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LAWYERS, GUNS & WEED

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Thanks and apologies to the late Warren Zevon for borrowing of the title of his song, "Lawyers, Guns and Money" for the title of this article. Available at: https://youtu.be/F2HH7J-Sx80? si=1nr4sEQwFi1ia57Q.

INTRODUCTION

Two particularly controversial topics in law are those around firearm rights and cannabis. Since its decision in *District of Columbia v. Heller*[1] in 2008, the United States Supreme Court has taken a wider view of the Second Amendment as an individual right under the Fourteenth Amendment. Contemporaneously, the individual states have been legalizing and decriminalizing cannabis possession and use, while the federal government keeps cannabis—in the cannabinoid bearing form of marijuana—listed as a schedule I controlled substance.[2] This means that there is no legitimate use for the plant under federal law.[3]

Consequently, cannabis users—even if obeying their respective state laws and not convicted of any felonies—are unable to exercise their Second Amendment rights. This brings up two particularly interesting Constitutional issues for cannabis users. Firstly, do cannabis users have the rights under the Second Amendment to keep and bear arms? To date, courts have largely upheld firearm bans for those using controlled substances illegally, and that would include users of medical cannabis patients.

Secondly, should the answer to the first question be answered in the affirmative—the related issues are questions of Due Process and Self-Incrimination under the Fourteenth Amendment. That is to say, if users are to lose these rights, do they do so without a legal proceeding or other due process procedure? Is registering for a state's medical cannabis program a confession, and is it one forced in violation of one's rights against self-incrimination under the Fifth Amendment?

When looking at rights of cannabis users, especially those using medical marijuana under a state-legal regime, it is not just an issue of the Second Amendment, but it is also a Fifth Amendment and Fourteenth Amendment Due Process issue as well. Until recently, court decisions have come down in favor of stripping firearm rights from those who are drug users in violation of the Controlled Substances Act[4],[5] but in light of new Supreme

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[1] Dist. of Columbia v. Heller, 554 U.S. 570, 576, 636 (2008) (holding that the Second Amendment, guaranteeing the right to keep and bear arms, is an individual right).
[2] *See* U.S. Dep't of Just., *Controlled Substances by [Controlled Substances Act] CSA Level* 77 (Dec. 14, 2023), https://www.deadiversion.usdoj.gov/schedules/orangebook/e_cs_sched.pDf.
[3] 21 U.S.C. § 812 ("The drug or other substance has no currently accepted medical use in treatment in the United States.").
[4] *See* Controlled Substances Act (CSA) § g(3), 21 U.S.C. § 922.
[5] *See infra* section III.

Court and Courts of Appeals decisions, the way we view cannabis users' rights should be changed.

Put another way: have medical marijuana patients (and their caregivers) inadvertently lost their Second Amendment rights without due process? Is registering in a state medical marijuana program a *de facto* admission of violation of the Controlled Substances Act? Since firearm applications require that applicants attest to whether or not they have violated the CSA, have these patients also lost their Second Amendment rights without the due process of law? Can patients be so compelled to admit to commission of a crime in order to get their necessary medication? Are we making citizens give up their Second, Fifth, and Fourteenth Amendment rights just to get the help they need?

This article will examine the first issue, that of Second Amendment rights for cannabis users, and the second issue will require a full analysis of its own. The question of Due Process for the loss of rights only applies if the right itself is secured. The determination of whether Second Amendment rights are an individual right for all includes cannabis users is the primary issue.

When looking at the gun rights of cannabis users, especially those using medical marijuana under a state-legal regime, it is not just an issue of the Second Amendment, but it is also a Fifth Amendment and Fourteenth Amendment Due Process issue as well. Until recently, the court decisions have come down in favor of stripping gun rights from those who are drug users in violation of the Controlled Substances Act[6], but in light of new Supreme Court and Courts of Appeals decisions, the way we view cannabis users' rights should be changed.

In this analysis of the application of the Second Amendment to cannabis users, this article takes four parts to analyze these two areas of law. First, is an analysis of the status of cannabis under federal law. Second, is a view of the protections given to cannabis users, particularly those who are registered medical users. By analogy, we can see that state laws have given us an expansive view of the rights of cannabis users. The third section is an analysis of Second Amendment decisions that affect the rights of cannabis users before the Supreme Court decision in *Bruen*.[7] Fourth, is the decision in *Bruen* and its recent progeny before the federal courts. Finally, the conclusion is a view of Second Amendment rights, in light of the protections already extended at the state level and recent court decisions, when applied to the users of cannabis.

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[6] *See infra* section III.

[7] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

I. CANNABIS UNDER FEDERAL LAW[8]

The federal law on cannabis used to be relatively straightforward.[9] It was illegal—full stop; so it could not be produced, sold, or consumed under any circumstances.[10] Much has changed since then, but the basic status of the substance remains the same: Cannabis is illegal under federal law, but with more asterisks than before.[11] The Controlled Substances Act, the Continuing Appropriations Acts, and the Agriculture Improvement Act of 2018 have changed the landscape for legal cannabis in the United States.[12]

Additionally, the Food and Drug Administration (FDA) approved two drugs with tetrahydrocannabinol (THC) and cannabidiol (CBD) as active ingredients.[13]

A. Continuing Appropriations Acts

1. Rohrabacher–Farr Amendment

The 2018 Consolidated Appropriations Act[14] contains a section that is often referred to as the Rohrabacher–Farr Amendment.[15] Subsequent appropriations acts have also implemented this amendment. It reads as follows:

> None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska,

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[8] This section is based in part on two of Robert L. Greenberg's articles, *Medical Marijuana Post-* McIntosh, 20 CUNY L. REV. 46 (2016) and *Cannabis Trademarks and the First Amendment*, 52 TEX. TECH. L. REV. 525 (2020), with updates. (NO IDEA WHAT THIS "with updates" PORTION MEANS. Please check with author).

[9] *See* Scott C. Martin, *A Brief History of Marijuana Law in America*, TIME (Apr. 20, 2016), http://time.com/4298038/marijuana-history-in-america/.

[10] *See id.*

[11] *See id.*

[12] *See* Agriculture Improvement Act of 2018, Pub. L. No. 155–334, 132 Stat. 4490 (codified as amended in scattered sections of 7 U.S.C.); Controlled Substances Act, 21 U.S.C. §§ 802, 812, 841 (2012); see Continuing Appropriations Act, 2018, Pub. L. No. 115–56, 131 Stat. 1139 (2018).

[13] *See* discussion *infra* Part I.C. (explaining how FDA classifies THC and CBD).

[14] Continuing Appropriations Act of 2018 Pub. L. No. 115–56, 131 Stat. 1139 (2018).

[15] *Rohrabacher–Farr Amendment*, https://en.wikipedia.org/wiki/Rohrabacher%E2%80%93Farr (last updated Jan. 4, 2020, 10:00 PM).

> Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.[16]

This amendment prohibits the Department of Justice (DOJ) from using federal funds to interfere with states implementing their own medical marijuana laws.[17] This does not apply to recreational or adult use of cannabis, and it does not define what "implementing" means.[18] That interpretation was left to the courts.[19]

To date, this provision has been included in subsequent appropriation acts, updated with the language: "medical marijuana states."[20] Notably, this has no actual effect on the CSA itself.[21] It only binds the DOJ with regard to medical marijuana states and those programs.[22]

The legal status of cannabis under federal law is unchanged.[23] Cannabis remains illegal under the CSA.[24] This only prohibits the DOJ using funds to interfere with the states' medical marijuana programs.[25]

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[16] Consolidated Appropriations Act, 2018, Pub. L. No. 115-, 132 Stat. 538 (2018).
[17] *Id.*
[18] *Id.*
[19] *See* United States v. McIntosh, 833 F.3d 1163, 1175–76 (9th Cir. 2016).
[20] Consolidated Appropriations Act, 2018 § 538; Consolidated Appropriations Act, 2019, H.R. Res. 648, 116th Cong. §537 (2019) (enacted).
[21] *See* Controlled Substances Act §§ 801-971; *see also* Consolidated Appropriations Act, 2018 § 538.
[22] Consolidated Appropriations Act, 2018 § 538.
[23] Controlled Substances Act §§ 802, 812, 841.
[24] *Id.*
[25] *See* Consolidated Appropriations Act, 2018 § 538.

