”¹³³ but relying on this language to preempt an entire local scheme premised on traditional state sovereignty would be a rather slender reed upon which to rest one’s argument, because this conflates the ordinary and legal meanings of the word “obstacle” in conflict preemption.¹³⁴ “Implied preemption...does not justify a ‘freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.’”¹³⁵ While the inquiry is purposive, “preemption analysis is...a matter of precise statutory...construction rather than an exercise in free-form judicial policymaking.”¹³⁶ Furthermore, “[t]he case for federal pre-emption is particularly weak where Congress has indicated an awareness...of state law in a field of federal interest, and has nonetheless decided to ‘stand by both concepts and to tolerate whatever tension there [is] between them.’”¹³⁷

¹³¹ Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 7 (2013).

¹³² 545 U.S. 1 (2005).

¹³³ *Id.* at 22, 27 (holding Congress can regulate “intrastate manufacture and possession of marijuana” under the CSA).

¹³⁴ See Chemerinsky et al., *supra* note 32, at 111 (noting the confusion between “the common definition of ‘obstacle’ with the distinct legal concept developed in the Supremacy Clause jurisprudence governing federal preemption of state law”).

¹³⁵ *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (plurality opinion) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring)).

¹³⁶ *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 911 (2000) (Stevens, J., dissenting) (quoting 1 L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-28, p. 1177 (3d ed. 2000)) (internal quotation marks omitted).

¹³⁷ *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)).

The Tenth Amendment anti-commandeering rule prevents the “Federal Government [from] compell[ing] the States [to] implement, by legislation or executive action, federal regulatory programs.”¹³⁸ The “Constitution has never been understood to confer upon Congress the ability to require State[s] to govern according to Congress’ instructions.”¹³⁹ But there is a distinction between conscripting a state to do the Federal Government’s bidding, which is prohibited under *Printz v. United States*,¹⁴⁰ and preemption, which becomes more likely when state laws impose affirmative duties that obstruct or interfere with federal law.

For example, Professor Mikos explains that protecting tenants from eviction for growing medical marijuana would be preempted because such eviction would be enforced by the state.¹⁴¹ The three ways one can violate the CSA¹⁴² include (1) manufacturing, distributing, dispensing, or possessing controlled substances with the intent to commit such acts;¹⁴³ (2) attempting to conspire to commit such acts;¹⁴⁴ and (3) aiding and abetting the commission of such acts.¹⁴⁵ Any affirmative duty imposed by the state preventing the landowner from evicting a marijuana grower likely frustrates the purpose of the CSA, which specifically proscribes manufacturing and distributing controlled substances¹⁴⁶ and additionally forbids landowners from renting their

¹³⁸ *Printz v. United States*, 521 U.S. 898, 926 (1997).

¹³⁹ *New York v. United States*, 505 U.S. 144, 162 (1992).

¹⁴⁰ *See* 521 U.S. at 935 (holding federal government was unable to “conscript[] the State’s officers directly” to conduct background checks).

¹⁴¹ Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1456 (2009).

¹⁴² *See id.* at 1452 (describing ways to violate the CSA).

¹⁴³ *See* 21 U.S.C. § 841(a) (2012).

¹⁴⁴ *See* 21 U.S.C. § 846 (2012).

¹⁴⁵ *See* 18 U.S.C. § 2(a) (2012) (punishing principals who aid, abet, counsel, command, induce or procure offenses against the United States).

property to anyone who will use it for such purposes in violation of the CSA.¹⁴⁷ But the same argument does not work for placing a duty on employers to refrain from discriminating based on medical marijuana use. Admittedly, renting property to a medical marijuana user and prohibiting workplace discrimination based on status promote marijuana to some extent: tolerance of the drug in either context implies a certain degree of public acceptance. The difference on the issue of preemption lies in the level of generality one attributes to the definition of “obstacle” in obstacle preemption. The “CSA does not purport to regulate the employer-employee relationship,” and it “does not prohibit employers from hiring drug-using individuals” in general.¹⁴⁸ Thus, the “CSA does not make it illegal...to employ a medical marijuana user.”¹⁴⁹

