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# High Anxiety: Forcing Medical Marijuana Patients to Choose Between Employment and Treatment

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# HIGH ANXIETY: FORCING MEDICAL MARIJUANA PATIENTS TO CHOOSE BETWEEN EMPLOYMENT AND TREATMENT

**Abstract:** The vast majority of states recognize the potential medical benefits of marijuana in treating debilitating medical conditions. To date, thirty-six states have legalized consumption of medical marijuana and eleven have done the same for low-tetrahydrocannabinol variations of the cannabis plant. Marijuana still remains illegal under federal law, however, subjecting it to stringent regulation since the Controlled Substances Act became law in 1971. Despite this, the wave of state legalization has essentially left the federal government in the past when it comes to marijuana policy. This federal prohibition poses unique problems for medical marijuana patients seeking employment. The current status of the law leaves no federal employment protections for patients who use marijuana to treat a medical condition, even if such usage complies with applicable state law. Further, even states that have legalized medical marijuana offer little in the way of employment protections for patients. Additionally, state disability protection statutes often exclude people engaging in "illegal use of drugs"—which courts have typically interpreted to include federally illegal substances, including marijuana. The majority of courts have also declined to protect medical marijuana use under lawful activities provisions. Some states have enacted provisions protecting medical marijuana patients from employment discrimination on the basis of their marijuana use, but these are just a small minority. This Note argues that the most expedient way to bring medical marijuana patients under the umbrella of employment protections is for courts to recognize protections for medical marijuana use under the tort of wrongful discharge in violation of public policy.

## INTRODUCTION

Joseph Casias, a resident of Michigan, received a diagnosis of sinus cancer and an inoperable brain tumor before turning eighteen years old.[1] His treating oncologist recommended marijuana as a treatment after conventional pain medication failed to offer any relief and resulted in considerable negative side effects.[2] Mr. Casias sought approval for a medical marijuana registry card under the Michigan Medical Marijuana Act shortly after the law went into effect.[3]

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[1] Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 431 (6th Cir. 2012).

[2] *Id.*

[3] Casias v. Wal-Mart Stores, Inc., 764 F. Supp. 2d 914, 916 (W.D. Mich. 2011), *aff'd*, 695 F.3d 428; *see* MICH. COMP. LAWS § 333.26424 (2021) (providing for a shield from criminal sanction for a

He began to use medical marijuana during his non-working hours to treat his condition.[4] After suffering a workplace accident during his employment at a Wal-Mart store, Mr. Casias willingly submitted to a mandatory drug screening.[5] Wal-Mart terminated Mr. Casius one week later, after five years as a model employee, because he tested positive for the active ingredient in marijuana.[6] A supervisor informed him that Wal-Mart made no exception in their drug policy for medical marijuana, regardless of state authorization or positive employee performance.[7] Unfortunately, the court system would offer Mr. Casias no legal remedy for the employment discrimination he suffered on the basis of his off-duty medical marijuana use.[8] Mr. Casias is one of millions currently left without a remedy for adverse employment actions based on their status as medical marijuana patients.[9]

As of May 2021, a total of forty-seven states have laws on their books allowing for medical cannabis use.[10] Thirty-six states and four territories have

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qualifying patient's possession and consumption of marijuana for treatment of a serious medical condition).

[4] *Casias*, 764 F. Supp. 2d at 916.

[5] *Id.* In November of 2009, Mr. Cassias was moving a shopping cart while working at the Battle Creek, Michigan, Wal-Mart location when he lost his footing and twisted his knee, suffering a minor injury. Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss at 3, *Casias*, 764 F. Supp. 2d 914 (No. 1:10-cv-781), 2010 WL 9501844. Mr. Casias was not under the influence of marijuana while working and reported the injury to his supervisor per employer policy. *Id.*

[6] *Casias*, 764 F. Supp. 2d at 916.

[7] *Id.* at 916–17. Wal-Mart considered Mr. Casias a model employee, promoting him to Inventory Control Manager and naming him "Associate of the Year" in 2008. *Id.* at 916.

[8] *See Casias*, 695 F.3d at 437 (affirming the district court's decision to dismiss the plaintiff's wrongful termination claims); *Casias*, 764 F. Supp. 2d at 926 (dismissing plaintiff's wrongful termination claims).

[9] *See Casias*, 695 F.3d at 437 (resulting in no remedy for employment discrimination on the basis of off-duty medical marijuana use); *see also* Coats v. Dish Network, LLC, 2015 CO 44, ¶ 4, 350 P.3d 849, 850 (holding that state lawful activities statutes do not protect off-duty medical marijuana use, regardless of state legality, because marijuana is still federally illegal); Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus., 230 P.3d 518, 520 (Or. 2010) (determining that medical marijuana use does not require accommodation under state disability or medical marijuana statutes because the federal Controlled Substances Act (CSA) preempts state statutes); Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC, 257 P.3d 586, 588 (Wash. 2011) (finding that the state medical marijuana statute provides no express or implied private right of action nor does it create public policy that would support a wrongful discharge claim); *Medical Marijuana Patient Numbers*, MARIJUANA POL'Y PROJECT, https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/medical-marijuana-patient-numbers/ [https://perma.cc/6962-LTJG] (May 27, 2021) (noting the increase in registered medical marijuana card holders, thus bringing the total number of registered patients into the millions).

[10] *See State Medical Cannabis Laws*, NAT'L CONF. OF ST. LEGISLATURES, https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx [https://perma.cc/GTL4-ZH4X] (Nov. 29, 2021) (listing states that have legalized medical cannabis including marijuana, low-tetrahydrocannabinol (THC), and high-cannabidiol (CBD) variations).

enacted laws legalizing the use of marijuana for medical purposes.[11] An additional eleven states maintain restrictions on marijuana but have approved the medical use of low-tetrahydrocannabinol (THC) or cannabidiol (CBD) products derived from the cannabis plant.[12] Marijuana policy advocates estimate

[11] ARK. CONST. amend. XCVIII, §§ 1–26; COLO. CONST. art. XVIII, § 14; MO. CONST. art. XIV, § 1; S.D. CONST. art. XXX, § 14 (held to be in contravention of S.D. Const. Art. XXIII § 1 in Thom v. Barnett, 967 N.W.2d 261 (S.D. 2021)); ALASKA STAT. §§ 17.37.010–.80 (2020); ARIZ. REV. STAT. ANN. §§ 36-2801 to -2844 (2021); CAL. HEALTH & SAFETY CODE §§ 11362.5–.9 (West 2021); CONN. GEN. STAT. ANN. § 21a-408 (West 2021); DEL. CODE ANN. Tit. 16, §§ 4901A–4928A (2022); D.C. CODE §§ 7-1671.01–.13 (2022); FLA. STAT. §§ 381.986–.988 (2021); 10 GUAM CODE ANN. §§ 122501–122530 (2021); HAW. REV. STAT. §§ 329-121 to -131 (2021); 410 ILL. COMP. STAT. §§ 130/1–130/999 (2021); LA. STAT. ANN. § 40:1046 (2021); ME. STAT. tit. 22, §§ 2421–2430-H (2021); MD. CODE ANN., HEALTH-GEN. §§ 13-3301 to -3316 (West 2021); MASS. GEN. LAWS ch. 94I, §§ 1–8 (2020); MICH. COMP. LAWS §§ 333.26421–.26430 (2021); MINN. STAT. §§ 152.21–.37 (2021); MONT. CODE ANN. §§ 50-46- 301 to -347 (2021) (repealed by 2021 Mont. Law ch. 576, § 104); NEV. REV. STAT. §§ 678C.005–.860 (2020); N.H. REV. STAT. ANN. §§ 126-X:1– :12 (2021); N.J. STAT. ANN. §§ 24:6I-1 to -56 (West 2021); N.M. STAT. ANN. §§ 26-2B-1–10 (2021); N.Y. PUB. HEALTH LAW §§ 3360–3369-E (McKinney 2022); N.D. CENT. CODE §§ 19-24.1-01 to -40 (2021); OHIO REV. CODE ANN. §§ 3796.01–.30 (LexisNexis 2021); OKLA. STAT. tit. 63, §§ 427.1–.23 (2021); OR. REV. STAT. §§ 475b.785–.949 (2021); 35 PA. STAT. AND CONS. STAT. ANN. §§ 10231.101–.2110 (West 2022); 21 R.I. GEN. LAWS §§ 21-28.6-1 to -18 (2022); UTAH CODE ANN. §§ 26-61a-101 to -703 (LexisNexis 2021); V.I. CODE ANN. Tit. 19, §§ 774a–797 (2021); VT. STAT. ANN. Tit. 18, §§ 4471–4474n (2021); VA. CODE ANN. § 18.2-251.1 (2021); WASH. REV. CODE §§ 69.51A.005–.903 (2021); W. VA. CODE §§ 16A-1-1 to -16-1 (2021); P.R. LAWS ANN. Tit. 24, §§ 2621–2626h (2021); Jimmie E. Gates, *Medical Marijuana in Mississippi Approved with Initiative 65 Vote. Here's What That Means*, CLARION LEDGER (Nov. 4, 2020), https://www.clarionledger.com/story/news/politics/2020/11/04/mississippi-medical-marijuana-initiative-65-a-election-results/6035290002/ [https://perma.cc/Z4GD-DYKP]; *see State Medical Cannabis Laws*, *supra* note 10 (listing states that have acted to legalize medical marijuana).