2. United States v. McIntosh

This lack of clarity has caused a number of cases to arise around the country.[26] The most notable case is *United States v. McIntosh* from the Ninth Circuit.[27] As of the writing of this Article, *McIntosh* is the controlling case on the conflict between the state and federal laws regarding cannabis and the interpretation of the Continuing Appropriations Act in regarding to federal enforcement.[28]

In short, the court's holding states that if the parties are in compliance with the state laws on medical marijuana, then they cannot be prosecuted for violations of the CSA.[29] Defendants that are charged with CSA violations are entitled to an evidentiary hearing as to whether or not they are in compliance with state laws.[30] This has no effect on the CSA itself, nor does it have any effect on state laws regarding recreational cannabis.[31]

B. Agriculture Improvement Act of 2018

The Agriculture Improvement Act of 2018 changed the way the government treats agricultural products derived from the cannabis plant.[32] After decades of an effective ban on the agricultural product grown by our Founding Fathers, hemp is now permitted to be grown again in the United States.[33] The THC-containing plant and the industrial hemp plant are the same plant.[34] There is some controversy about whether there are several species of the same plant or different breeds of the same species, but it is agreed that

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[26] *See* United States v. McIntosh, 833 F.3d 1163. (9th Cir. 2016).
[27] *Id.*
[28] *Id.*; *See also* Robert L. Greenberg, *Medical Marijuana Post*-McIntosh, 20 CUNY L. REV. 48, 51 (2016) (providing further analysis of the Controlled Substances Act and *United States v. McIntosh*).
[29] *McIntosh*, 833 F.3d at 1179.
[30] Controlled Substances Act, 21 U.S.C. ch. 13 (2012); *McIntosh*, 833 F.3d at 1179.
[31] *See generally* 21 U.S.C. §§ 801-971; *McIntosh*, 833 F.3d at 1179.
[32] *See generally* Agriculture Improvement Act of 2018, Pub. L. No. 115–334, 132 Stat. 4490 (codified as amended in scattered sections of 7 U.S.C.).
[33] *See Did George Washington Grow Hemp?*, GEORGE WASHINGTON'S MOUNT VERNON, https://www.mountvernon.org/george-washington/facts/george-washington- grew-hemp (last visited May 17, 2024) (discussing George Washington's hemp cultivation); *Hemp*, MONTICELLO, https://www.monticello.org/site/research-and-collections/hemp (last visited May 17, 2024). Yes, both George Washington and Thomas Jefferson grew hemp. *Id*.
[34] *See* Nicole Gleichmann, *Hemp vs Marijuana: Is There a Difference?*, ANALYTICAL CANNABIS (Sept. 2, 2019), https://www.analyticalcannabis.com/articles/hemp-vs-marijuana-is-there-a-difference-311880.

both "hemp" and "marijuana" are of the same genus.[35] The main difference between hemp and marijuana is in the THC content of the flowers produced by the plant.[36] Hemp has low levels of THC and is often utilized for its industrial and food purposes (*e.g.*, paper and hemp seeds as a "superfood" protein source).[37] Marijuana has comparatively high levels of THC and is bred for the flowers or "buds," which are smoked, vaporized, processed into a concentrated form, or processed into an edible form.[38] However, different breeds of the plant have differing concentrations of THC, CBD, and other medicinal chemical compounds, which are generally referred to as cannabinoids.[39] The Agriculture Improvement Act of 2018 legalizes hemp with a concentration of THC that is less than 0.3% by dry weight.[40]

The term "hemp" means the plant *Cannabis sativa L.* and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3 percent on a dry weight basis.[41]

Notably, the definition of hemp does not contain any reference to CBD nor does it provide guidance on what can be done with legal hemp and any concentrated chemicals derived therefrom.[42] It is possible that one could isolate or concentrate the THC from the low-THC cannabis and ultimately end up with an end product with a very high concentration of THC, but the

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[35] *Id.*
[36] *Id.*
[37] *See, e.g.*, Kentucky Hempsters, *Why Are Hemp Seeds Considered a 'Superfood'?*, LEAFLY (Nov. 13, 2015), https://www.leafly.com/news/lifestyle/why-are-hemp-seeds- considered-a-superfood ("Many people call hemp a 'superfood,' and for good reason. All hemp foods begin with hemp seeds, which are unique because they contain many of the nutrients needed to maintain a healthy diet. With a nearly perfect balance of omega 3 to omega 6, plus iron, vitamin E, and all of the essential amino acids, hemp seeds are said to be the most nutritionally complete food source in the world.").
[38] *See* Agriculture Improvement Act of 2018, Pub. L. No. 115–334, 132 Stat. 4490 (2018) (codified as amended in scattered sections of 7 U.S.C.). Many sources available—online and offline—have conflicting and often inaccurate information. For purposes of this Article and for purposes of the laws and cases discussed herein, hemp and marijuana are the same plant. The Agriculture Improvement Act's definition includes any plant that could be called hemp or marijuana (sativa or indica). *Id.*
[39] *See* Gleichmann, *supra* note 34.
[40] *Id.*
[41] 7 U.S.C. § 16390.
[42] *Id.*

Agricultural Improvement Act gives no specific guidance on this.[43] The resulting chemical compound, however, would likely violate the concentrate prohibitions of the CSA.[44]

C. The Food and Drug Administration's Opinion on THC & CBD

The Food and Drug Administration (FDA) classifies THC and CBD as drugs and not as dietary supplements.[45] The FDA issued a statement in response to the Agriculture Improvement Act that clarifies its position on these cannabinoids:

> Just as important for the FDA and our commitment to protect and promote the public health is what the law *didn't* change: Congress explicitly preserved the agency's current authority to regulate products containing cannabis or cannabis-derived compounds under the Federal Food, Drug, and Cosmetic Act (FD&C Act) and section 351 of the Public Health Service Act. In doing so, Congress recognized the agency's important public health role with respect to all the products it regulates. This allows the FDA to continue enforcing the law to protect patients and the public while also providing potential regulatory pathways for products containing cannabis and cannabis-derived compounds.[46]

The FDA has asserted its role in regulating CBD and THC-based products through its drug approval process.[47] The FDA-approved Epidiolex is a drug used for the treatment of seizures, in which CBD is the active

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[43] Controlled Substances Act, 21 U.S.C. §§ 801 – 971 (2012). Presumably, concentrations of THC derived from otherwise legal hemp products would still be illegal under the CSA. *See id.*
[44] *See id.*
[45] Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301, 331, 333 (2019).
[46] Scott Gottlieb, M.D., *Statement from FDA Commissioner Scott Gottlieb, M.D., on Signing of the Agriculture Improvement Act and the Agency's Regulation of Products Containing Cannabis and Cannabis- Derived Compounds*, U.S. FOOD & DRUG ADMIN. (Dec 20, 2018) [hereinafter FDA Statement], https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-signing-agriculture-improvement-act-and-agencys.
[47] *FDA Approves First Drug Comprised of an Active Ingredient Derived from Marijuana to Treat Rare, Severe Forms of Epilepsy*, U.S. FOOD & DRUG ADMIN. (June 25, 2018), https://www.fda.gov/news-events/press-announcements/fda-approves-first-drug-comprised-active-ingredient-derived-marijuana-treat-rare-severe-forms.

ingredient.[48] Marinol and Syndros are the brand names of Dronabinol, also approved by the FDA, which is a THC-based drug that is prescribed for patients that have extreme nausea from diseases such as cancer or AIDS and for patients with anorexia.[49]

The FDA treats CBD as an active ingredient in drugs and not as a dietary supplement:

> [The FDA] treat[s] products containing cannabis or cannabis-derived compounds the same as any other FDA-regulated products — meaning they're subject to the same authorities and requirements as FDA-regulated products containing any other substance. This is true regardless of the source of the substance, including whether the substance is derived from a plant that is classified as hemp under the Agriculture Improvement Act. . . .
> [The FDA will] take enforcement action needed to protect public health against companies illegally selling cannabis and cannabis-derived products that can put consumers at risk and are being marketed in violation of the FDA's authorities.[50]

The proliferation of CBD-based products around the country make it appear to consumers as though they are legal dietary supplements, but in reality, these products are in violation of several federal laws, even after the passage of the Agriculture Improvement Act.[51]

II. STATE PROTECTIONS FOR CANNABIS PATIENTS

Several states have ruled specifically, either by statute or by judicial decision, on the issue of whether cannabis users' may own firearms. Additionally, while many states have not officially ruled on the issue of Second Amendment rights for medical cannabis patients, there are anti-discrimination provisions in many states' laws. The examination of employment protection, examination of protections for those on probation, parole, and post-release supervision, and the examination of workers'

[48] *Id.*
[49] *See* dronabinol (Rx), MEDSCAPE, https://reference.medscape.com/drug/marinol- syndros-dronabinol-342047 (last visited May 17, 2024); Dronabinol, WIKIPEDIA, https://en.wikipedia.org/wiki/Dronabinol (last updated Mar. 23, 2024, 5:51 PM).
[50] *Supra* note X.
[51] *Id.*

compensation cases is to analyze by analogy, *i.e.* since we treat these individuals and their rights with regard to medical marijuana in these instances, we should view the rights of these individuals with regard to their Constitutional rights in a similar fashion.

This section is an examination of state protections of cannabis users with regard to firearms licensing and possession laws, state employment protection, protections extended to cannabis users in the criminal justice system (specifically those on probation and parole,) and state workers compensation protections. With the legalization of cannabis in various forms throughout the United States, the laws of these states have been adapting to keep up. The states have taken the lead when the federal laws with regard to firearms rights for cannabis users have not changed.

Especially with the rapid changes to cannabis laws, the following analysis is only part of the many instances of protections and prohibitions of various rights and protections in the states.

A. State Firearm Licenses for Cannabis Users

In part because different states have different laws relating to cannabis and cannabis products, states also have different interpretation of Second Amendment rights for cannabis users. The issues of federalism come to the fore when examining these state laws.