The primary purpose of the CSA was preventing drug trafficking,¹⁵⁰ and the language of the statute demonstrates this goal as well. The only way the state law would realistically serve as an obstacle to the federal scheme would be by the state aiding and abetting a violation of the CSA by forcing the employer to act contrary to federal law.¹⁵¹ Aiding and abetting requires the government to prove “specific intent to facilitate the commission of a crime,” the “requisite intent of the underlying offense,” that the accused assisted or participated in the commission of the underlying offense, and that “someone committed the underlying substantive offense.”¹⁵² By

¹⁴⁶ See 21 U.S.C. § 841(a).

¹⁴⁷ See 21 U.S.C. § 856.

¹⁴⁸ Mikos, *supra* note 131, at 21-22.

¹⁴⁹ James v. City of Costa Mesa, 700 F.3d 394, 411 (9th Cir. 2012) (Berzon, J., concurring and dissenting in part).

¹⁵⁰ See Gonzales v. Raich, 545 U.S. 1, 12 (2005).

¹⁵¹ See Mikos, *supra* note 141, at 1457 (“It would be a stretch to say that a state aids and abets a violation of the CSA by...barring an employer from firing one of its employees simply because the employee was using marijuana outside of work.”).

¹⁵² See Conant v. Walters, 309 F.3d 629, 635 (9th Cir. 2002).

prohibiting employment discrimination, the state does not act with the specific intent to provide the means for an employee to acquire marijuana.

The most significant threat to this analysis is posed by *Emerald Steel Fabricators, Inc. v. Bureau of Labor Industries*.¹⁵³ In that case, the Bureau of Labor Industries (BOLI) argued the terminated employee’s medical marijuana use was legal under state law and not an “illegal use of drugs” under the state discrimination statute, thereby entitling the employee to a reasonable accommodation.¹⁵⁴ Oregon’s discrimination statute does not protect those using illegal drugs, but drug use authorized by state law does not constitute an “illegal use of drugs.”¹⁵⁵ For BOLI’s argument to prevail, the state medical marijuana statute, which affirmatively permitted a person to “engage” in “the medical use of marijuana,”¹⁵⁶ had to survive the employer’s preemption challenge. Reading “engage” as an affirmative authorization, the Oregon Supreme Court held that by “[a]ffirmatively authorizing” the use of medical marijuana, which “federal law prohibits[, the state law] stands as an obstacle to the implementation and execution of the full purposes and objectives” of the CSA.¹⁵⁷ Since the provision that authorized medical marijuana use was preempted, the plaintiff could not argue that his use was permissible under state law,¹⁵⁸ and the “employer was not required to accommodate the employee’s use of medical marijuana.”¹⁵⁹

¹⁵³ 230 P.3d 518 (Or. 2010).

¹⁵⁴ *See id.* at 524-25.

¹⁵⁵ *See id.* at 524-25.

¹⁵⁶ *Id.* at 525.

¹⁵⁷ *Id.* at 529.

¹⁵⁸ *See id.* at 529 (“Because [the Oregon statute authorizing medical marijuana use] was not enforceable when the employer discharged the employee, no enforceable state law either authorized employee’s use of marijuana or excluded its use from the ‘illegal use of drugs ’ [language of the statute].”).

¹⁵⁹ *Id.* at 520.

Emerald Steel relied on *Michigan Canners & Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board*¹⁶⁰ to support its holding. In *Michigan Canners*, a Michigan law that required agricultural producers to pay food producers' associations to serve as their *exclusive* bargaining agent.¹⁶¹ The Supreme Court preempted the Michigan law because a federal law prohibited food producers' associations from interfering with producers' independent marketplace participation.¹⁶² Generalizing the holding of *Michigan Canners*, the Oregon Court explained that just as "state law stood as an obstacle to the enforcement of federal law in *Michigan Canners*," because "the Michigan Act authorize[d] producers' associations to engage in the conduct the federal act forbids," so too here.¹⁶³ While this precedent may seem grim for states attempting to impose antidiscrimination statutes to protect medical marijuana users, there are two reasons why future courts might not rely on *Emerald Steel*'s reasoning.