[12] ALA. CODE § 13A-12-214.3 (2021); GA. CODE ANN. § 43-34-120 to -126 (2021); IND. CODE §§ 24-4-21-1 to -22-2 (2021); IOWA CODE §§ 124E.1–.26 (2022); KY. REV. STAT. ANN. § 218A.010(28) (West 2022); N.C. GEN. STAT. § 90-94.1 (2020); S.C. CODE ANN. §§ 44-53-1810 to -1840 (2021); TENN. CODE ANN. § 39-17-402 (2021); TEX. HEALTH & SAFETY CODE ANN. §§ 487.001–.201 (2021); WIS. STAT. § 961.34 (2022); WYO. STAT. ANN. § 35-7-1063 (2021); *see State Medical Cannabis Laws*, *supra* note 10 (recounting the current status of state medical cannabis law). Additionally, seventeen states and three territories have legalized recreational marijuana for adult use. COLO. CONST. art. XVIII, § 16; ALASKA STAT. § 17.38.010–.900; ARIZ. REV. STAT. ANN. §§ 36-2850–2865; CAL. HEALTH & SAFETY CODE § 11362.1; D.C. CODE § 48-904.01(1A); 11 GUAM CODE ANN. §§ 8108–8120; 410 ILL. COMP. STAT. § 705/1-1–705/999-99; ME. STAT. tit. 28-B, §§ 1501–1504; MASS. GEN. LAWS ch. 94G, §§ 1–21; MICH. COMP. LAWS §§ 333.27951–.27967; MONT. CODE ANN. §§ 16-12-101 to -533; NEV. REV. STAT. §§ 678D.005–.510; N.J. STAT. ANN. § 24:6I-31 to -56; 4 N. MAR. I. CODE §§ 53001–077 (2021); OR. REV. STAT. §§ 475B.005–.548; VT. STAT. ANN. Tit. 18, §§ 4230–4230j; VA. CODE ANN. §§ 4.1-600 to -1503; WASH. REV. CODE § 69.50.4013; 2021 N.M. Laws ch. 4 (setting forth a cannabis regulatory scheme); 2021 N.Y. Laws ch. 92 (same); *see State Medical Cannabis Laws*, *supra* note 10 (providing a list of states that have acted to legalize medical marijuana use). The cannabis plant is the natural state from which cultivators and producers derive marijuana, oil extracts, and other commodities like hemp. Kelly Burch, *What's the Difference Between CBD and THC? Understanding Their Health Benefits and Side Effects*, INSIDER, https://www.insider.com/cbd-vs-thc [https://perma.cc/82JN-RPC8] (Apr. 19, 2021). Tetrahydrocannabinol, or THC, is one of the two most common active ingredients in the cannabis plant and is the ingredient responsible for the psychotropic effects of consuming marijuana. *Id.* Recent research has identified potential medical benefits in THC, including appetite stimulation, nausea reduction, and

that approximately 5.5 million Americans are registered as medical marijuana patients under the laws of their respective states or territories.[13] The number of registered patients will only continue to grow as additional states adopt their own medical marijuana legalization statutes.[14] In addition to this exponential patient growth, public support for medical marijuana is overwhelming, with national polls frequently finding that ninety percent of respondents approve of legalizing medical marijuana.[15] Despite this consistent support by an overwhelming majority of voters, marijuana remains federally illegal for almost all purposes under the federal Controlled Substances Act (CSA).[16] The only provision of the CSA that permits the manufacture and possession of marijuana is for use in federally-approved research projects—an exceedingly narrow exception.[17]

This dissonance between state and federal legislation has resulted in many employees, like Mr. Casias, with little or no way of vindicating their civil

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treatment of spasticity and neuropathic pain. *Id.* Cannabidiol, or CBD, is the other of the two most active ingredients in the cannabis plant and yields no psychotropic effects. *Id.* Potential medical uses for CBD include treatment of epileptic seizures, anxiety, and psychosis. *Id.*

[13] *Medical Marijuana Patient Numbers*, *supra* note 9.

[14] *See* Charlotte Morabito, *What 2020 Revealed About the Future of Marijuana Legalization in the U.S.*, CNBC (Jan. 6, 2021), https://www.cnbc.com/2021/01/06/marijuana-united-states-law.html [https://perma.cc/TM5G-EQWK] (commenting on the continuing trend of states legalizing both medical and recreational marijuana). The number of registered medical marijuana patients has risen exponentially from 1.1 million patients in 2014, to 2.1 million patients in 2018, and 4.3 million patients in 2020 as additional states legalize this form of treatment. *See Medical Marijuana Patient Numbers*, *supra* note 9 (estimating the number of medical marijuana patients in 2020); *Number of Legal Medical Marijuana Patients*, PROCON.ORG, https://medicalmarijuana.procon.org/number-of-legal-medical-marijuana-patients/ [https://perma.cc/P6VD-P85U] (May 18, 2018) (estimating the number of medical marijuana patients in 2018); *Number of Legal Medical Marijuana Patients*, PROCON.ORG, https://medicalmarijuana.procon.org/background-resources/2014-number-of-legal-medical-marijuana-patients/ [https://perma.cc/LAP6-WG43] (Nov. 13, 2014) (estimating the number of medical marijuana patients in the United States in 2014).

[15] *See* Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RSCH. CTR. (Nov. 14, 2019), https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/ [https://perma.cc/G26B-MF2E] (concluding that 91% of respondents favor legalizing marijuana for medicinal purposes); *U.S. Voters Oppose Trump Emergency Powers on Wall 2-1 Quinnipiac University National Poll Finds; 86% Back Democrats' Bill on Gun Background Checks*, QUINNIPIAC UNIV. POLL (Mar. 6, 2019), https://poll.qu.edu/Poll-Release-Legacy?releaseid=2604 [https://perma.cc/YFS4-89FW] (concluding that 93% of respondents favored the legalization of medical marijuana in the United States if a medical professional prescribes it).

[16] *See* 21 U.S.C. §§ 812, 844 (placing restrictions on the possession of controlled substances based on categories known as "schedules" and placing marijuana into Schedule I); Gonzales v. Raich, 545 U.S. 1, 32–33 (2005) (holding that the CSA provisions criminalizing possession of marijuana were within Congress's commerce power); *supra* note 15 and accompanying text (describing overwhelming support for medical marijuana legalization in opinion polls).

[17] 21 U.S.C. § 823; *see Gonzales*, 545 U.S. at 14 (describing the narrow exception in the CSA for Schedule I drugs, including marijuana, used "as part of a Food and Drug Administration preapproved research study"); Coats v. Dish Network, LLC, 2015 CO 44, ¶ 19, 350 P.3d 849, 852–53 (explaining that the possession and use of marijuana is federally illegal except when researchers use it as part of "federally-approved research projects").

rights.[18] This has also left many patients with the impossible choice of either treating their condition effectively or keeping their job—an unambiguous Catch-22.[19] Although some state and federal courts have found protections from employment discrimination for patients, the vast majority have declined to extend such employment protections to encompass off-duty medical marijuana use.[20] Even where courts allow employees' disability discrimination claims to proceed, courts have recognized other ways that the employer may escape liability.[21] The most effective employment protections for medical marijuana patients seem to come from anti-discrimination provisions in the state medical marijuana statutes themselves.[22] But even these explicit provisions typically

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[18] *See* Casias v. Wal-Mart Stores, Inc. 695 F.3d 428, 437 (6th Cir. 2012) (denying relief to plaintiff under employment discrimination law for medical marijuana use); G.M. Filisko, *Weed-Whacked: Employers and Workers Grapple with Laws Permitting Recreational and Medical Marijuana Use*, A.B.A. J., Dec. 2015, at 46, 48 (noting the confusion for both employees and employers alike due to conflict between state and federal marijuana law).