Some states, like Oklahoma below, have explicitly permitted their medical marijuana patients to keep and bear arms. Others, like Nevada below, have denied firearm licenses because of the medical marijuana usage of a patient. The current federal laws appear clear in this matter, but this particular issue—whether this class of individuals have their Second Amendment right—especially in light of *Heller*[52] and its progeny, has not been litigated at the Supreme Court.

1. Nevada Firearm Ownership Restrictions for Cannabis Users

Denial of Nevada firearms license to a medical marijuana cardholder was upheld by the 9th Circuit in *Wilson v. Lynch*.[53] *Wilson* makes reference to the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF's) opinion letter from 2011. In that letter, it states:

[52] *District of Columbia v. Heller*, 554 U.S. 570 (2008).
[53] 835 F.3d 1083 (9th Cir. 2016) (*cert. denied* Wilson v. Sessions, 137 S. Ct. 1396 (2017)).

> A]ny person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition. Such persons should answer "yes" to question 11.e. on ATF Form 4473 . . . and you may not transfer firearms or ammunition to them. Further, if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have "reasonable cause to believe" that the person is an unlawful user of a controlled substance. As such, you may not transfer firearms or ammunition to the person, even if the person answered "no" to question 11.e. on ATF Form 4473.[54]

Such a denial of license was found not to be unconstitutional as the regulation met the court's standard of intermediate scrutiny, and did not unfairly impinge on Wilson's right to bear arms under the Second Amendment.[55]

Similarly to the analysis of the CSA generally, *supra*, the supremacy clause applies as well to firearms possession.[56]

When asking the question of whether enrollment entails a violation of the patients' rights, the Nevada Supreme Court found that: a state medical marijuana program was not considered a Fifth Amendment, self-incrimination violation, nor a violation of Fourteenth Amendment guarantee of Due Process.

Nevada's medical marijuana registry does not impinge upon a fundamental right, and the registry is rationally related to a legitimate state interest. Thus, we hold Nevada's medical marijuana registry does not violate the Due Process or Equal Protection Clauses. Finally, we hold Nevada's medical

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[54] Letter from Bureau of Alcohol, Tobacco, Firearms, and Explosives to All Fed. Firearms Licensees (Sept. 21, 2011) (available at https://www.atf.gov/firearms/docs/open-letter/all-ffls-sept2011-open-letter-marijuana-medicinal-purposes/download); *see also id.* at 1089 (citing the letter).

[55] *Wilson*, 137 S. Ct. at 1092.

[56] *See, e.g.*, United States v. Baer, 235 F.3d 561, 562-63 (10th Cir. 2000) (upholding Baer's conviction of his violation of 18 U.S.C. § 922(g)(1) even though his possession of a firearm was permitted under the Utah Constitution).

marijuana registry does not violate a registrant's right against self-incrimination. Therefore, we affirm the district court's order.[57]

The court applied rational basis review to the medical marijuana statute in its requirement that patients register with the state for a medical marijuana card.

When determining the issue of self-incrimination, the court made reference to the Selective Service System and financial aid applications.[58] Applications for financial aid require students to admit to failing to register for the Selective Service, if they have so failed, and thus admit to a violation of the Selective Service Act.[59] As that does not constitute a violation of the Fifth Amendment, neither does requiring a registry for medical marijuana patients.

Nevada law does not compel anyone to seek a registry identification card, and if an individual does apply, Nevada law does not impose criminal or civil penalties on them if they do not complete the application. Rather, the application may simply be denied. This possibility, in itself, does not implicate the Self-Incrimination Clauses of the United States and Nevada Constitutions.[60]

That there is a difference between financial aid for college, which is (ostensibly) voluntary and medical marijuana, which many patients and their physicians find medically necessary, is not specifically discussed.[61]

2. Minnesota Firearms Rights for Cannabis Users

In 2023, Minnesota approved recreational cannabis statewide. In enacting the statute that legalized cannabis, Minnesota explicitly permits its cannabis users to possess firearms, if not otherwise disqualified:

> 624.713 CERTAIN PERSONS NOT TO POSSESS FIREARMS
>
> Subdivision 1. Ineligible persons. — Ineligible persons. The following persons shall not be entitled to possess ammunition or a pistol or semiautomatic military-style assault weapon or, except for clause (1), any other firearm: . . .
>
> (4) a person who has been convicted in Minnesota or elsewhere of a misdemeanor or gross misdemeanor violation of chapter 152, unless

[57] Doe v. State ex rel. Legislature of the 77th Session of Nev., 406 P.3d 482, 484 (Nev. 2017).
[58] *Id.* at 487 (citing Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 856-58 (1984)).
[59] *Id.*
[60] *Id.*
[61] *Id.*

> three years have elapsed since the date of conviction and, during that time, the person has not been convicted of any other such violation of chapter 152 or a similar law of another state; or a person who is or has ever been committed by a judicial determination for treatment for the habitual use of a controlled substance or marijuana, as defined in sections 152.01 and 152.02, unless the person's ability to possess a firearm and ammunition has been restored under subdivision 4.[62]

The state Department of Criminal Justice confirms this expansive reading of Second Amendment rights for cannabis users:

> Under Minnesota law, a person may not be denied the right to own, possess or carry firearms based on their status as a patient in the medical cannabis registry program or on the basis that the person is 21 years of age or older and uses adult-use cannabis products. The use or possession of marijuana remains unlawful under federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in Minnesota. The [Minnesota Bureau of Criminal Apprehension] BCA recognizes this conflict in the law.[63]

In contrast to the Minnesota BCA's opinion, the ATF issued an official comment, in May 2023, stating that despite any state law to the contrary, federal law still remains supreme. To wit:

> "Regardless of the recent changes in Minnesota law related to the legalization of marijuana, an individual who is a current user of marijuana is still federally defined as an 'unlawful user' of a controlled substance and therefore is prohibited

[62] MINN. STAT. § 624.713 (2023).
[63] Minn. Dept. of Pub. Safety, Bureau of Crim. Apprehension, "Changes to Minnesota Gun Laws," https://www.penningtonsheriff.org/images/Forms/Changes_to_Gun_Laws_Fact_Sheet_2023.pdf (last visited May 17, 2024).

> from shipping, transporting, receiving, or possessing firearms or ammunition."[64]

This ATF response is largely specific to the changes in the Minnesota law, but is certainly indicative of its opinion on Second Amendment rights with regard to all cannabis users and all state laws that may protect them.

3. Oklahoma Firearm Ownership Protections for Cannabis Users Oklahoma has a law that explicitly allows medical marijuana patients to possess firearms.

The Oklahoma Medical Marijuana and Patient Protection Act can be found at 63 Okl. St. §§ 420, *et seq.* (yes, I also noticed the "420") and the specific portion referring to firearms can be found at 63 Okl. St. § 427.8:

> E. A medical marijuana patient or caregiver licensee shall not be denied the right to own, purchase or possess a firearm, ammunition, or firearm accessories based solely on his or her status as a medical marijuana patient or caregiver licensee. No state or local agency, municipal or county governing authority shall restrict, revoke, suspend or otherwise infringe upon the right of a person to own, purchase or possess a firearm, ammunition, or firearm accessories or any related firearms license or certification based solely on their status as a medical marijuana patient or caregiver licensee.

This act lists the rights of patients and caretakers with regard to medical marijuana, including rights against discrimination in employment. These largely mirror those laws in other states that explicitly protect patients in the state medical marijuana program.

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[64] Ashlee J. L. Sherrill, "*ATF Provides Clarification Related to New Minnesota Marijuana Law*", ATF (May 30, 2023) https://www.atf.gov/news/pr/atf-provides-clarification-related-new-minnesota-marijuana-law.

B. Employment Protection for Medical Cannabis Patients

Generally speaking, under state and federal law, disabled employees are entitled to reasonable accommodations.[65] In short, if it is possible to provide continued employment to the medical marijuana patient with reasonable accommodations, then that employee is protected under the law. This does not—of course—mean that patients can be impaired while at-work.

Many states that have medical marijuana laws have employment protections for employees who are medical patients. A medical recommendation is (presumably) made because a patient has a chronic condition that makes cannabis medically necessary.

1. Arizona Employment Protections

Arizona's medical act has specific protections for employees who are certified patients. Its law takes into account that certain employers may not be able to employ these patients because of federal law or regulation, and so has carved out an exception for those employers.

B. Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either:

1. The person's status as a cardholder.
2. A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.[66]

Certified medical marijuana patients are protected under Arizona law. Employees may test positive for metabolites, because the presence of metabolites does not necessarily mean that the employee is impaired on-the-job. On-the-job impairment is impermissible and is legal grounds for termination:

> A.R.S. 36-2814. Acts not required; acts not prohibited
>
> A. Nothing in this chapter requires:

[65] *See, e.g.*, Americans with Disabilities Act of 1990, 101 Pub. L. No. 101-336, 104 Stat. 327; 42 U.S.C. §§ 12101-12213.

[66] ARIZ. REV. STAT. ANN. § 36-2813 (2024).