First, "*Michigan Canners*...does not stand for the broad proposition that, if a state law permits something a federal law prohibits, it is preempted."¹⁶⁴ This is because the state law in *Michigan Canners* "permitted what federal law prohibited" and "required that certain federal guarantees be denied"¹⁶⁵ by forcing all producers, "regardless of whether they [had] chosen to become members of the association," to pay a fee and enter an agency shop agreement when federal law explicitly granted them the right to be free from such coercion.¹⁶⁶ The difference in the medical marijuana context is that antidiscrimination provisions, like exemptions from

¹⁶⁰ *Michigan Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461 (1984).

¹⁶¹ *Id.* at 466-69.

¹⁶² *See id.* at 477-78. *See also Emerald Steel Fabricators, Inc.*, 230 P.3d at 528-29.

¹⁶³ *Emerald Steel Fabricators, Inc.*, 230 P.3d at 529.

¹⁶⁴ *Ter Beek v. City of WY.*, 846 N.W.2d 531, 541 n.6 (Mich. 2014).

¹⁶⁵ *Id.*

¹⁶⁶ *See Michigan Canners & Freezers Ass'n, Inc.*, 467 U.S. at 467-68.

prosecution, do not impede the Federal Government from enforcing federal law. In *Michigan Canners*, the federal law granted protection from the exact activity Michigan state law imposed. But the CSA does not forbid a state from imposing antidiscrimination provisions on employers.

Second, since *Emerald Steel*, the Oregon Supreme Court has reevaluated the reach of its holding: “*Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as ‘affirmatively authorizing’ what federal law prohibits is preempted.”¹⁶⁷

The importance of identifying a true conflict can be made clear by reference to two local law preemption cases. The states’ success in passing permissive marijuana legislation is currently being undermined by municipalities that are enacting local ordinances reinstating marijuana prohibitions. In *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*,¹⁶⁸ the California Supreme Court held that a local ordinance deeming medical marijuana dispensaries a public nuisance was not preempted (and therefore does not serve as an obstacle to the state medical marijuana program) because the medical marijuana program’s “substantive provisions simply remove specified state law sanctions from certain marijuana activities.”¹⁶⁹ Under California law, people qualified to use medical marijuana under the statute may “collectively or cooperatively” “cultivate cannabis for medical purposes” without facing criminal sanctions.¹⁷⁰ City of Riverside enacted a local ordinance deeming land used for the purpose of running a marijuana dispensary a public nuisance. Under a loose preemption analysis, the local law would probably be preempted by the state law. But the Court explained that the state law does not preempt the local zoning restriction because “the sole effect of the [state]

¹⁶⁷ Willis v. Winters, 253 P.3d 1058, 1064 n.6 (Or. 2011).

¹⁶⁸ 300 P.3d 494 (Cal. 2013).

¹⁶⁹ *Id.* at 510.

¹⁷⁰ CAL. HEALTH & SAFETY CODE § 11362.775 (West, Westlaw through Reg. Sess. 2016).

statute’s substantive terms is to exempt specified medical marijuana activities from...state criminal and nuisance statutes. Those provisions do not mandate that local jurisdictions permit such activities.”¹⁷¹ The Court emphasized that it “cannot lightly assume the voters or the Legislature intended to impose a ‘one size fits all’ policy” on medical marijuana legislation.¹⁷²

The Supreme Court of Michigan, addressing the same issue under a similar state law, reached the opposite conclusion, holding the local ordinance created a more direct conflict. In *Ter Beek v. City of Wyoming*,¹⁷³ the Supreme Court of Michigan found that the state medical marijuana law preempted a local ordinance prohibiting any medical marijuana use “contrary to federal law, state law or local” law.¹⁷⁴ The Court distinguished *City of Riverside* because the local ordinance in *Ter Beek* was “not similarly circumscribed” to land use.¹⁷⁵ The Michigan “[o]rdinance directly conflicts with the [state medical marijuana law] by permitting what the [state law] expressly prohibits—the imposition of a ‘penalty in any manner’ on a registered qualifying patient” whose medicinal marijuana use falls within the state-law immunity.¹⁷⁶

The different outcomes between the two cases can also be harmonized by reference to *Michigan Cannery*, the case that the Oregon Supreme Court relied on and read broadly in *Emerald Steel*. Remember that in *Michigan Cannery*, federal law granted a right to agricultural producers to be free from coercion, and the state law obstructed the federal law’s purpose by mandating industry representation by an exclusive bargaining agent provided certain conditions

¹⁷¹ *City of Riverside*, 300 P.3d at 511.