[19] *See* Ari Lieberman & Aaron Solomon, *A Cruel Choice: Patients Forced to Decide Between Medical Marijuana and Employment*, 26 HOFSTRA LAB. & EMP. L.J. 619, 621–22 (2009) (describing how the conflict between federal and state laws leaves employees who use medical marijuana with the choice of finding employment or treating their illness). Joseph Heller first described the term "Catch-22" in his 1961 novel, *Catch-22*, that follows a U.S. Air Force bombardier who finds that the Air Force continually increases the number of required combat missions as he approaches the threshold that would allow him to return home. *See generally* JOSEPH HELLER, CATCH-22 (50th Anniversary ed. 2011) (describing a "Catch-22" as an inescapable paradox resulting from conflicting conditions).

[20] *Compare* Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37, 45–46 (Mass. 2017) (finding that the federal illegality of medical marijuana does not result in the per se unreasonableness of its off-site use as an accommodation), *and* Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761, 781 (D. Ariz. 2019) (finding an implied right of action within the Arizona Medical Marijuana Act), *with* Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC, 257 P.3d 586, 590, 594, (Wash. 2011) (ruling that the Washington Medical Use of Marijuana Act does not imply a right of action nor does it satisfy the public policy exception to wrongful termination), *and* Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 206–07 (Cal. 2008) (refusing to find employer accommodation for off-site medical marijuana use to be a reasonable accommodation due to its use being federally illegal).

[21] *See Barbuto*, 78 N.E.3d at 47 (recognizing that an employer may be able to escape liability by proving that accommodation of an employees' off-site medical marijuana use is unreasonable and poses an undue burden). In order to make a prima facie showing of common-law wrongful termination, the plaintiff must demonstrate that the employer did not have an "overriding legitimate business justification" for the termination. *See, e.g.*, Collins v. Rizkana, 652 N.E.2d 653, 657–58 (Ohio 1995) (defining the "overriding justification" element of a common law wrongful discharge claim). Additionally, the issue of an employer's "overriding justification" is a factual question left for the jury to decide. *See* Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397, 401 (1989) (describing the bifurcation of decision-making between the court and jury in common-law wrongful discharge cases). In 2017, the Supreme Judicial Court of Massachusetts in *Barbuto v. Advantage Sales & Marketing, LLC* provided examples for why accommodation of medical marijuana use may constitute an undue burden on the employer, such as the employee's marijuana use impairing their performance, threatening the safety of others, or jeopardizing the employer's contractual or statutory obligations to come within federal law. 78 N.E.3d at 47–48.

[22] *See, e.g.*, CONN. GEN. STAT. ANN. § 21a-408p(b)(3) (West 2021) (prohibiting refusal to hire and termination of an employee solely based on their status as a medical marijuana registrant); N.J. STAT. ANN. § 24:6I-6.1 (West 2021) (allowing medical marijuana patients to rebut a positive em-

provide liability shields to employers where continued employment of a medical marijuana patient jeopardizes a monetary or licensing benefit—a relatively low threshold to meet.[23]

This Note explores the current ways in which states have attempted to protect employees who use medical marijuana and argues that the courts' use of the common law tort of wrongful termination in violation of public policy may be the best method of establishing these protections.[24] Part I of this Note summarizes current federal and state marijuana law as well as relevant legal developments protecting employees from discrimination based on medical treatment.[25] Part II of this Note analyzes the common legal arguments of both employees terminated for medical marijuana use and employers who terminate medical marijuana patients, and evaluates the strengths and weaknesses of these arguments under the current legal regime.[26] Finally, Part III of this Note argues that employees who use medical marijuana would receive better protection from the courts through the tort of wrongful termination and makes recommendations for advocates to advance these protections in the face of federal prohibition.[27]

## I. The Current Status of Protections for Employee Medical Marijuana Use

The conflicting nature of federal and state marijuana laws has resulted in a confusing patchwork of law that offers little protection for patients' employment prospects or guidance to employers themselves.[28] This Part provides a background on these laws, thereby allowing the reader to better grasp how these facial contradictions impact employment protections for medical mariju-

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ployment drug screening with medical documentation); 21 R.I. GEN. LAWS § 21-28.6-4(e) (2022) (prohibiting adverse employment action against an employee based on status as a medical marijuana patient). Like many states, the Rhode Island medical marijuana legislation provides exceptions to its discrimination provision for instances in which employees use marijuana on the clock, undertake tasks in which marijuana use may constitute negligence, operate machinery or a motor vehicle, and where allowing for such use would violate a collective bargaining agreement. *See* 21 R.I. GEN. LAWS § 21-28.6-4(e) (providing exceptions for state medical marijuana employment anti-discrimination provision).

[23] *See* ARIZ. REV. STAT. ANN. § 36-2813 (2021) (prohibiting termination of an employee for their status as a medical marijuana cardholder or for a positive drug screen with exceptions for impairment on the premises or if the employer would lose a "monetary or licensing related benefit under federal law"); DEL. CODE ANN. tit. 16, § 4905A (2022) (same); N.M. STAT. ANN. § 26-2B-9 (2021) (same).

[24] *See infra* notes 28–258 and accompanying text.

[25] *See infra* notes 28–145 and accompanying text.

[26] *See infra* notes 146–209 and accompanying text.

[27] *See infra* notes 210–258 and accompanying text.

[28] *See* 42 U.S.C. § 12112 (prohibiting hiring and employment discrimination on the basis of disability); MASS. GEN. LAWS ch. 151B, § 4 (2020) (same). *Compare* 21 U.S.C. § 812(C)(10) (placing marijuana in the most restrictive category of controlled substances), *with* MASS. GEN. LAWS ch. 94I, § 2 (allowing the possession and use of marijuana by an individual with a qualifying debilitating medical condition), *and* VT. STAT. ANN. tit. 18, § 4474b (2021) (same).

ana patients.[29] Section A provides an overview of federal marijuana and disability discrimination statutes.[30] Section B provides an overview of state marijuana laws and employee protections in the context of medical marijuana use.[31] Finally, Section C summarizes the law regarding federal preemption of state medical marijuana legislation.[32]

### *A. The Interaction of Federal Employment Protections and Cannabis Law*

Disability discrimination statutes typically mandate that employers offer reasonable accommodations for patients undergoing treatment for a medical condition that affects their ability to work.[33] Unlike some state disability protection statutes, the federal Americans with Disabilities Act (ADA) prohibits medical marijuana patients from claiming disability discrimination in the employment context because the ADA exempts illegal drug users as defined under the CSA from its protections.[34] This includes the use of marijuana, which the CSA still considers an "illegal use of drugs" even where a patient ingests it for medical purposes.[35] Subsection 1 of this Part provides a brief overview of the CSA as it pertains to marijuana.[36] Subsection 2 provides a brief overview of the ADA in the context of employment discrimination.[37]

#### 1. The Controlled Substances Act and Marijuana

The United States faced a worsening epidemic of drug use in the late 1960s and early 1970s, including increased fear of marijuana.[38] President

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[29] *See infra* notes 28–145 and accompanying text.

[30] *See infra* notes 33–72 and accompanying text.

[31] *See infra* notes 73–124 and accompanying text.

[32] *See infra* notes 125–145 and accompanying text.

[33] *See, e.g.*, Breaux v. Bollinger Shipyards, LLC, CV 16-2331, 2018 WL 3329059, at *15 (E.D. La. July 5, 2018) (holding that allowing an employee's suboxone ingestion may constitute a reasonable accommodation under the Americans with Disabilities Act (ADA)); Rowles v. Automated Prod. Sys., Inc., 92 F. Supp. 2d 424, 430 (M.D. Pa. 2000) (holding that, under the ADA, an employer cannot prohibit use of a legally-prescribed medication).

[34] *See* 42 U.S.C. §§ 12111(6), 12114(a) (stating that disability discrimination protections do not extend to an employee who uses controlled substances under 21 U.S.C. § 812(C)(10)).

[35] *See* 21 U.S.C. § 812(C)(10) (identifying marijuana as a Schedule I controlled substance); *id.* § 841(a) (making it unlawful to possess or consume a controlled substance); 42 U.S.C. §§ 12111(6)(a) (defining the term "illegal use of drugs"); *id.* § 12114(a) (exempting individuals who engage in the "illegal use of drugs" from ADA protections).

[36] *See infra* notes 38–54 and accompanying text.

[37] *See infra* notes 55–72 and accompanying text.