> 1. A government medical assistance program, a private health insurer or a workers' compensation carrier or self-insured employer providing workers' compensation benefits to reimburse a person for costs associated with the medical use of marijuana . . .
> 3. An employer to allow the ingestion of marijuana in any workplace or any employee to work while under the influence of marijuana, except that a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.[67]

The Arizona law effectively says that employees may not be impaired while at work, but may still test positive. That is to say, a test result that is positive for cannabis metabolites is not sufficient to terminate an employee, if that employee is a medical cannabis patient. However, any employee may be terminated if the employee is impaired while on-the-job.[68]

2. California Employment Protections

California has been known for its liberal stance on cannabis and its restrictive laws on firearm ownership. A discussion of cases involving California gun laws can be found *infra*, section III.B.3. California law protects cannabis users employed by in California:

> it is unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, if the discrimination is based upon any of the following:
>
> > (A) The person's use of cannabis off the job and away from the workplace.[69]

[67] ARIZ. REV. STAT. ANN. § 36-2814 (2024).
[68] *See* Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761 (D. Ariz. 2019).
[69] CAL. GOV'T CODE § 12954 (Deering 2024).

While the state of California has some of the most liberal laws with regard to cannabis and protections for cannabis users, California also has some of the strictest firearm restrictions.

3. Delaware Employment Protections

Similarly, Delaware's medical cannabis act also prohibits discrimination based upon a patient's use of the drug. "The purpose of Section 4905A is to prohibit employment-related discrimination based upon either status as a medical marijuana cardholder or a qualifying patient's positive drug test."[70]

4. New York Employment Protections

Employees that are medical marijuana patients are considered to be disabled and are entitled to the legal protections accorded to disabled employees.

> N.Y. Pub. Health Law § 3369
> 2. Non-discrimination. Being a certified patient shall be deemed to be having a "disability"This subdivision shall not bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance. This subdivision shall not require any person or entity to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding.[71]

As employers are generally barred from discriminating against disabled workers, the protections that would apply to protected groups in employment will also apply to registered patients in the program.[72]

The plaintiff in *Gordon v. Consol. Edison, Inc.*, was an employee of ConEd, the New York City power company, and was terminated for testing positive for marijuana. The court found that as the defendant may have discriminated

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[70] Chance v. Kraft Heinz Foods Co., No. K18C-01-056, 2018 Del. Super. LEXIS 1773, at *12 (Del. Super. Ct. Dec. 17, 2018).
[71] NY PUB. HEALTH LAW § 3369 (CONSOL. 2024).
[72] *See* Gordon v. Consol. Edison, Inc., No. 152614/2017, slip op. at *3 (N.Y. Sup. Ct. 2018).

against the plaintiff for her use of marijuana, as the termination came after the plaintiff made defendant aware that she was a registered patient.[73]

C. Patients on Probation, Parole, or Post-Release Supervision

Probation, parole, and post-release supervision (PRS) are different systems, but all involve individuals convicted of crimes who are subject to supervision by the state. These supervisory programs have regular drug testing as part of the condition of release.

The issue is whether those on probation, parole, or PRS are permitted to use cannabis. These decisions often rest on whether the defendant's use is medical or recreational. Recreational usage would be prohibited, along with other non-prescribed intoxicants, while medically necessary usage may be permitted.

1. Colorado Medical Cannabis Use by Probationers

In Colorado, there is a presumption of permissibility with regard to medical cannabis usage for probationers.[74] That is, if a defendant's usage is medically necessary, it should not qualify as a violation of probation.[75] However, the court can make the determination whether that usage is medically necessary.[76] The presumption is in favor of usage, but it may be rebutted.[77]

2. New York Medical Cannabis for Probationers

Whether or not probationers who are registered patients are permitted to use medical cannabis is not entirely clear. New York's court of first impression found:

> New York's Public Health Law, however, does not address whether an individual who is on felony probation with specific conditions to abstain from the use of alcohol or any illicit substances,

[73] *Id.*
[74] *See* Walton v. People, 451 P.3d 1212, 1215-16 (Colo. 2019).
[75] COLO. REV. STAT. § 18-1.3-204(2)(a)(VIII) (effective Feb. 20, 2024) (explicitly stating the conditions of probation).
[76] *See Walton*, 451 P.3d at 1215-16.
[77] *See id.* at 1216.

> including marijuana, can be prescribed and allowed to use medical marijuana during their probationary sentence. Those on probation are allowed to use medications that are legally prescribed to them, including those that would appear during routine drug testing, as for example, methadone. Given the fairly recent legalization of medical marijuana in the State of New York and lack of relevant case law, it appears to this Court to be a matter of first impression . . . .
>
> Prohibiting medical marijuana in this case would hardly serve any lawful and logical relation to the Defendant's rehabilitation. In fact, the record reflects that should he be prohibited from using medical marijuana, the Defendant would need to rely on highly addictive prescription narcotics that significantly interfered with his ability to function on a daily basis to ease the symptoms of his conditions.[78]

As the defendant was able to legally use and possess cannabis under the New York Compassionate Care Act, he was permitted to continue his utilization even while on probation.

D. State Workers Compensation Protections

Workers' compensation is designed to compensate workers who are injured on-the-job and alongside job-site injuries are pain issues. Many patients in medical marijuana programs use cannabis as an alternative (or supplement to) opiates and other controlled substances prescribed by physicians.

States with these medical programs have taken different approaches to compensating employees for costs relating to cannabis while injured. There does not appear to be a clear consensus on whether these costs are reimbursable or not.

[78] People v. Stanton, 80 N.Y.S.3d. 888, 891, 893 (N.Y. Sullivan Cnty. Ct. 2018).

1. Arizona Workers' Compensation

Arizona's medical program explicitly states that insurers and employers are not required to pay for cannabis for injured patients. The Arizona Medical Marijuana Act can be found at A.R.S. §§ 36-2801, *et seq.* The specific section reads:

> ARS § 36-2814. Acts not required; acts not prohibited
>
> A. Nothing in this chapter requires:
>
> 1. A government medical assistance program, a private health insurer or a workers' compensation carrier or self-insured employer providing workers' compensation benefits to reimburse a person for costs associated with the medical use of marijuana.[79]

The issue of civil and criminal liability for employers and insurers for paying for a patient's cannabis is discussed at length in this section, part 3, *infra*.

2. Maine Workers' Compensation

Workers Compensation courts in Maine have found that there is no obligation for employers to compensate for the costs relating to medical cannabis for injured workers. The Maine Medical Use of Marijuana Act (MMUMA) can be found at 22 MRS §§ 2421, *et seq.* "does bar the board from requiring a self-insured employer to reimburse an injured employee for those costs."[80]

3. NJ Workers' Compensation

An appellate court in New Jersey has found that compensation for cannabis-costs may be mandated.[81] In a 31-page opinion, the NJ appellate court deals with the issues of federal preemption and whether reimbursing a

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[79] ARIZ. REV. STAT. § 36-2814 (LexisNexis 2024).
[80] Noll v. Lepage Bakeries, Inc., No. 15-0061, 2016 WL 10428768, at *6 (Me. Workers Comp. Bd. App. Div. Aug. 23, 2016).
[81] *See* Hager v. M&K Constr., 225 A.3d 137, 153 (N.J. Super Ct. App. Div. 2020), *cert. granted*, 229 A.3d 208 (N.J. 2020), *aff'd*, 2021 N.J. LEXIS 332 (N.J. 2021).

patient would be aiding in the commission of a federal crime. The court found that reimbursement would not be aiding and there was no inherent conflict between the CSA and the New Jersey state law, and the NJ Supreme Court has affirmed.

> In this case of first impression, we consider whether a workers' compensation judge can order an employer to reimburse its employee for the employee's use of medical marijuana prescribed for chronic pain following a work-related accident. Respondent M&K Construction argues that the federal Controlled Substances Act (CSA), 21 U.S.C. § 841, which makes it a crime to manufacture, possess or distribute marijuana, preempts the New Jersey Compassionate Use Medical Marijuana Act (MMA) because it is impossible to comply with both statutes.[82]

Part of the employer's objection to the New Jersey statute was that it would be complicit in the criminal activity prohibited by the CSA. It argued that paying the employee's expenses would make it a party to the purchase and possession of controlled substances:

> Because we conclude the order does not require M&K to possess, manufacture or distribute marijuana, but only to reimburse petitioner for his purchase of medical marijuana, we discern no conflict between the CSA and MMA. Furthermore, M&K's compliance with the order does not establish the specific intent element of an aiding and abetting offense under federal law. We also conclude M&K is not a private health insurer. Therefore, it is not excluded under the MMA from reimbursing the costs of medical marijuana . . . .
>
> In 2001, petitioner, then twenty-eight years old, was employed by M&K and working on a construction site, when a truck delivering concrete dumped its load onto him . . . .
>
> Following the accident, petitioner immediately experienced lower back pain that radiated down

[82] *Id.* at 140.