¹⁷² *Id.* at 508.

¹⁷³ 846 N.W.2d 531 (Mich. 2014).

¹⁷⁴ *Id.* at 534.

¹⁷⁵ *Id.* at 543.

¹⁷⁶ *Id.* at 541.

were met. The state law threatened to take a right that the federal law guaranteed and, to that extent, it was preempted: the direct conflict obstructed the federal scheme. In much the same way, when the state law grants an explicit state-law immunity, local ordinances explicitly threatening the exercise of that immunity will be preempted, as demonstrated by *Ter Beek*.

After *Wyeth v. Levine*,¹⁷⁷ “[i]mplied obstacle preemption....requires two things: (1) an identification of the congressional purposes or objectives which support the federal law[,] and[] a rigorous assessment of whether Congress considered state law claims to pose an obstacle to the accomplishment of those objectives.”¹⁷⁸ The question is one of “direct and specific incompatibility, rather than on general notions concerning the underlying purpose of competing directives.”¹⁷⁹ Applying the logic of *Ter Beek*, antidiscrimination provisions protecting an employee’s status as a medical marijuana user should not be preempted by the CSA because state laws will not be preempted when they do not explicitly obstruct the federal law’s purpose; in this case, the federal purpose is preventing drug trafficking, not regulating the workplace.

III. PREEMPTING WORKERS’ COMPENSATION LAWS UNDER THE CSA

While, as analyzed above, antidiscrimination provisions should not be preempted under current preemption doctrine, Part III offers an example of a workplace law that *should* be preempted by the CSA: workers’ compensation laws that require an employer to reimburse the costs of medical marijuana to treat a workplace injury.

A. *Introduction to Workers’ Compensation: Access to Benefits*

Workers’ compensation is based on a “historical compact between workers and employers” whereby “workers gave up the right to sue employers in tort in exchange for a no-

¹⁷⁷ 555 U.S. 555 (2009).

¹⁷⁸ Mary J. Davis, *The Case Against Preemption: Vaccines & Uncertainty*, 8 IND. HEALTH L. REV. 291, 305 (2011).

¹⁷⁹ *James v. City of Costa Mesa*, 700 F.3d 394, 411 (9th Cir. 2012) (Berzon, J., concurring and dissenting in part).

fault system that afforded them a speedy remedy.”¹⁸⁰ The primary goals of workers’ compensation are to protect injured workers¹⁸¹ and incentivize workplace safety.¹⁸² While courts, in granting claimants benefits, emphasize the liberal construction and “humanitarian purposes” of their respective state compensation laws, workers’ compensation is an exclusive remedy that in some states will even bar intentional torts committed by an employer against an employee.¹⁸³

Most workers’ compensation laws require “[e]very employer [to] secure compensation [for] its employees and pay or provide compensation for their disability from compensable injury arising out of and in the course of employment without regard to fault as a cause of the injury.”¹⁸⁴ Although there is slight variation in the statutory language in some states,¹⁸⁵ there are two parts to this definition: (1) “arising out of” and (2) “in the course of employment.”¹⁸⁶

“Arising out of” is a term of art that ties the injury to the employee’s job. Courts use three doctrines in determining whether an injury arose out of employment: increased-risk, actual-risk, and positional-risk.¹⁸⁷ According to the increased-risk doctrine, an injury arises out of

¹⁸⁰ Edwin L. Felter, Jr. & Sarah A. Hubbard, *Erosion of the Exclusive Remedy in Workers’ Compensation*, 31-DEC COLO. LAW. 83, 83 (2002).