[38] *See* Jean Dietz, *New Drug Head Sees Epidemic*, BOS. GLOBE, Apr. 12, 1970, at 53 (noting that the assistant commissioner for the Massachusetts Department of Mental Health found the drug problem in Massachusetts had reached "epidemic proportions"); Peter Osnos, *Drugs Called 'Epidemic' in Maryland*, WASH. POST, Jan. 28, 1970, at C6 (stating that Maryland officials declared that drug use in the state had become an epidemic); Harold Schmeck Jr., *A Physician Urges LSD Facts Be Told*, N.Y. TIMES, Mar. 30, 1967, at 52 (reporting that a California physician had claimed that hallucinogenic

Richard Nixon, in an attempt to leverage fear over increasing drug use to win reelection, made combatting drug addiction a major component of his campaign for reelection.[39] On October 27, 1970, President Nixon signed the CSA into law, creating new procedures for regulating legitimate drug manufacture and sale, harsher penalties for drug trafficking, and drug rehabilitation and education initiatives.[40] The CSA went into effect on May 1 of the following year.[41]

Once in effect, the CSA prohibited the manufacturing, distribution, and possession of "controlled substances" as defined under the Act.[42] In defining a "controlled substance," the CSA provides an explicit list of substances that it separates into five categories known as schedules.[43] Congress based the com-

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drug use had become an epidemic in the state); *Foe of Marijuana Says G.I. Threw a Grenade at Him*, N.Y. TIMES, Aug. 19, 1970, at 16 (describing the testimony of a former Marine sergeant on the effects of marijuana); *Rise in Marijuana and Hashish Found*, N.Y. TIMES, Jan. 8, 1974, at 16 (reporting on the "runaway escalation" of marijuana use (quoting Senator James O. Eastland)). *But see* Jennifer Robison, *Decades of Drug Use: Data from the '60s and '70s*, GALLUP POLLING (July 2, 2002), https://news.gallup.com/poll/6331/decades-drug-use-data-from-60s-70s.aspx [https://perma.cc/J2VJ-H2QV] (claiming that historical Gallup Polling data indicates that drug use was rare during the 1960s and early 1970s, especially when compared with today). Soldiers returning from the Vietnam War fueled increasing fear over drug addiction throughout the 1960s and 1970s, with the public often wrongly blaming them for the worsening drug epidemic. *See* William Lewis, *Viet Drug Danger Is Cited*, BOS. GLOBE, Apr. 13, 1970, at 3 (citing returning Vietnam veterans as compounding an epidemic of drug use in the United States). *But see 209,000 in Army Found to Be Using Marijuana*, N.Y. TIMES, May 25, 1978, at A18 ("The Army views its drug abuse problem as serious but not of epidemic proportions." (quoting Brigadier General John H. Johns)).

[39] *See* Robert Semple Jr., *Nixon and Agnew Seek Votes on Fear Issues*, N.Y. TIMES, Oct. 25, 1970, at E1 ("They are running against pot, permissiveness, protest, pornography, and dwindling patriotism, negative symbols for which they hope, the silent majority shares their distaste."); *see also War on Drugs Gets White House Priority*, N.Y. AMSTERDAM NEWS, June 5, 1971, at 1 (describing President Nixon's declaration of a "'national offensive' against drug abuse").

[40] *Nixon Signs Drug Abuse Control Bill*, N.Y. TIMES, Oct. 28, 1970, at 54 (providing an overview of the provisions in the CSA).

[41] Controlled Substances Act, Pub. L. No. 91-513, tit. II, 84 Stat. 1236, 1242 (1970) (codified as amended in scattered sections of 21 U.SC.); *Nixon Signs Drug Abuse Control Bill*, *supra* note 40, at 54. In a recently unearthed interview with Nixon's Policy Advisor John D. Ehrlichman, Ehrlichman elaborated on the motivation behind the Nixon Administration's "War on Drugs" claiming:

> The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAG. (Apr. 2016), https://harpers.org/archive/2016/04/legalize-it-all/ [https://perma.cc/X34N-Z959] (quoting John D. Ehrlichman).

[42] 21 U.S.C. § 841(a).

[43] *See id.* § 812(a) (establishing the five schedules); Kelcey Phillips, Comment, *Employees Getting Lost in the Trees:* Tameny *Claims and the Public Policy Behind Preventing Termination on the Basis of Medical Marijuana Use*, 52 U.S.F. L. REV. 115, 118 (2018) (providing a brief overview of the five schedules in the CSA).

position of the schedules on three factors: (1) the drug's "potential for abuse"; (2) the drug's currently accepted treatment potential in medicine; and (3) considerations of the drug's safety under a supervising physician.[44] Substances with a "high potential for abuse," no recognized medical use, and questionable safety, even under medical supervision, fall into the most restrictive category: Schedule I.[45] Regulations of controlled substances become less restrictive in each successive category from Schedule II to Schedule V.[46] Despite numerous efforts to re-schedule marijuana, the federal government has continued to classify it as a Schedule I substance under the CSA since its passage.[47]

Although the authority to define criminal law historically falls within the states' police power, Congress justified passing the CSA under its commerce

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[44] *See* § 812(b) (outlining the characteristics that the federal government uses to determine schedule placement).

[45] *See id.* § 812 (describing the factors that will result in a drug's placement in Schedule I); Lieberman & Solomon, *supra* note 19, at 621 (defining the characteristics of Schedule I drugs under the CSA); Stephen M. Scannell, Comment, *Medical Marijuana and the ADA: Following the Path Blazed by State Courts to Extend Protection*, 12 ST. LOUIS U. J. HEALTH L. & POL'Y 391, 395 (2019) (explaining that the CSA only permits Schedule I drugs under certain restrictive conditions but permits Schedule II–V drugs to be "manufactured, distributed, and used in accordance with the CSA").

[46] *See* 21 C.F.R. §§ 1306.01–.32 (2021) (describing regulations surrounding the ability for medical professionals to prescribe substances categorized in Schedules II through V); *see also* Scannell, *supra* note 45, at 395 (noting that Schedule I substances are much more restricted than Schedule II–V substances).

[47] *See* § 812 (placing marijuana into Schedule I); Jerry Knight, *The Case for Prescription Pot*, WASH. POST, June 14, 1988, at C2 (noting that marijuana advocates have consistently asked the federal government to reschedule marijuana to no avail); Catherine Saint Louis, *DEA Refusal to Reclassify Marijuana Draws Criticism*, N.Y. TIMES, Aug. 12, 2016, at A13 (summarizing criticism directed at the Drug Enforcement Administration's decision not to reclassify marijuana from Schedule I to Schedule II); Dana Adams Schmidt, *Eased Law Urged on Marijuana Use*, N.Y. TIMES, May 19, 1972, at 7 (describing efforts by the National Organization for the Reform of Marijuana Laws, the Institute for the Study of Health in Society, and the Public Health Association to have marijuana recategorized under Schedule V). Aside from marijuana, other substances that Congress classifies as Schedule I include lysergic acid diethylamide, known as LSD, heroin, peyote, and psilocybin. § 812. In contrast, the federal government continues to classify substances including opium, cocaine, fentanyl, and methamphetamine as Schedule II in recognition of their currently accepted medical uses. *Id.* Congress originally intended marijuana's relegation to Schedule I to be temporary, until the scientific community had the opportunity to conduct research into its effects. *See* Press Release, Congressman Steve Cohen, Cohen Urges Attorney General Holder to Take Marijuana Off of Schedule I (Apr. 8, 2014), https://cohen.house.gov/press-release/cohen-urges-attorney-general-holder-take-marijuana-schedule-i [https://perma.cc/ZK7R-XAPP] (remarking that Congress planned for marijuana's original classification in 1970 as a Schedule I drug to be temporary); Sanjay Gupta, *Why I Changed My Mind on Weed*, CNN, https://www.cnn.com/2013/08/08/health/gupta-changed-mind-marijuana/index.html [https://perma.cc/HJ58-JYC6] (Aug. 8, 2013) (referencing a letter that Assistant Secretary of Health Dr. Roger Egeberg authored in August 1970 that recommends placing marijuana in Schedule I "at least until the completion of certain studies now underway to resolve the issue"); Schmidt, *supra*, at 7 (citing former Chief Counsel for the Bureau of Narcotics and Dangerous Drugs, Dennis Baumgartner, as stating that he understood marijuana's placement in Schedule I to be temporary).

power.[48] Congress expressed that it did not intend for the CSA to occupy the entire field of drug legislation to the exclusion of state law, but to allow states to implement their own coexisting regulatory regimes regarding controlled substances.[49] The U.S. Supreme Court would not address this uncertainty regarding the question of conflicts between state and federal marijuana law until the landmark 2005 decision *Gonzales v. Raich*.[50] The Court held that the Commerce Clause gives Congress plenary power to regulate the production, distribution, and possession of marijuana, even when the activity is purely local (or intrastate) in nature.[51] The Court determined that the locality of the activity was irrelevant because there was a rational basis to believe that a failure to regulate such local commerce would have a substantial effect on interstate commerce.[52] Nevertheless, the Court declined to find the California medical