> both legs, describing it as a "shooting and stabbing pain . . . ."
> . . . .
> Petitioner continues to treat his pain with the prescribed two ounces of medical marijuana per month.[83]

The court's finding that there was no conflict between the CSA and the New Jersey Medical Marijuana Act allows the court to further look into the issue of whether an active supporting of a patient's use of cannabis in dealing with pain issues is addressed:

> The issue of whether the [Medical Marijuana Act] MMA is preempted by the CSA in the context of a workers' compensation case has not been addressed by any New Jersey state court. Of the thirty-three states that have legalized medical marijuana, only New Mexico and Maine have considered whether their medical marijuana legislation is preempted by the CSA.
> In enacting the MMA, "the Legislature expressed its intent to steer clear of such a conflict, declaring that 'compliance with this act does not put the State of New Jersey in violation of federal law.'" Despite that intention, M&K contends it is physically impossible for an employer to comply with both the CSA and MMA, therefore the MMA is preempted under a conflict analysis. We disagree.
> . . . .
> The MMA does not require an employer to possess, manufacture or distribute marijuana — the actions proscribed by the CSA. Because it is not physically impossible to comply with the CSA and the MMA, there is no positive conflict between these laws.[84]

The court then described why the employer would not be "aiding and abetting" any federal crimes committed by the employee in using medical marijuana to treat his pain:

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[83] *Id.* at 140-42.
[84] *Id.* at 147-48.

> To obtain a conviction on an aiding and abetting theory, the government must prove a defendant: "[(1)] in some sort associate himself with the venture, [(2)] that he participate in it as in something that he wishes to bring about, [and (3)] that he seek by his action to make it succeed."
> Under the circumstances presented here, M&K is not an active participant in the commission of a crime. The employer would be complying with an order requiring it to reimburse a person for the legal use of medical marijuana under this state's law. M&K has not established the requisite intent and active participation necessary for an aiding and abetting charge.
> We further note that "one cannot aid and abet a completed crime." Here, M&K is not purchasing or distributing the medical marijuana on behalf of petitioner; it is only reimbursing him for his legal use of the substance. In addition, petitioner has obtained the medical marijuana before M&K reimburses him. M&K is never in possession of the marijuana. Therefore, the federal offense of purchasing, possessing or distributing has already occurred. M&K cannot abet the completed crime. The compensation judge's order directing an employer to reimburse its employee for the use of prescribed and regulated medical marijuana is not prohibited under a federal preemption argument.[85]

The court's argument that one cannot aid-and-abet a completed crime and therefore the employer is not violating the CSA is not particularly persuasive. A promise to compensate a purchaser is effectively what the employer is giving the employee, which would be *before* the commission of the purchase, possession and use of cannabis. This promise would presumably have some value, even if the promise is not the payment.

To deprive petitioner of the only relief from the constant pain he has experienced for almost twenty years would eviscerate the principles and goals of the WCA [Workers' Compensation Act] and MMA. As M&K has not presented

[85] *Id.* at 148.

this court with any concrete legal or legislative grounds upon which to overturn the compensation judge's order, we affirm the order for reimbursement of petitioner's use of medical marijuana.[86]

One would hope that an employer's depending on such a ruling to carry some weight before a federal court if the employer were charged, but one would assume that providing funds—whether before or after the purchase —would be considered part of the purchase of the cannabis and therefore part of the violation of the CSA.

4. NY Workers' Compensation

Workers' compensation may compensate injured employees for the expenses relating to medical marijuana if certain conditions are met.[87] While the workers' compensation board may not necessarily mandate the coverage, the board is authorized to do so:

Where marijuana has been duly prescribed under the Public Health Law by a medical provider certified to prescribe medical marijuana by the Department of Health and authorized by the Workers' Compensation Board pursuant to [Workers Compensation Law] WCL 13-b, the Board Panel finds that WCL 13 gives the Board authority to compel carriers to pay for the medical marijuana.[88]

Workers' compensation insurance carriers can be compelled to cover medical marijuana-related expenses for injured employees. However, it will be noted that few of the recent decisions find in favor of coverage.[89] It appears that there is not yet an official standard of when and how coverage will apply to cannabis.

With these other protections extended towards cannabis users, it logically should also apply to protections with regard to Second Amendment rights. As seen in the following section, a state's attitude towards cannabis and its attitude towards firearms can often be rather divergent.

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[86] *Id.* at 151.

[87] *See generally* N.Y. Workers' Comp. Law § 13-b (LexisNexis 2024).

[88] *In re WDF Inc.*, No. W087381, 2018 N.Y. Workers' Comp. LEXIS 1573, *5 (N.Y. Workers' Comp. Bd. 2018).

[89] *See, e.g.*, *In re* Flatbed Express, No. W204002, 2018 N.Y. Workers' Comp. LEXIS 2805 (N.Y. Workers' Comp. Bd. 2018).

III. HISTORY AND ANALYSIS OF SECOND AMENDMENT RIGHTS FOR CANNABIS USERS

Americans have long had the right to keep and bear arms under the Second Amendment to the United States Constitution. However, like many rights, it is not without limit. Foremost under limitations on firearms ownership is that felons have forfeited this right. Whether cannabis users that have not been convicted of a felony have forfeited this right is in question.

A. Federal Firearms Restrictions on Cannabis Users

Since cannabis usage is prohibited under federal law, cannabis users may not possess firearms. 18 U.S.C. § 922(g)(3) "It shall be unlawful for any person who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)) to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

An "unlawful user" includes anyone who is a regular user cannabis, in violation of the CSA. The specifics of what quantity or regularity constitutes regular use have not been defined, but from the litigation to date, anyone using it for medical purposes would likely qualify as a regular user of cannabis. Those who habitually use it in a recreational fashion (*e.g.* on weekends) would likely also qualify as a regular user, but one who only uses on occasion would be less likely to be considered to be a regular user.

Compliance with state law would generally still violate the CSA, so medical cannabis patients and others using these substances are prohibited from firearm ownership. Presumably, those with valid prescriptions for cannabinoid-based prescription drugs approved by the FDA would not be unlawful users, but this has not been litigated as of this writing.

Second Amendment litigation in favor of medical marijuana users has been frequently rejected by courts. For example:

> M]arijuana users necessarily are "unlawful users" for purposes of § 922(g) (3), and a policy or regulation that identifies holders of medical marijuana cards as unlawful drug users, is consistent with 18 U.S.C. § 922(g)(3). Every circuit court to have considered the issue of the

> constitutionality of § 922(g)(3) under the Second Amendment has affirmed its constitutionality. Therefore, Plaintiff's allegations fail to state a plausible Second Amendment violation.[90]

Whether these decisions would be upheld in light of the later rulings, like *Bruen*,[91] is still unclear.

B. Denial of Second Amendment Rights in View of the Controlled Substances Act

For the most part, courts have upheld prohibitions on drug users' owning firearms. The courts have largely applied a "reasonable basis" test in examining these rights and have found that the government's interest in keeping firearms away from violent drug users has outweighed the balance of the individual users' rights.

However, the line of Supreme Court cases that started with Heller has raised the level of analysis required as the Second Amendment has been recognized as an individual right, having been incorporated against the states by the Fourteenth Amendment to the Constitution. In this section, I will analyze these cases in which the CSA and the Second Amendment intersect.

1. Intermediate Scrutiny Standard

Much of the consideration in Second Amendment litigation has been that of an application of intermediate scrutiny. In these analyses, the courts balance the need to keep violent drug users away from firearms and the Second Amendment rights of all Americans. The distinguishing of cannabis from other controlled substances seems to have gotten very little traction. In 2014, the Fourth Circuit upheld the ban on firearms for cannabis users because of the link between drugs and violence, and the court applied an intermediate scrutiny standard:

> We conclude that it may and that the government need not prove a causal link between drug use and violence in order to carry its burden of demonstrating that there is a reasonable fit between § 922(g)(3) and an important

[90] Gibson v. Holder, No. 3:14cv641/MCR/EMT, 2015 U.S. Dist. LEXIS 128541, at *42 (N.D. Fla., Pensacola Div. Aug. 3, 2015) (citations omitted).