¹⁸¹ See *Nuss v. Estate of Andy Monghan*, 91 So.3d 90, 94 (Ala. Civ. App. 2012) (noting the “primary goal of workers’ compensation legislation is to aid the injured employee”).

¹⁸² See *Mason v. Georgia-Pacific Corp.*, 271 P.3d 381, 386 (Wash. Ct. App. 2012) (noting a “core purpose of the Act is to motivate employers to make workplaces safer”).

¹⁸³ See David B. Torrey, *100 Years of Pennsylvania Workers’ Compensation: History, The Current Scene, and Challenges Ahead*, 87 PA. B.A. Q. 6, 14 (2016).

¹⁸⁴ ARK. CODE ANN. § 11-9-401(a)(1) (West, Westlaw through Second Extraordinary Sess. 2016).

¹⁸⁵ West Virginia, for example, uses the phrase “resulting from” instead of “arising out of.” See W. VA. CODE ANN. § 23-4-1(a) (West, Westlaw through Reg. Sess. 2016).

¹⁸⁶ See *Spivey v. Novartis Seed*, 43 P.3d 788, 794 (Idaho 2002) (“[A]n employee incurs an injury in the course of employment[] ‘if the worker is doing the duty that the worker is employed to perform.’ An injury is considered to arise out of employment when a casual connection exists between the circumstances under which the work must be performed and the injury of which the claimant complains.”).

¹⁸⁷ See 1-3 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 3.01 (2015).

employment when there is a “showing that the employment in some specific way can be said to have increased the workman’s hazard.”¹⁸⁸ Under the actual-risk doctrine, the employee does not have to show that he or she was exposed to an *increased* risk, just that the injury is an *actual* risk associated with the job.¹⁸⁹ Under the positional-risk doctrine, which is rarely applied, an injury arises out of employment if “[b]ut for the employment, the claimant would not have been injured at that time and place.”¹⁹⁰ An injury takes place “in the course of employment” if “the injury occurred within the time and space boundaries of the employment, when the employee [was]...advancing the employer’s interest directly or indirectly.”¹⁹¹

Marijuana’s illegal federal status under the CSA permits employers to assert multiple defenses against a marijuana-using employee’s compensation claim; common defenses include use of illegal drugs, willful disregard of work rules (i.e., a zero-tolerance drug policy), and intoxication.¹⁹² Although these are stand-alone defenses, they quickly overlap with the more general “misconduct” defense under certain circumstances.¹⁹³ In this way, an employer who wishes to challenge an employee’s workers’ compensation claim will automatically have at least three defenses at its disposal. The employer will claim that the employee’s medicinal marijuana use was illegal under federal law, contrary to an established workplace policy, and led to intoxication that resulted in an injury not covered by workers’ compensation. The mere presence of the drug in the employee’s system will, in many states, be sufficient to trigger a rebuttable

¹⁸⁸ *Hensley v. Glass*, 597 P.2d 641, 645 (Kan. 1985).

¹⁸⁹ *See Smithfield Packing Co. v. Carlton*, 510 S.E.2d 740 742-43 (Va. 1999) (applying “actual risk test” to find trucker attacked by motorist had a claim arising out of employment and was entitled to workers’ compensation).

¹⁹⁰ *Fetzer v. North Dakota Workforce Safety & Ins.*, 815 N.W.2d 539, 541 (N.D. 2012) (concluding that the “but-for reasoning of the positional risk doctrine is incompatible” with the state workers’ compensation act).

¹⁹¹ *Pifer v. Single Source Transp.*, 69 S.W.3d 1, 4 (Ark. 2002) (internal quotation marks omitted).

¹⁹² *See generally* 3 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 32-37 (2015).