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[48] *See* Gonzales v. Raich, 545 U.S. 1, 42, 45 (2005) (O'Connor, J., dissenting) (arguing that such a broad reading of the commerce power allows the federal government to intrude on the states' police power). The state police power is the generally accepted ability of states to legislate in order to maintain the "health, safety, morals, or general welfare" of its citizens. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (holding that meeting constitutional muster under the state police power requires the legislation in question to bear a "substantial relation to the public health, safety, morals, or general welfare"); *see also State Police Power*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The power of a state to enforce laws for the health, welfare, morals, and safety of its citizens, if enacted so that the means are reasonably calculated to protect those legitimate state interests."). The United States Constitution provides Congress with an enumerated list of legislative powers, among which includes the power to "regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. The Constitution also provides that powers not delegated to the federal government are reserved to the states. *Id.* amend. X. These provisions result in tension between the sovereignty of the federal government and the states, especially where the Constitution is unclear about the extent of federal power such as regulating intrastate commerce. *See* Wickard v. Filburn, 317 U.S. 111, 121 (1942) (describing the history of conflict between the Commerce Clause and state sovereignty). Despite this tension, courts have continuously interpreted the commerce power broadly, granting Congress the authority to legislate on matters that directly or indirectly effect interstate commerce. *See id.* at 123–24 (evincing a broad view of the Commerce Clause); United States v. Darby, 312 U.S. 100, 115 (1941) (holding that Congress has the power to regulate labor due to the effect of competition between states for cheap and unregulated labor on interstate commerce). Further, the Dormant Commerce Clause doctrine "prevents state regulation of interstate commercial activity even when Congress has not acted under its Commerce Clause power to regulate that activity." *See Commerce Clause*, BLACK'S LAW DICTIONARY, *supra* (defining the Dormant, or Negative, Commerce Clause).

[49] 21 U.S.C. § 903.

[50] *See Raich*, 545 U.S. at 19, 32–33 (majority opinion) (holding that "[g]iven . . . the commercial market for marijuana," its "substantial effect" on interstate commerce renders its regulation within Congress's power). Preemption is a legal doctrine derived from the Constitution's Supremacy Clause rendering federal law supreme to state law and therefore voiding any conflicting state law. *See infra* notes 125–136 and accompanying text (describing preemption).

[51] *See* U.S. CONST. art. I, § 8, cl. 3 (describing Congress's commerce powers); *Raich*, 545 U.S. at 22 (emphasizing the near impossibility of distinguishing between interstate and locally-produced marijuana, its likely illicit endpoint, and the resulting difficulties in enforcement).

[52] *See Raich*, 545 U.S. at 22 (holding that the locality of the activity is irrelevant). The Court applied a standard of review known as rational basis review in *Raich*. *See id.* (asking whether a "rational basis" exists for Congress's conclusion that an activity targeted for regulation, in this case

marijuana law unconstitutional, allowing for federal enforcement of the CSA to coexist with protection from state prosecution, but leaving the issue of preemption in limbo where it remains today.[53] As a result, medical marijuana users remain unsure as to what degree state medical marijuana statutes protect their rights and privileges in the face of conflicting federal law.[54]

### 2. The Americans With Disabilities Act and Employment

The ADA is a wide-ranging piece of legislation providing protections for persons with disabilities[55] in the contexts of employment, housing, and public accommodations.[56] The ADA defines a "disability" as "a physical or mental

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growing marijuana, affects interstate commerce (quoting United States v. Lopez, 514 U.S. 549, 557 (1995)).

[53] *See* Scannell, *supra* note 45, at 397 (describing how the Supreme Court, despite upholding the CSA, did not find that it invalidated the contrary state legislation). *See generally Raich*, 545 U.S. 1 *passim* (declining to invalidate the California medical marijuana law anywhere in the opinion). The Department of Justice (DOJ) has altered its approach to federal enforcement of the CSA prohibitions on marijuana a number of times. *Compare* Memorandum from James M. Cole, Deputy Att'y Gen., to All U.S. Att'ys 2–3 (Aug. 29, 2013), https://www.justice.gov/opa/press-release/file/1022196/download [https://perma.cc/F4TN-2BX7] [hereinafter Cole Memorandum] (recommitting to a shift in focus for federal law enforcement away from individuals using marijuana under an appropriate state regulatory scheme), *and* Memorandum from David W. Ogden, Deputy Att'y Gen., to Selected U.S. Att'ys 2 (Oct. 19, 2009), https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf [https://perma.cc/YMG8-TK7F] (shifting federal resources away from policing individuals who comply with state law regulating the use of medical marijuana), *with* Memorandum from Jefferson B. Sessions III, U.S. Att'y Gen., to All U.S. Att'ys 1 (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download [https://perma.cc/4TZN-YNTE] (repealing the previous administration's guidance on marijuana enforcement and affirming the DOJ's commitment to the prosecution of any marijuana-related activities).

[54] *See infra* notes 125–145 (describing federal preemption of state medical marijuana laws).

[55] There is some disagreement in the disability community regarding appropriate terminology when referring to persons with disabilities (person-first language) or disabled persons (identity-first language). *See Disability Terminology: Choosing the Right Words When Talking About Disability*, HIE HELP CTR, https://hiehelpcenter.org/2018/09/25/disability-terminology-choosing-right-words-talking-disability/ [https://perma.cc/PC3Z-H6JX]. By emphasizing the person at the beginning, person-first language, such as "person with a disability," focuses on the person whom the disability affects rather than the disability itself. *Id.* In contrast, identity-first language, such as "disabled person," focuses on the person's disability as an intrinsic part of their identity, thereby engendering pride. *Id.* This Note employs person-first language because the author believes that, especially when considering abstract legal impacts, it is imperative to focus on the person impacted.

[56] *See* Ronald J. Ostrow, *Despite Concerns, Administration Backs Sweeping Civil Rights Bill for Disabled*, L.A. TIMES, June 23, 1989, at 4 (describing the ADA's new requirements for businesses and public accommodations). With substantial policy changes leading to greater visibility for persons with disabilities through the 1970s, a new generation of civil rights activists arose to advocate for protections for individuals with disabilities. *See* John P. Shapiro, *A New 'Common Identity' for the Disabled*, WASH. POST., Mar. 29, 1988, (Health) at 19 (describing how the policy of mainstreaming, referring to enrolling children with disabilities in educational programs alongside children without disabilities, and the rise of independent living centers propelled the rise of disability rights activists). Activists' successful opposition to the Reagan Administration's attempts to cut protections for persons with disabilities emboldened them, resulting in their increased political sophistication and influence

impairment that substantially limits one or more major life activities," "a record of such an impairment," or "being regarded as having such an impairment."[57] In the employment context, which is the focus of this Note, the ADA prohibits employers from discriminating against an individual based on their disability with regard to the conditions of their employment, including hiring, promotion, training, compensation, and discharge.[58] The ADA requires employers to make reasonable accommodations for an individual who, but for their disability, would be otherwise qualified for the position.[59] An employer can escape liability, however, if they can demonstrate that such an accommodation would result in "undue hardship" on the employer's business.[60] Although the ADA leaves the definition of "reasonable accommodation" ambiguous, Equal Employment Opportunity Commission (EEOC) regulations define such accommodations to include, *inter alia*, modifications to the hiring process, the work environment, and work benefits, so that employees with disabilities may enjoy the same benefits as employees without disabilities.[61]

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during the early 1980s. *See id.* (describing the evolution in organization of disability rights groups). By 1986, the newly founded National Council on Disability called for new comprehensive legislation to protect the rights of persons with disabilities. Herman Wong, *Warrior for the Disabled*, L.A. TIMES, July 25, 1990, at E1. After the arrests of one hundred disability rights activists protesting on the steps of the Capitol in March 1990, President George H.W. Bush signed the ADA into law on July 26, 1990, despite considerable opposition from business groups. *See* Stephen Buckley, *100 Disabled Arrested on Hill*, WASH. POST, Mar. 14, 1990, at B4 (recounting the arrest of one hundred disability activists in the Capitol rotunda); Ann Devroy, *In Emotion-Filled Ceremony, Bush Signs Rights Law for America's Disabled*, WASH. POST, July 27, 1990, at A18; William J. Eaton, *Disabled Person Rally, Crawl up Capitol Steps*, L.A. TIMES, Mar. 13, 1990, at A27 (describing activists protesting delays in passage of the ADA); Albert R. Karr, *Disabled-Rights Bill Inspires Hopes, Fear*, WALL ST. J., May 23, 1990, at B1 (summarizing business opposition to the ADA over worries about the costs of compliance); Susan F. Rasky, *Bill Barring Bias Against Disabled Holds Wide Impact*, N.Y. TIMES, Aug. 14, 1989, at A1 (same).