[91] *See generally* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

> government objective. Indeed, the studies . . . show that individuals who used marijuana were much more likely to engage in violence, even controlling for multiple demographic and behavioral variables including age, race, economic status, marital status, and educational level. While eliminating these potentially confounding variables does not prove that marijuana use causes violence, it substantially bolsters the link and helps to justify regulating gun possession by marijuana users. We have emphasized that, under intermediate scrutiny, the fit between the regulation and the harm need only be reasonable, not perfect. The correlational evidence put forward by the parties in the present case easily clears that bar.[92]

Its implementing of a lower standard allows the court to look primarily to the data when deciding the constitutionality of the restrictions:

> While the empirical data alone are sufficient to justify the constitutionality of § 922(g)(3), we find that common sense provides further support . . . [w]e noted the government's argument that "due to the illegal nature of their activities, drug users and addicts would be more likely than other citizens to have hostile run-ins with law enforcement officers, which would threaten the safety of the law enforcement officers when guns are involved." The government also warned that "the inflated price of illegal drugs on the black market could drive many addicts into financial desperation, with the common result that the addict would be 'forced to obtain the wherewithal with which to purchase drugs through criminal acts either against the person or property of another or through acts of vice such as prostitution or sale of narcotics.'" Finally, the government suggested that drugs "impair [users'] mental function . . . and thus subject others (and

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> themselves) to irrational and unpredictable behavior." ("Habitual drug users . . . more likely will have difficulty exercising self-control, particularly when they are under the influence of controlled substances"). We find all three of these observations convincing, and Carter has provided no argument grounded in either logic or evidence to undercut them.
>
> Finally, we observe that every court to have considered the issue has affirmed the constitutionality of § 922(g)(3) under the Second Amendment. Indeed, the majority of these courts found the statute constitutional without relying on any empirical studies.
>
> At bottom, we conclude that the empirical evidence and common sense support the government's contention that drug use, including marijuana use, frequently coincides with violence. Carter has failed to present any convincing evidence that would call this conclusion into question. Accordingly, we join our sister circuits in holding that § 922(g)(3) proportionally advances the government's legitimate goal of preventing gun violence and is therefore constitutional under the Second Amendment.[93]

The reference to the "sister circuits" is correct.[94] In applying this lower standard, courts have consistently found that the CSA's firearm restrictions were constitutional. That this case came in 2014 is noteworthy, as it is unclear whether the law would pass muster under the post-*Bruen* level of scrutiny.[95]

2. Ban on Firearm Ownership for Cannabis Users

The Ninth Circuit in 2016 heard a challenge to the banning of firearms for cannabis users:[96]

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[93] *Id.*
[94] *Id.* at 470.
[95] *See generally infra* Section III.
[96] *See generally* Wilson v. Lynch, 835 F.3d 1083 (9th Cir. 2016), *cert. denied*, Wilson v. Session, 580 U.S. 1217 (2017).

> Wilson's first constitutional challenge to 18 U.S.C. § 922(d)(3), 27 C.F.R. § 478.11, and the Open Letter purportedly rests on the Second Amendment. Specifically, Wilson claims that these provisions unconstitutionally burden her individual right to bear arms. See *District of Columbia v. Heller*, 554 U.S. 570, 592, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). The district court concluded, however, that Wilson's Second Amendment challenge failed . . . we held that the Second Amendment does not protect the rights of unlawful drug users to bear arms, in the same way that it does not protect the rights of "felons and the mentally ill," *Heller*, 554 U.S. at 626-27. The Government argues that if the Second Amendment does not protect the rights of unlawful drug users to bear arms, it must not protect any possible rights of unlawful drug users to purchase firearms or of firearm dealers to sell to unlawful drug users. Therefore, were Wilson an unlawful drug user, she would be beyond the reach of the Second Amendment, and her claims would fail categorically.
>
> . . . .
>
> This does not mean that her Second Amendment claim succeeds. We have adopted a two-step inquiry to determine whether a law violates the Second Amendment. We ask (1) "whether the challenged law burdens conduct protected by the Second Amendment and (2) if so . . . apply an appropriate level of scrutiny." Following this approach, **we apply intermediate scrutiny** and uphold 18 U.S.C. § 922(d)(3), 27 C.F.R. § 478.11, and the Open Letter.[97]

Here, notably, the Ninth Circuit prescribes intermediate scrutiny for its Second Amendment Analysis. Even as late as 2019, courts have held the banning of guns for cannabis users, citing other appellate decisions from around the country:

[97] *Id.* at 1091-92 (emphasis added) (some citations omitted).

> The government correctly cites to other Circuits that have held that section 922(g)(3) is constitutional under the Second Amendment. See Mem. in Opp. at 12-13; *see also United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010) ("in passing § 922(g)(3), Congress expressed its intention to [']keep firearms out of the possession of drug abusers, a dangerous class of individuals.[']); *United States v. Dugan*, 657 F.3d 998, 999 (9th Cir. 2011) ([W]e see the same amount of danger in allowing habitual drug users to traffic in firearms as we see in allowing felons and mentally ill people to do so."); *United States v. Yancey*, 621 F.3d 681, 686 (7th Cir. 2010) ("[T]he connection between chronic drug abuse and violent crime . . . illuminate[s] the nexus between Congress's attempt to keep firearms away from habitual drug abusers and its goal of reducing violent crime."). The court finds the cited cases persuasive, and nothing in Moss' argument convinces this court that it should "depart company from every other court to examine [section] 922(g)(3) following Heller" in finding that the provision is constitutional. *Seay*, 620 F.3d at 925.[98]

The *Seay* decision further expounded upon the Supreme Court's decision in *Heller*, in saying:

> Nothing in Seay's argument convinces us that we should depart company from *every* other court to examine § 922(g)(3) following Heller. Further, § 922(g)(3) has the same historical pedigree as other portions of § 922(g) which are repeatedly upheld by numerous courts since Heller. Moreover, in passing § 922(g)(3), Congress expressed its intention to "keep firearms out of the possession of drug abusers, a dangerous class of individuals." *United States v. Cheeseman*, 600

[98] United States v. Moss, No. 18-CR-316, 2019 U.S. Dist. LEXIS 118823, at *11-12 (D. Conn. July 17, 2019).

> F.3d 270, 280 (3d Cir. 2010) . . . As such, we find that § 922(g)(3) is the type of "longstanding prohibition on the possession of firearms" that Heller declared presumptively lawful. Accordingly, we reject Seay's facial challenge to § 922(g)(1).[99]

This kind of dismissal of claims in light of *Heller* has been consistent up through the decision in *Bruen*. It is that decision and its expansion of rights that may well change the way the Second Amendment is viewed with regard to cannabis users.

3. Constitutional Challenge to California Firearms Regulations

One of the more recent cases to look into the issue of gun-control legislation is Duncan. In this case, the 9th Circuit Court of Appeals examined legislation from California that limited the size of magazines in firearms.

In 2020, the Ninth Circuit approved this restriction on the magazine capacity at ten rounds. The court states:

> The Court does not look away from a governmental restriction on the people's liberty just because the state did not impose a full-tilt limitation on a fundamental and enumerated right. Rather, in assessing a governmental imposition on a fundamental right, the Court shuns policy-balancing and focuses on the erosion of the people's liberties. . . .
>
> Our decision today is in keeping with Ninth Circuit precedent. While we have not articulated a precise standard for what constitutes a substantial burden on core Second Amendment rights, we have consistently stated that a law that bans *possession* of a commonly used arm for self-defense — with no meaningful exception for law-abiding citizens — likely imposes a substantial burden on the Second Amendment.[100]

[99] United States v. Seay, 620 F.3d 919, 925 (8th Cir. 2010) (some internal citations omitted).
[100] Duncan v. Becerra, 970 F.3d 1133, 1157-58 (9th Cir. 2020).

The court found that because the law in-question did not meet either strict scrutiny nor intermediate scrutiny, but it does not definitively say which is the proper standard to utilize in Second Amendment Cases.[101] In applying an intermediate standard, the court asks whether the imposition of the law at-bar is a compelling state interest.[102]

Interestingly, this matter is still under appeal, as the "[t]he Supreme Court vacated our [Ninth Circuit] *en banc* interest-balancing and remanded for further consideration in light of *Bruen*. *Duncan v. Bonta*, 142 S. Ct. 2895, 213 L. Ed. 2d 1109 (2022). Our *en banc* panel then remanded the case to the district court. *Duncan v. Bonta*, 49 F.4th 1228, 1231 (9th Cir. 2022)."[103]

Upon its review, the Ninth Circuit Court of Appeals has upheld an emergency stay keeping the law prohibiting large-capacity magazines in-place pending the outcome of the appeal.[104]

III. BRUEN AND POST-*BRUEN* DECISIONS

The decisions from the Supreme Court, as well as the circuit and district-court levels, have changed the view of Second Amendment cases. No longer is there the lower standards of scrutiny that have passed muster in the pre-*Bruen* Second Amendment litigation. Since this time, there have been decisions that have been more friendly to medical cannabis users' Second Amendment rights.

A. N.Y. State Rifle & Pistol Ass'n v. Bruen[105]

Before the 2022 decision in *Bruen*, the Supreme Court had been moving towards a more expansive view of the Second Amendment right to keep and bear arms. The 2008 case, *District of Columbia v. Heller*[106] and the 2010 case, McDonald v. City of Chicago[107] found that the right was an individual right and thus is incorporated against the states under the Fourteenth Amendment, specifically saying, "[i]n *Heller* and *McDonald*, we held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for

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[101] *See id.* at 1162.
[102] *Id.* at 1165.
[103] Duncan v. Bonta, No. 23-55805, 2023 U.S. App. LEXIS 26869, at *11 (9th Cir. Oct. 10, 2023) (Bumatay, J. dissenting) (describing the procedural history of the matter).
[104] *See id.* at *4-5.
[105] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).
[106] District of Columbia v. Heller, 554 U.S. 570 (2008).
[107] McDonald v. City of Chicago, 561 U.S. 742 (2010).

self-defense. In doing so, we held unconstitutional two laws that prohibited the possession and use of handguns in the home."[108]

As background to the decision in *Bruen*, the gun control laws in New York state are some of the most restrictive in the United States. After the decisions in Heller and McDonald, the Supreme Court looked at the laws in New York to determine whether the state's law complied with the Constitutional protections on firearm ownership. Justice Thomas's decision describes the licensing regime:

> In 43 States, the government issues licenses to carry based on objective criteria. But in six States, including New York, the government further conditions issuance of a license to carry on a citizen's showing of some additional special need. Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State's licensing regime violates the Constitution.[109]

These states are often referred to as "may issue" rather than "shall issue," as New York may issue a given person a license, but other states will issue a license (unless the applicant is otherwise disqualified).