¹⁹³ *Id.*

presumption that the injury was the result of the marijuana use.¹⁹⁴ Since the presumption is rebuttable, employees have sometimes prevailed in such claims.¹⁹⁵

Before continuing to the next subsection, it is important to note the distinction between the worker who used marijuana at the time of the injury and the worker who requires medical marijuana to treat the harm that resulted from the workplace injury. In the former case, discussed immediately above, the medical marijuana-using employee who is injured on the job will often face a presumption of intoxication by the mere presence of illegal drugs (the marijuana) in his or her system, whereas the latter employee likely will not; the employer will have fewer defenses to assert in this latter scenario. For brevity, this Article focuses on the latter situation.

B. Preemption: Must Employers Reimburse Injured Workers' Medical Marijuana Costs?

Assume that an employee is injured on the job, files a workers' compensation claim, and ultimately survives the employer's affirmative defenses mentioned above because the employee was not a marijuana user at the time of the injury. Assume further that the employee is given a prescription for medical marijuana to treat the injury that occurred in the workplace, and he or she seeks reimbursement from the employer for the costs of the medication. Does the employer have to pay? In twelve states and the District of Columbia, the answer is a resounding "no," because those jurisdictions have enacted statutes that exempt "health carrier[s]" from being liable for "reimbursement for the medical use of marijuana."¹⁹⁶ In New Mexico, the answer is a

¹⁹⁴ See, e.g., *Desert Valley Constr. v. Hurley*, 96 P.3d 739, 741-42 (Nev. 2004) ("[I]f an employee has marijuana in his system when injured, then [it is presumed that] marijuana caused the accident unless proven otherwise.").

¹⁹⁵ See, e.g., *Edminsten v. Bull Shoals Landing & AIG Domestic Claims, Inc.*, 432 S.W.3d 25 (Ark. 2014) (reversing and remanding the Commission's decision that Plaintiff failed to rebut the presumption of a direct causal link between drug use and the accident).

¹⁹⁶ See, e.g., WASH. REV. CODE ANN. § 69.51A.060(2) (West, Westlaw through Special Sess. and Laws 2016, chs. 1 & 2).

resounding “yes”—at least for the time being.¹⁹⁷ With the increasing number of states passing medical marijuana legislation,¹⁹⁸ it is therefore important to ask the correct question; the question is not what are the states *doing*, but, rather, what does the law *enable* states to do?

In *Lewis*, the New Mexico Court of Appeals dismissed the employer’s claim that “if it [(the employer)] were to follow the WCJ’s order [requiring the reimbursement of medical marijuana]...it would be civilly responsible for violation of the CSA by way of conspiracy or aiding and abetting.”¹⁹⁹ The court reaffirmed *Vialpando*, claiming the argument was “only speculation in view of existing Department of Justice and federal policy,” which specifically defunded the Federal Government’s marijuana prosecutorial programs.²⁰⁰ Since New Mexico’s standing jurisprudence mimics the federal scheme, the court essentially told the employer in *Lewis* that it could not demonstrate “injury-in-fact” if the government is not prosecuting marijuana claims.²⁰¹ But this is an unsatisfying response from the court. The New Mexico Court of Appeals made a similar move in *Vialpando*, where the court dismissed the employer’s workers’ compensation challenge, refusing to “guess” as to whether forcing the employer to reimburse for the cost of “medical marijuana ‘essentially requires’ [the] Employer to commit a federal crime.”²⁰² The court was being evasive, implying that the employer might have prevailed if it had challenged the state medical marijuana act instead of objecting to paying for the medical

¹⁹⁷ See *Vialpando v. Ben’s Auto. Servs.*, 331 P.3d 975, 976 (N.M. Ct. App. 2014) (holding that an employer and its insurance carrier must reimburse employee for costs associated with the purchase of medical marijuana treatment).

¹⁹⁸ For example, Pennsylvania became the twenty fourth state to implement a medical marijuana program on April 17, 2016. See *Gov. Wolf Signs Medical Marijuana Legalization Bill Into Law*, PITTSBURGH’S ACTION NEWS (April 17, 2016), <http://www.wtae.com/news/final-votes-may-be-close-on-medical-marijuana-bill/38972378>.

¹⁹⁹ *Lewis v. Am. Gen. Media*, 355 P.3d 850, 858 (N.M. Ct. of App. 2015).

²⁰⁰ *Id.* See Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235 (2015).