[57] 42 U.S.C. § 12102(1). "[M]ajor life activities" under the ADA definition of "disabled" include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working," as well as "major bodily function[s]," including "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.* § 12012(2) An individual also may state a claim under the ADA if they can establish that their employer discriminated against them based on "an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity." *Id.* § 12012(3)(A).

[58] *Id.* § 12112(a).

[59] *Id.* § 12112(b)(5)(A).

[60] *Id.*

[61] *See id.* § 12111(9) (providing guidance for what constitutes a "reasonable accommodation"); 29 C.F.R. § 1630.2(o) (2021) (same); Ravel v. Hewlett-Packard Enter., Inc., 228 F. Supp. 3d 1086, 1093 (E.D. Cal. 2017) (citing the Equal Employment Opportunity Commission (EEOC) regulations on "reasonable accommodation"). According to EEOC regulations, a "reasonable accommodation" may include an employer setting policy such that employees with disabilities may access and use existing facilities, adapting work schedules, reassigning employees with disabilities to different positions, modifying work equipment, providing readers or interpreters, and making other such accommo-

The ADA further prohibits employers from subjecting new hires to medical examinations or tests that might discriminate against individuals with disabilities.[62] Additionally, the ADA prohibits examinations that the employer does not universally require of all entering employees or that inquire into a disability, unless job or business-related functions necessitate such examinations.[63] Despite this, an explicit exception in the ADA exempts preemployment drug screenings from the prohibited medical examinations.[64] This provision also provides that an individual engaging in the use of illegal drugs does not fall under the protections of the ADA based on that drug use.[65]

Despite this exemption, courts have consistently refused to allow employers to use preemployment drug screenings to inquire into an employee's use of legally-prescribed drugs, constituting a prohibited inquiry into their disabled status.[66] Additionally, courts have consistently held that policies that impose a blanket ban on legal prescription drugs or fail to make reasonable accommodations for an employee's legal prescription drug use violate the ADA.[67] In the

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dations. 29 C.F.R. § 1630.2(o)(2); *see also, e.g.*, Feist v. La., Dep't of Just., Off. of the Att'y Gen., 730 F.3d 450, 453 (5th Cir. 2013) (finding that the provision of a reserved parking space may constitute a reasonable accommodation under the ADA); Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1135 (9th Cir. 2001) (finding that a medical "leave of absence . . . may be a reasonable accommodation under the ADA"); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1161 (10th Cir. 1999) (en banc) (finding that a reasonable accommodation may include re-assignment from the employee's current position to one impacting their disability less); *Ravel*, 228 F. Supp. 3d at 1094 (same). *But see* US Airways, Inc. v. Barnett, 535 U.S. 391, 403, 405 (2002) (finding that the violation of a seniority system that is part of a collective bargaining agreement is not a reasonable accommodation).

[62] 42 U.S.C. § 12112(d).

[63] 29 C.F.R. § 1630.14(b). The ADA permits employers to require prospective employees to undergo a medical examination between their receiving an offer and beginning employment if they uniformly apply the policy to all employees, regardless of disability status, and do not attempt to inquire into the employee's disability. *Id.*

[64] § 12114(d)(1) ("For the purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.").

[65] *Id.* § 12114(a) ("For purposes of this subchapter, a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.").

[66] *See, e.g.*, Bates v. Dura Auto. Sys., Inc., 767 F.3d 566, 580 (6th Cir. 2014) (determining that a reasonable jury could find an employer's drug screening policy to constitute a medical examination inquiring into an employee's disability); Roe v. Cheyenne Mountain Conf. Resort, Inc., 124 F.3d 1221, 1230 (10th Cir. 1997) (holding that an employer policy requiring prescription drug disclosure violated provisions of the ADA that prohibit inquiries into an employee's disability); Connolly v. First Pers. Bank, 623 F. Supp. 2d 928, 932 (N.D. Ill. 2008) (finding that an employer's preemployment drug screening was a pretext to prohibit legally-prescribed medication and therefore did not conform to the ADA).

[67] *See, e.g.*, Breaux v. Bollinger Shipyards, LLC, CV 16-2331, 2018 WL 3329059, at *15 (E.D. La. July 5, 2018) (holding that there are genuine issues of material fact as to whether the use of Suboxone as an addiction treatment constituted a reasonable accommodation under the ADA, even given the employer's offered alternative of "job-protected leave" for six months); Rowles v. Automated Prod. Sys., Inc., 92 F. Supp. 2d 424, 430 (M.D. Pa. 2000) (finding that the employer's prohibition of legally-prescribed medications violated the ADA); *see also* 42 U.S.C. § 12112(d)(4)(A) ("A covered

context of medical marijuana, a plaintiff would argue that an employer's allowance of employees' off-duty medical marijuana use would constitute a "reasonable accommodation" for management of their disability under the ADA.[68]

Nevertheless, the ADA provides no remedy for an employee suffering discrimination based on their use of medical marijuana as treatment of a health condition under state law.[69] Although the ADA provides a narrow exception that protects employees who formerly used illegal drugs and are in treatment, it does not protect employees who currently use illegal drugs.[70] The ADA defines illegal drugs as substances catalogued in Schedules I–V of the CSA, for which the CSA prohibits the drug's possession or distribution.[71] Therefore, because

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entity . . . shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity."). The EEOC has also issued guidance on employee use of legally prescribed opioids in the workplace and the employer's obligations regarding reasonable accommodation. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NTVA-2020-2, USE OF CODEINE, OXYCODONE, AND OTHER OPIOIDS: INFORMATION FOR EMPLOYEES (2020), https://www.eeoc.gov/laws/guidance/use-codeine-oxycodone-and-other-opioids-information-employees [https://perma.cc/E7TJ-KNRQ]; *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2020-1, HOW HEALTH CARE PROVIDERS CAN HELP CURRENT AND FORMER PATIENTS WHO HAVE USED OPIOIDS STAY EMPLOYED (2020), https://www.eeoc.gov/laws/guidance/how-health-care-providers-can-help-current-and-former-patients-who-have-used-opioids [https://perma.cc/EHS8-H9X7] (providing agency guidance to healthcare providers treating recovering addicts on helping their patients seek reasonable accommodations in their employment). Further, the EEOC has not hesitated to bring lawsuits against employers who terminate otherwise qualified employees based on their legal prescription drug use. Press Release, U.S. Equal Emp. Opportunity Comm'n, Scottsdale Car Dealership Sued by EEOC for Disability Discrimination (Aug. 26, 2016), https://www.eeoc.gov/newsroom/scottsdale-car-dealership-sued-eeoc-disability-discrimination [https://perma.cc/NHJ9-MFLX] (discussing a lawsuit against an employer, *EEOC v. Bell Leasing, Inc.*, Civil Action No. 2:16-cv-02848-DKD, for rescinding a job offer based on an employee's use of a legally-prescribed drug).

[68] *See, e.g.*, Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37, 46 (Mass. 2017) (recounting the plaintiff's argument that her employer could make a reasonable accommodation for her by allowing her off-duty use of marijuana to treat her Crohn's disease).

[69] *See, e.g.*, Steele v. Stallion Rockies Ltd., 106 F. Supp. 3d 1205, 1212 (D. Colo. 2015) (holding that plaintiff's discharge for off-duty medical marijuana use did not constitute discrimination under the ADA); James v. City of Costa Mesa, SACV 10-0402 AG MLGX, 2010 WL 1848157, at *4 (C.D. Cal. Apr. 30, 2010), *aff'd*, 684 F.3d 825 (9th Cir. 2012), *amended*, 700 F.3d 394 (9th Cir. 2012) (holding that the ADA provides no remedy for those whose employers discriminated against them based on their medical marijuana use); *see also* 42 U.S.C. § 12114(a) (excluding any employee using illegal drugs from the definition of "a qualified individual with a disability" under the ADA). *See generally* Kathryn Evans, *What Legal Protections Exist for Employees Who Use Medical Marijuana?*, NAT'L L. REV. (Oct. 21, 2020), https://www.natlawreview.com/article/what-legal-protections-exist-employees-who-use-medical-marijuana [https://perma.cc/NUW4-NU67] (describing current legal protections in place for employees who use medical marijuana).

[70] § 12114(b)(1) ("Nothing in [the illegal drug use exception] shall be construed to exclude as a qualified individual with a disability an individual who . . . has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use . . . .").