While the decisions in *Heller* and *McDonald* did establish the Second Amendment as an individual right, states still enacted restrictions like the ones in New York. The courts of appeal and the district courts had established a two-step framework that the court in *Bruen* rejects:

> In the years since [*McDonald*], the Courts of Appeals have coalesced around a "two-step" framework for analyzing Second Amendment challenges that combines history with means-end scrutiny.
>
> Today, we decline to adopt that two-part approach. In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important

[108] *Bruen*, 597 U.S. at 17.
[109] *Id.* at 11.

> interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[110]

The court goes on to say that the second step is unnecessary. Instead, the lower courts should analyze the law with history (the first step) and to ignore the means-end analysis that would be consistent with a lower level of scrutiny traditionally applied to these cases:

> Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history. But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.[111]

The court does not give a specific framework for analyzing these cases, but in dismissing the means-end scrutiny, the court is prescribing a higher level of scrutiny, *i.e.* strict scrutiny is likely the level to be applied going forward.

The court explains that the decisions in *Heller* and *McDonald* show that the historical background of the Second Amendment demonstrates that restrictions on firearm ownership must pass a higher level of scrutiny.[112] However, in doing so, we are not left with a specific framework from which the courts can determine the constitutionality of a given law that affects Second Amendment rights. The question becomes whether the justification for denial of gun permits for cannabis users can be upheld in light of these decisions.

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[110] *Id.*
[111] *Bruen*, 597 U.S. at 19.
[112] *Id.*

B. Framework for Second Amendment Analysis

The line of decisions from *Heller* to *Bruen* has upended much of what is known about limitations on firearms rights in light of the Second Amendment. Particularly with regard to the issuance of firearms licenses to cannabis users.

Prior to *Heller*, the Second Amendment was not considered to be incorporated by the Fourteenth Amendment the way that other aspects of the Bill of Rights had been. After *Bruen*, the tests of Constitutionality with regard to legislation affecting these rights, can no longer be tested on a rational basis or government interest basis. Instead, we look to the guidance on testing found in *Bruen* and in subsequent lower-court decisions.

Recent cases from the lower courts have reviewed various restrictions in light of the *Bruen* ruling and have instead issued other tests in order to determine the Constitutionality of the various laws around the United States.

C. Federal Firearms Restrictions Based on Age

A May 2023 district court decision expands on the analysis in its determination of "members of the political community."[113] *Frasier v. BATFE* was a district court decision that considered of ownership rights for individuals who were over the age of 18, but below 21. Under federal law, a holder of a Federal Firearms License (FFL), which license firearms resellers must have, cannot resell to those under 21. However, people under the age of 21 can own a firearm.[114]

The court focuses largely on the definition of "the people" and "members of the political community."[115] In its analysis, the court looks first to *Bruen* in its analysis. The discussion states:

> In *Bruen*, the Supreme Court did not conduct a historical analysis of the meaning of "the people." It treated the question as a simple one and concluded that, at least, the term applied to all "adult citizens," and the Court did not make any attempt to determine if the petitioners in question would have been considered "adult citizens" at the time of the Founding. *Bruen*, 142 S.Ct. at 2134. The approach manifest in *Heller* and

[113] Fraser v. BATFE, No. 3:22-cv-410, 2023 U.S. Dist. LEXIS 82432 (E.D. Va. May 10, 2023).
[114] Fraser, 2023 U.S. Dist. LEXIS 82432 at *6.
[115] *Id* at *24-25.

> *Bruen* supports a finding that today's understanding of "the people" is appropriate when considering the reach of the Second Amendment in the context presented by the motions under consideration.[116]

The court does grant that the issue of substance usage is one that lends itself to more legal restraint:

> Therefore, when it comes to controlled substances and health, legislatures constitutionally may regulate these matters within reason and their determinations are due significant judicial deference. In contrast, in the Second Amendment context, judicial deference to legislative interest balancing. . . is not deference that the Constitution demands. *N.Y. State Rifle & Pistol Assoc. v. Bruen*, 142 S.Ct. 2111, 2131, 213 L. Ed. 2d 387 (2022). "The Second Amendment 'is the very product of an interest balancing by the people' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense." *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)). This accords the Second Amendment the same respect as other constitutional rights.[117]

The court's recognition of the Second Amendment's full incorporation as an individual right is a big change in Second Amendment law. The court recognizes that *Bruen* expands this right further than *Heller* and *McDonald* had:

> *Bruen* requires two distinct analytical steps. First, it must be determined if "the Second Amendment's plain text covers an individual's conduct.: *Bruen*, 142 S.Ct. at 2126 (citation and quotation marks omitted). If it does, "the Constitution presumptively protects that conduct." *Id.* Second, if the conduct is presumptively protected, "the government must

[116] *Id.* at *32.

[117] *Id* at *35.

> demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* To do so, the Government "must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127.
>
> When establishing that analytical construct, *Bruen* explicitly prohibited courts from engaging in any means-end scrutiny. The Supreme Court also "expressly rejected the application of any judge-empowering interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[118]

When performing the historical analysis, the historical law and the modern one being analyzed need not be an exact copy. To be a law that passes muster, the modern law can be an analogue of the historical one.[119]

> In describing these "analytical steps," the court seems to apply a strict scrutiny standard that includes a historical analysis, *i.e.* "Does this law comport with the historical laws regarding the Second Amendment?" This does appear to be consistent with the decision in *Bruen*.

D. New York Conceal Carry in Light of Bruen

Interestingly, New York did change its laws in light of the decision against it in *Bruen*, but restrictions on conceal-carry permits still remained. The State of New York passed the Conceal Carry Improvement Act (CCIA)[120] as a result of the decision in *Bruen*, and the new law was challenged on Second Amendment grounds.

The Second Circuit describes the restrictions on issuance of licenses for the concealed carry of firearms under this new regime as:

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[118] Fraser, 2023 U.S. Dist. LEXIS 82432 at *14-15.
[119] *See id.* at *16.
[120] N.Y. Penal Law § 400.00.

Under the CCIA, applicants for both in-home and concealed-carry licenses must have "good moral character" to obtain a license. The CCIA defines "good moral character" as "the essential character, temperament and judgement necessary to be entrusted with a weapon and to use it only in a manner that does not endanger oneself or others." As noted above, the good-moral-character requirement for both in-home and concealed-carry licenses pre-dates *Bruen* and the CCIA, but that standard had not previously been defined by statute.

The CCIA added other relevant requirements that are particular to the issuance of concealed-carry licenses. An applicant for a concealed-carry license must attend an in-person meeting with a licensing officer and disclose to the officer: (1) the "names and contact information for the applicant's current spouse, or domestic partner, any other adults residing in the applicant's home, including any adult children of the applicant, and whether or not there are minors residing, full time or part time, in the applicant's home"; (2) the "names and contact information of . . . four character references who can attest to the applicant's good moral character"; (3) a list of all former and current social media accounts from the preceding three years; and (4) such other information as the licensing officer may require "that is reasonably necessary and related to the review of the licensing application."

The applicant must also provide the licensing officer with a certificate verifying that he has completed certain required training. To obtain a concealed-carry license, the applicant must complete an in-person live firearms safety course conducted by a duly authorized instructor with curriculum approved by the division of criminal

> justice services and the superintendent of state police. [121]

There are also restrictions on where license holders may carry, specifically they are banned from carrying in "restricted locations."[122] These restrictions and others in the recent legislation have been challenged as overly burdensome and the Second Circuit decided based upon a post-*Bruen* "two-step framework, with the first step based on text and the second step based on history."[123]

The court's historical analysis comprises two parts.

> First, when used to interpret text, not all history is created equal. While ancient practices and post-enactment history remain critical tools of constitutional interpretation, they must be examined with some care because while history and tradition shed light on the meaning of the right to keep and bear arms — they do not create it."[124]

That is to say that the court will use history as a bound on what states can when enacting laws that affect ownership of firearms, but it does not constrain states from broadening individuals' rights under the Second Amendment.

> Second, in examining history and tradition, a court must identify the societal problem that the challenged regulation seeks to address and then ask whether past generations experienced that same problem and, if so, whether those generations addressed it in similar or different ways. ... And if courts during that period upheld similar governmental practices against similar constitutional challenges, that is strong evidence of constitutionality. Third, the absence of a distinctly similar historical regulation in the

[121] Antonyuk v. Chiumento, 89 F.4th 271, 290 (2d Cir. 2023) (internal quotes and citations omitted.)

[122] *Id.* at 291.