²⁰¹ See *ACLU of New Mexico v. City of Albuquerque*, 188 P.3d 1222, 1224 (N.M. 2008) (refusing to establish a new standing doctrine under state law and reaffirming the elements of injury in fact, causation, and redressability).

²⁰² *Vialpando*, 331 P.3d at 979-80.

marijuana under the workers' compensation law. However, the court's observation seems only partially correct: employers should argue that the *workers' compensation law* is preempted by the CSA to the extent that it requires reimbursements for a controlled substance that has been congressionally deemed to possess no acceptable safe use—even under “medical supervision.”²⁰³ This is why what the law is *doing* is less important (for the purpose of this Article) than what the law is *able* to do. Can the CSA *ever* preempt a state's workers' compensation law? No court has so held—but it appears that the answer will be in the affirmative if given the proper opportunity.

While it might be that the state would not aid and abet in violation of the CSA in the *discrimination context* by barring the employer from terminating medical marijuana users solely based on their status as medicinal marijuana patients,²⁰⁴ the employer's case is significantly stronger in the *workers' compensation* context. The leading medical marijuana preemption case, *Emerald Steel*, held that a state “[a]ffirmatively authorizing a use [of medical marijuana] that federal law prohibits stands as an obstacle to the...objectives of the Controlled Substances Act.”²⁰⁵ If mere *authorization* of medical marijuana use by the state is enough to invoke the obstacle preemption of the state law, then surely the *affirmative requirement* that an employer pay for an employee's use of medical marijuana under the state workers' compensation law should also be preempted. In their recent treatise on statutory interpretation, Justice Scalia and his co-author, Bryan Garner, explain as follows: “it is a reliable canon of interpretation...to presume that a federal statute does not preempt state law. The presumption is readily overcome if state law would *require* something that federal law prohibits.”²⁰⁶ Indeed, requiring the employer

²⁰³ 21 U.S.C. § 812(a) (2012).

²⁰⁴ See *supra* Part. II.C.2.

²⁰⁵ *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 529 (Or. 2010).

to pay for an injured workers' medical marijuana through the state workers' compensation system might even meet the high threshold for impossibility preemption: forcing the employer to fund the distribution of medical marijuana to employees makes it impossible for the employer to fulfill this obligation under state workers' compensation law while simultaneously heeding the federal ban on distributing marijuana.²⁰⁷

If (or when) the Federal Government decides to resume prosecuting marijuana possession and distribution (such that medical marijuana prosecution is no longer “speculative” as described by the New Mexico Court of Appeals), an employer making the same arguments the business owners made in *Vialpando* and *Lewis* will likely succeed on its obstacle preemption claim, and possibly even the physical impossibility claim. It is not even clear that an employer would have to wait on the Federal Government; for example, the New Mexico Court of Appeals could have decided the issue, because the employers in *Vialpando* and *Lewis* arguably had standing to sue.²⁰⁸ Timing issues aside, the argument would be that the state's implementation of the state workers' compensation program serves as an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA, which prohibits “knowingly or intentionally” “manufactur[ing], distribut[ing], or dispens[ing], or possess[ing] [an illegal controlled substance]

²⁰⁶ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 290 (1st ed. 2012).

²⁰⁷ *See Mikos, supra* note 131, at 10 (providing a similar example of impossibility preemption).

²⁰⁸ The three elements of standing are (1) injury in fact, (2) causation, (3) and redressability. *See ACLU of New Mexico v. City of Albuquerque*, 188 P.3d 1222, 1225 (N.M. 2008). It seemed like the New Mexico Court of Appeals felt that injury in fact was too speculative because the Federal Government is not currently impeding the implementation of state marijuana programs. *See Lewis v. Am. Gen. Media*, 355 P.3d 850, 858 (N.M. Ct. of App. 2015). But “a litigant need not suffer the actual effects of the challenged action or statute, such as arrest and prosecution.” *ACLU of New Mexico*, 188 P.3d at 1227. The injury can be “slight”—even “[an] identifiable trifle is enough for standing to fight out a question of principle.” *Ramirez v. City of Santa Fe*, 852 P.2d 690, 693 (N.M. 1993) (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (internal quotation marks omitted)). Causation and redressability were not an issue flagged by the Court.