[71] *See id.* § 12111(6) (defining "illegal use of drugs" under the ADA).

the CSA identifies marijuana as a Schedule I controlled substance, the ADA does not protect its off-duty use, even if applicable state law allows it.[72]

### *B. The Interaction Between State Employment Protections and Cannabis Law*

Despite the federal government's longstanding prohibition on marijuana, a substance derived from the cannabis plant, a vast majority of states have legalized some form of medical cannabis use.[73] Consequently, this facial conflict with federal law has left a patchwork of inconsistent state employment protections for medical marijuana patients to navigate.[74] Subsection 1 provides a background of the varying types of state medical marijuana statutes and any protections that they may provide.[75] Subsections 2 through 5 describe the law surrounding the four common claims that employees bring against their employers that have discriminated against them for their medical marijuana use.[76] Specifically, Subsection 2 explains how a plaintiff can succeed in a civil suit through an implied private right of action even where no explicit remedy exists.[77] Subsection 3 describes state employment protections for legal off-duty conduct and the application of these statutes in the context of medical marijuana.[78] Subsection 4 outlines the common-law tort of wrongful discharge in violation of public policy and illustrates courts' hesitancy to apply the doctrine to medical marijuana cases.[79]

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[72] *See* 21 U.S.C. § 812 (categorizing controlled substances by Schedules); 42 U.S.C. § 12111 (incorporating the CSA into the definition of "illegal use of drugs"); § 12114 (providing that "illegal use of drugs" is grounds to be denied employment protections in the ADA); James v. City of Costa Mesa, 700 F.3d 394, 405 (9th Cir. 2012) (determining that medical marijuana use is an illegal use of drugs for the purposes of the ADA); Barber v. Gonzales, CV-05-0173-EFS, 2005 WL 1607189, at *2 (E.D. Wash. July 1, 2005) (holding that because marijuana is unlawful under the CSA, the ADA does not protect its medical use even when state law allows its use for medical purposes). The CSA does allow for legal possession and consumption of controlled substances in Schedules II–V when a medical professional prescribes them in accordance with the law. 21 U.S.C. § 829. When a doctor prescribes a Schedule II–V controlled substance in accordance with the CSA, the patient's use does not constitute "illegal use of drugs" under the ADA. *See id.* (describing the application of prescriptions to Schedules II–V); 42 U.S.C. § 12111 (noting that "illegal use of drugs" does not include taking a controlled substance at the direction of a doctor in compliance with the CSA).

[73] *See* 21 U.S.C. §§ 812, 841 (stating the federal illegality of marijuana possession and use pursuant to the CSA); *supra* notes 11–12 and accompanying text (describing the numerous states that have enacted legislation allowing for the use of medical marijuana, THC, and CBD).

[74] *See* Connor P. Burns, *I Was Gonna Get a Job, but Then I Got High: An Examination of Cannabis and Employment in the Post*-Barbuto *Regime*, 99 B.U. L. REV. 643, 667 (2019) (articulating the varying state law approaches to enacting employment protections for medical marijuana patients in the face of federal illegality).

[75] *See infra* notes 81–88 and accompanying text.

[76] *See infra* notes 89–124 and accompanying text.

[77] *See infra* notes 89–98 and accompanying text.

[78] *See infra* notes 99–104 and accompanying text.

[79] *See infra* notes 105–114 and accompanying text.

Finally, Subsection 5 details state disability discrimination laws and how courts interpret them in circumstances involving medical marijuana.[80]

1. State Medical Marijuana Statutes: Their Approaches and Protections

California became the first state to permit the medicinal use of marijuana with the passage of the Compassionate Use Act of 1996 by ballot initiative.[81] Since then, an additional forty-seven states have legalized some form of medical cannabis use, with thirty-six states in total allowing for the use of marijuana and eleven states allowing for low-THC, high-CBD variations of the cannabis plant.[82] Many of the states that have enacted laws permitting the use of medical marijuana have done so in accordance with their inherent police power to protect the health and welfare of their citizens.[83] Further, because the federal government cannot forcibly deputize states as a wing of federal law enforcement, many states maintain that their medical marijuana statutes do not actually violate federal law.[84]

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[80] *See infra* notes 115–124 and accompanying text.

[81] *See* Michael Pollan, *Living with Medical Marijuana*, N.Y. TIMES, July 20, 1997, at SM22 (describing California voters' overwhelming approval of Proposition 215, thereby enacting the Compassionate Use Act of 1996 into law); Christopher S. Wren, *Votes on Marijuana Are Stirring Debate*, N.Y. TIMES, Nov. 17, 1996, at 16 (reporting on California's permitting of medical marijuana use by ballot initiative). Arizona voters also approved a ballot measure permitting the medical use of marijuana at the same time as California, but a significant conflict with federal law over requiring a physician "prescription" instead of a "recommendation" rendered it ineffective. *See* MARIJUANA POL'Y PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS 7 (2015 & Supp. 2016), https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/ [https://perma.cc/S7ZB-DA9Y] (noting the "symbolic" nature of Arizona's medical marijuana law).

[82] *See State Medical Cannabis Laws*, *supra* note 10 (reporting on states that currently allow medical cannabis use).

[83] *See, e.g.*, DEL. CODE ANN. tit. 16, § 4901A (2022) (establishing that the purpose behind the medical marijuana law is to ensure the "health and welfare of its citizens"); 410 ILL. COMP. STAT. § 130/5 (2021) (same); 21 R.I. GEN. LAWS § 21-28.6-2 (2022) (same); *see also* Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (arguing that such a broad reading of the commerce power in upholding the CSA allows the federal government to intrude on the states' police power and traditional responsibilities of defining and enforcing criminal law).

[84] *See* DEL. CODE ANN. tit. 16, § 4901A(f) (stating that the state medical marijuana statute does not violate federal law because the federal government cannot delegate the enforcement of federal law to the states based on their citizens' conduct violating it); MICH. COMP. LAWS § 333.26422(c) (2021) (same); N.J. STAT. ANN. § 24:6I-2(d) (2021) (same); *In re* Rent-Rite Super Kegs W. Ltd., 484 B.R. 799, 805 (Bankr. D. Colo. 2012) (holding that the legislative intent behind Colorado's medical marijuana amendment was to avoid conflict with federal law and that nothing in the amendment inhibits enforcement of federal law); *see also* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1476 (2018) (holding that the ability to issue orders to state governments is not one of the federal government's enumerated powers); New York v. United States, 505 U.S. 144, 188, 112 (1992) (holding that the federal government cannot give a direct order to a state to carry out a federal prerogative). The United States Supreme Court has consistently held that the federal government may not force states to enact and manage federal regulatory aims. *See, e.g.*, Printz v. United States, 521 U.S. 898, 925 (1997) (striking down federal encroachment on the states' sovereignty); *New York v. United*

Although different states have taken various approaches to medical marijuana legislation, they all allow individuals to possess, consume, and cultivate cannabis for a valid medical purpose, so long as they obtain a diagnosis and recommendation from a licensed physician.[85] State legislation also typically establishes oversight boards to create and promulgate regulations, as well as provide patients with a medical marijuana identification card.[86] A number of states have already enacted anti-discrimination provisions that prohibit refusing rights or benefits to medical marijuana patients, but courts rely on a variety of justifications to refuse to extend these protections to the employment context.[87] In recognition of this issue, a few states have included explicit provi-

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*States*, 505 U.S. at 188, 112 (same); F.E.R.C. v. Mississippi, 456 U.S. 742, 761–62 (1982) (same); Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc., 452 U.S. 264, 271 (1981) (same).

[85] *See* Michael A. Cole, Jr., *Functional Preemption: An Explanation of How State Medicinal Marijuana Laws Can Coexist with the Controlled Substances Act*, 16 MICH. ST. U. J. MED. & L. 557, 558 (2012) (describing the trend of either decriminalizing or providing an affirmative defense for the possession and use of marijuana for medical purposes across state legislatures); Elizabeth Rodd, Note, *Light, Smoke, and Fire: How State Law Can Provide Medical Marijuana Users Protection from Workplace Discrimination*, 55 B.C. L. REV. 1759, 1768 (2014) (describing state medical marijuana laws as allowing possession, consumption, and cultivation of marijuana without state prosecution). Some state medical marijuana statutes have explicitly decriminalized the use of medical marijuana while others merely provide an affirmative defense to state prosecution. *Compare* ARK. CONST. amend. XCVIII, § 3 (decriminalizing medical use of marijuana under state law), *and* ARIZ. REV. STAT. ANN. § 36-2811 (2021) (same), *and* OKLA. STAT. tit. 63, § 420 (2021) (same), *with* ALA. CODE § 13A-12-214.3 (2021) (providing for an affirmative defense to state prosecution for medical CBD use), *and* ALASKA STAT. ANN. § 17.37.030 (2020) (same), *and* S.D. CODIFIED LAWS § 34-20G-51 (2021) (same).