[123] *Id.* at 298. The plaintiffs also challenged the sensitive-places restriction on First Amendment grounds. *Id.* at 292.

[124] Antonyuk, 89 F. 4th at 301 (internal quotes and citations omitted).

> presented record, though undoubtedly relevant, can only prove so much.[125]

However, the court goes on to note that things have changed considerably since the ratification of the Bill of Rights, and that the absence of a given law in the historical record does not necessarily mean that the new restrictions are unconstitutional.

> Fourth, courts must be particularly attuned to the reality that the issues we face today are different than those faced in medieval England, the Founding Era, the Antebellum Era, and Reconstruction. To put it plainly, our era does not resemble those. Thus, the lack of a distinctly similar historical regulation, though (again) no doubt relevant, may not be reliably dispositive in Second Amendment challenges to laws addressing modern concerns.[126]

The court goes on to discuss the historical record which further illustrates this nuanced approach that the Second Circuit is applying to these kinds of firearms laws.[127]

Ultimately the court determined that the "character requirement . . . is not *facially* unconstitutional."[128] However, the law as-applied may still be unconstitutional.[129] The new law, as distinguished from the law at-question in *Bruen,* does not have the proper-cause rule that was struck down by the *Bruen* court.[130] That the law still gives discretion to the licensing officer is not enough to invalidate the law, but should the discretion be abused, it may still be subject to an as-applied constitutional challenge. However, the court found that the requirement of an applicant to disclose "one's social media accounts—including ones that are maintained pseudonymously—forfeits anonymity in that realm. Conditioning a concealed carry license on such a disclosure imposes a burden on the right to bear arms that is without sufficient analogue in our nation's history or tradition of firearms regulation."[131]

In a 100-page opinion, the court upholds the law in-part and strikes it down in-part. It does extensive historical analysis of the various historical

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[125] *Id.* at 301 (internal quotes and citations omitted).
[126] *Id.* at 302.
[127] *See id.* at 302-06.
[128] *Id.* at 307.
[129] *Id.*
[130] Antonyuk, 89 F. 4th at 316.
[131] *Id.* at 331.

analogues to the regulations in the CCIA and gives its extensive analysis of the *Bruen* decision. However, the decision is dated December 8, 2023, and as of this writing it is unclear if further hearings and appeals will be held in this matter.

E. Challenge to the Ban on Firearms Ownership for the Accused

United States v. Rahimi is a decision from the Fifth Circuit on the issue of the prohibition of possession of firearms by those subject to a restraining order but who have not been convicted of a crime.[132] The United States Supreme Court has granted *certiorari*.[133]

> The question presented in this case is not whether prohibiting the possession of firearms by someone subject to a domestic violence restraining order is a laudable policy goal. The question is whether 18 U.S.C. § 922(g)(8), a specific statute that does so, is constitutional under the Second Amendment of the United States Constitution. In the light of *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022), **it is *not***.[134]

The prohibition on possession of firearms by users of controlled substances is in the same section of the statute at 18 U.S.C. § 922(g)(3). The subsection being challenged in *Rahimi* is the section that prohibits possession of firearms by individuals subject to a restraining order, specifically 18 U.S.C. § 922(g)(8).[135]

Not only is this the same part of the law, but the question before the court is very similar: can someone have their Second Amendment rights taken from them without due process? *I.e.* if someone is only accused of a crime—but not yet convicted, is the prohibition on their ownership of firearms constitutional?

The Fifth Circuit found that such a ban does not pass constitutional muster in light of *Bruen*.[136] In its evaluation, the court noted that the deprivation of rights occurs not after a conviction, but simply upon the court's

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[132] United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), *cert. granted*, 91 U.S.L.W. 3339 (U.S. June 30, 2023) (No. 22-915).
[133] *Id.*
[134] *Id.*
[135] United States v. Rahimi, 143 S. Ct. 2688 (2023).
[136] *Id.*

order. "This is so even when the individual has not been criminally convicted or accused of any offense and when the underlying proceeding is merely civil in nature."[137]

The lack of due process is fundamental in the evaluation because an individual has been found to have forfeited this and other rights when convicted of a felony.[138] The prohibition on felons possessing firearms is "long-standing," but whether the accused can also be prohibited is a new question in light of the decision in *Bruen*.[139]

F. Challenge to Prohibition of Firearms Possession by Cannabis Users

Since the decision in Rahimi, discussed supra, a district court in the Fifth Circuit found that the prohibition on firearms possession by cannabis users is also unconstitutional.[140] The court found that the decisions in *Bruen* and *Rahimi* changed the legal precedent that had upheld section 922(g)(3).[141]

In its historical analysis, the court found that the prohibition for those who are intoxicated is a longstanding prohibition.[142] However, those prohibitions, "prevented individuals from *using* firearms while *actively intoxicated*, while § 922(g)(3) prevents *users* of intoxicants from *possessing* firearms altogether."[143]

This is an important distinction between the law as-is and the historical precedent that only prohibits the actively intoxicated from possession, as opposed to those who may just possess firearms at other times. The court analogizes this to motor vehicles where there is a prohibition on driving under the influence of alcohol but there is no prohibition against individuals who may consume alcohol from driving altogether.[144]

In holding that the defendant had retained her Second Amendment rights, the court said, "The longstanding prohibition on possession of firearms by felons requires the Government to charge and convict an individual *before*

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[137] *Id.* at 455.
[138] *Id.* at 452 (citing Heller, 554 U.S. at 626-7).
[139] *See id.*
[140] United States v. Connelly, 668 F. Supp. 662, 680 (W.D. Tex. 2023) *appeal filed,* No. 23-50312 (May 04, 2023).
[141] *Id.* at 668.
[142] *Id.* at 677.
[143] United States v. Connelly, 668 F. Supp. 662 (2023) at 672 (emphasis in original).
[144] *Id.* at 673.

disarming her."[145] Without a felony conviction, one's right to firearm possession cannot be abrogated.

However, not all courts have decided accordingly. For example, a district court in Iowa found that the prohibition is valid.[146] There the court said, "The Court has reviewed these non-binding decisions and, with respect, simply disagrees with the narrow view these courts took of the historic precedent of regulating firearm possession by dangerous and unlawful citizenry. The Court is persuaded that Section 922(g)(3) is a constitutional restriction consistent with historical tradition."[147] The decision in *Seay*, was not overturned by *Bruen*, and is thus still the law.[148] There are also other district courts that have found that the § 922(g)(3) is constitutional, and as of this writing, no appellate court has issued a decision on the matter.[149]

There has not been a decision on this issue from any of the courts of appeals since the Supreme Court decision in *Bruen*. As a result, it is unclear if a circuit split will arise, but it is clear that district courts around the nation have disagreed with the constitutionality of § 922(g)(3) in light of *Bruen*. Should the courts of appeals uphold the district courts' decisions, it will likely only be a matter of time until the Supreme Court grants *certiorari* and decides the matter conclusively.

CONCLUSION

In looking at the line of Supreme Court decisions from *Heller* to *Bruen* as applied to cannabis users' Second Amendment rights, we do not get a perfectly clear answer as to how it is applied. Second Amendment rights were incorporated by the Fourteenth Amendment by *Heller*, and a higher standard of scrutiny was placed on legislation that affects these rights by *Bruen*.

Cannabis rights have been consistently expanding at the state level for many years now, with a majority of states legalizing its consumption to different degrees. However cannabis is still listed as a Schedule I controlled

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[145] *Id.* at 677 (emphasis in original).
[146] United States v. Springer, No. 23-CR-1013-CJW-MAR, 2023 U.S. Dist. LEXIS 134957, at *5-14 (N.D. Iowa Aug. 3, 2023); *See also* United States v. Springer, No. 23-CR-1013 CJW-MAR, 2023 U.S. Dist. LEXIS 181854, at *1 (N.D. Iowa Oct. 10, 2023) (accepting Defendant's subsequent guilty plea).
[147] *Id.* at *13.
[148] *Id.* at *8-10. *See generally* United States v. Seay, 620 F.3d 919 (8th Cir. 2010).
[149] *See* Springer 2023 U.S. Dist. LEXIS 181854, at *12 (listing decisions from other district courts and expressly stating its disagreement with the decision in Springer).

substance under the CSA.[150] These states have also been expanding the protections extended to cannabis users, but the intersection of the state and federal law still adds complications. By way of analogy, this expansion and recognition of rights of cannabis users at the state level also argues for an expansive view of the Second Amendment when applied to cannabis users.

Further, the question of firearms possession by cannabis users has been considered by various district courts, but no federal appellate court has issued a decision, nor has the Supreme Court passed any judgment. While decisions are split, the historical analysis seems to favor the unconstitutionality of the prohibition under 18 U.S.C. § 922(g)(3). The decision in *Bruen* combined with the decisions discussed *supra* calls for a broad reading of the Second Amendment. *Bruen* calls for a historical analysis in which the law in-question has to have a historical analogue. No historical analysis can yet point to a close analogue of this law. Therefore, I conclude that 18 U.S.C. § 922(g)(3) is unconstitutional under the Second Amendment in light of *Bruen*.

[150] *See* discussion, *supra* Introduction.