with intent” to commit one of the aforementioned acts²⁰⁹ and was enacted to prevent the trafficking of illegal controlled substances.²¹⁰ Consider a similar example from Professor Mikos:

It is...possible that a benefit program that is specifically designed to promote a violation of the CSA would pose a direct conflict, for the program would satisfy the elements of aiding and abetting liability. Oregon voters, for example, recently rejected a ballot measure that would have provided state funds specifically to help low-income residents buy medical marijuana from private suppliers. Had it passed, program employees arguably could have been charged with aiding and abetting violations of the CSA—they would, after all, give residents money with the specific intent of helping them to buy marijuana.²¹¹

So too in the workers’ compensation context: by forcing employers to pay for a workers’ medical marijuana, the state employees facilitating the program are aiding and abetting the violation of the CSA. This argument is similar to that which prevailed in *Emerald Steel Fabricators*; the primary difference is that the court in *Emerald Steel Fabricators* preempted the state *medical marijuana law*, whereas in the workers’ compensation context it is the *state workers’ compensation law* that would be preempted.

CONCLUSION

While the states are swimming in deep water, enacting medical marijuana laws and forcing courts to squint at state statutes until their relationship to the federal scheme seems clear, the Federal Government is occasionally dipping its big toe in the water and consistently burying its head in the sand. This unfortunate reality creates inconsistent law—the kind of inconsistencies outlined in this Article: an employer can fire a worker who tests positive for marijuana on the job, but that same employer in a different state might be required, through the state workers’ compensation program, to pay for an injured worker to use medical marijuana as treatment for an

²⁰⁹ 21 U.S.C. § 846 (2012).

²¹⁰ See 21 U.S.C. § 801 (2012) (outlining congressional findings and declarations of the CSA).

²¹¹ Mikos, *supra* note 131, at 35-36 (footnotes omitted).

injury arising out of the workplace.²¹² To reach this result, courts have had to put on their grammarian spectacles and play semantic games with state statutes, asking exactly how much is too much “authorization” to use medical marijuana. Sweeping authorizations will be preempted.²¹³ But this Article argues that not all authorizations are created equal. The current goal for any state legislature seeking to protect a patient’s right to use marijuana while keeping his or her job is to enact antidiscrimination provisions that prevent discrimination based on one’s status as a medical marijuana user. Such statutes should not be preempted by the CSA because the CSA does not purport to regulate issues of employment, only drug trafficking; in the workers’ compensation context, however, any attempt to force employers to pay for a worker’s medical marijuana should be preempted for serving as an obstacle to the purpose of the CSA.²¹⁴

In the Author’s opinion, the status quo is problematic, because it leaves some of America’s most vulnerable workers without remedy. Clearer lines must be drawn. The Federal Government can no longer afford to have it both ways, declaring marijuana illegal on one hand and defunding prosecution efforts on the other. The resulting condition is too unpredictable.

Time and time again, workers using medical marijuana are being fired—even though they are performing at the expected level without issue.²¹⁵ This candid admission made by employers in many medical marijuana cases should make a federal solution rather simple: reschedule the drug and protect workers relying on marijuana’s medicinal value.

²¹² Compare *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012) (finding the Michigan Medical Marijuana Act did not restrict private employer’s ability to terminate employees for testing positive for marijuana), with *Vialpando v. Ben’s Auto. Servs.*, 331 P.3d 975 (N.M. Ct. App. 2014) (holding that an employer and its insurance carrier must reimburse employee for costs associated with the purchase of medical marijuana treatment).

²¹³ See *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 529 (Or. 2010) (finding because “[Oregon law] affirmatively authorizes the use of medical marijuana, federal law preempts that subsection”).

²¹⁴ See *supra* Parts II & III.

²¹⁵ See, e.g., *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 203 (Cal. 2008) (“Plaintiff has worked in the same field since he began to use marijuana and has performed satisfactorily....”).