[86] *See, e.g.*, MASS. GEN. LAWS ch. 94I, § 2 (2020) (allowing for a commission to operate a medical marijuana program and issue medical marijuana registry cards to qualifying patients); VT. STAT. ANN. tit. 18, § 4473 (2021) (empowering the Department of Public Safety to receive and review patient applications and issue medical marijuana registration cars); WASH. REV. CODE § 69.51A.040 (2021) (requiring a newly-established government agency to enter qualified patients into the medical marijuana authorization database and issue them a medical marijuana recognition card). Guidance from the DOJ committing to a passive enforcement of federal marijuana laws in states that have legalized medical marijuana invokes robust state regulatory schemes as an important factor in the DOJ's leniency. *See* Cole Memorandum, *supra* note 53, at 2–3 (encouraging states to establish strong and effective regulatory and enforcement systems).

[87] *See* ARK. CONST. amend. XCVIII, § 3 (including anti-discrimination protections for medical marijuana patients); ARIZ. REV. STAT. ANN. § 36-2811 (same); CAL. HEALTH & SAFETY CODE § 11362.5 (2021) (protecting physicians who recommend medical marijuana from discrimination); DEL. CODE ANN. tit. 16, § 4903A (allowing medical marijuana patients a safe harbor from prosecution); HAW. REV. STAT. § 329-125.5 (2021) (prohibiting discrimination of medical marijuana patients in education, housing, medical care, and other instances); 410 ILL. COMP. STAT. § 130/25 (2021) (preventing state criminal proceedings against medical marijuana patients for violating state drug laws); ME. STAT. tit. 22, § 2430-C (2021) (same); MD. CODE ANN., HEALTH-GEN. § 13-3313 (West 2021) (same); MASS. GEN. LAWS ch. 94I, § 2 (same); MICH. COMP. LAWS § 333.26424 (2021) (same); N.H. REV. STAT. ANN. § 126-X:2 (2021) (same); N.J. STAT. ANN. § 24:6I-2 (same); N.M. STAT. ANN. § 26-2B-4 (2021) (same); OKLA. STAT. tit. 63, § 427.8 (2021) (providing protections from discrimination for medical marijuana patients in a variety of contexts); OR. REV. STAT. § 475B.919 (2021) (including antidiscrimination protections for medical marijuana caregivers); 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103 (West 2022) (exempting medical marijuana patients from prosecution under state drug laws); 21 R.I. GEN. LAWS § 21-28.6-4 (forbidding discrimination against medical mari-

sions that protect medical marijuana patients from employment discrimination, even if they test positive for marijuana in an employment drug screening.[88]

2. Implied Private Right of Action Allowing Civil Enforcement of Rights

The majority of state medical marijuana legislation provides some form of protection for medical marijuana patients, but the ability to enforce those provisions through private rights of action is much more ambiguous.[89] Although some state courts recognize an implied private right of action in their medical marijuana statutes, others do not.[90] In determining whether a statute implies a private right of action where one is not explicitly provided, the court looks to the following factors: (1) whether the legislature enacted the statute to benefit the class of people of which the plaintiff is a part; (2) whether the legislature or voters had specific intentions regarding a private right of action; and (3) whether the court's recognition of a private right of action would advance the

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juana patients based on their medical marijuana use); S.D. CODIFIED LAWS § 34-20G-7 (shielding medical marijuana patients from criminal liability); VT. STAT. ANN. tit. 18, § 4474b (same); WASH. REV. CODE § 69.51A.040 (same); Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 436 (6th Cir. 2012) (holding that the anti-discrimination provision in the Michigan medical marijuana statute did not apply to employment); Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC, 257 P.3d 586, 591 (Wash. 2011) (holding that employment discrimination was outside the scope of Washington's medical marijuana statute).

[88] *See* ARIZ. REV. STAT. ANN. § 36-2813(B) (providing employment protections for medical marijuana patients); CONN. GEN. STAT. ANN. § 21a-408p(b)(3) (West 2021) (same); DEL. CODE ANN. tit. 16, § 4905A(a)(3) (same); 410 ILL. COMP. STAT. § 130/40(a)(1) (same); ME. STAT. tit. 22, § 2430-C(3) (same); MINN. STAT. § 152.32 (2021) (same); OKLA. STAT. tit. 63, § 425(B)(2) (same); PA. STAT. AND CONS. STAT. ANN. tit. 35, § 10231.2103 (same); 21 R.I. GEN. LAWS § 21-28.6-4(e) (same).

[89] *See* Chance v. Kraft Heinz Foods Co., CV K18C-01-056 NEP, 2018 WL 6655670, at *4 (Del. Super. Ct. Dec. 17, 2018) (addressing the question of whether Delaware's medical marijuana statute implies a private right of action); *supra* note 87 and accompanying text (describing state medical marijuana anti-discrimination provisions). A private right of action is "[a]n individual's right to sue in a personal capacity to enforce a legal claim." *Private Right of Action*, BLACK'S LAW DICTIONARY, *supra* note 48. An express private right of action exists where Congress has included language in a statute explicitly allowing an individual to sue privately for its enforcement. *See* Caroline Bermeo Newcombe, *Implied Private Rights of Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied from a Federal Statute*, 49 LOY. U. CHI. L.J. 117, 120 (2017) (describing the differences between an express and implied private right of action). In contrast, an implied private right of action is a judicial creation and allows a claimant to enforce their rights under a statute, even if that statute provides for no specific remedy. *Id.*

[90] *Compare* Eplee v. City of Lansing, 935 N.W.2d 104, 112 (Mich. App. 2019) (holding that Michigan's medical marijuana statute provides patients "*immunity from* arrest, prosecution, or penalty" but not an affirmative right to use medical marijuana that a court can enforce (quoting Michigan v. McQueen, 828 N.W.2d 644, 653–54 (Mich. 2013))), *with* Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761, 781 (D. Ariz. 2019) (finding that Arizona's medical marijuana statute did imply a private right of action because without one, the statute would not provide medical marijuana patients with the protections that the legislature intended).

statute's purpose.[91] If the plaintiff can make a prima facie showing of these factors, courts can then consider "all evidence that could bear on each factor" in assessing whether sufficient evidence exists to suggest legislative intent to create a private right of action.[92]

Despite identically drafted statutes, courts in different states are split on whether an implied private right of action exists in their state's individual medical marijuana statute.[93] For example, in 2019, the Michigan Court of Appeals in *Eplee v. City of Lansing* refused to find that the plaintiff had an implied right of action under the Michigan Medical Marijuana Act, holding instead that the provision was an immunity provision providing no affirmative rights.[94] In contrast, in 2018, the Superior Court of Delaware determined in *Chance v. Kraft Heinz Foods Co.* that the Delaware Medical Marijuana Act implied a private right of action.[95] The court held that because no agency is in charge of enforcing the anti-discrimination provisions, the legislature must have intended a private right of

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[91] *See* Cort v. Ash, 422 U.S. 66, 78 (1975) (defining the test for determining whether a statute provides an implied private right of action); *Chance*, 2018 WL 6655670, at *4 (citing *Cort*, 422 U.S. at 78) (same); Noffsinger v. SSC Niantic Operating Co. LLC, 273 F. Supp. 3d 326, 338 (D. Conn. 2017) (same).

[92] *Noffsinger*, 273 F. Supp. 3d at 339.

[93] *See supra* note 90 and accompanying text (describing a divergence in the jurisprudence of courts in different states regarding whether each state's medical marijuana law allows for an implied private right of action). For example, the Michigan Medical Marijuana Act states that a registered qualifying patient "shall not be subject to arrest, prosecution, or penalty" or "denied any right or privilege" for their personal use of medical marijuana. MICH. COMP. LAWS § 333.26424 (2021). In 2019, in *Eplee v. City of Lansing*, the Michigan Court of Appeals held that the Michigan Medical Marijuana Act excluded a private right of action, and the immunity provision evinced this intention. 935 N.W.2d at 116; *see infra* note 94 (explaining what an immunity provision is). The Arizona Medical Marijuana Act contains almost identical language, stating that a registered qualifying patient "is not subject to arrest, prosecution, or penalty" for their medical marijuana use. ARIZ. REV. STAT. ANN. § 36-2811(B). Despite the matching language, in 2019, the U.S. District Court for the District of Arizona held in *Whitmire v. Wal-Mart Stores Inc.* that the Arizona Medical Marijuana Act did offer an implied private right of action because, without one, there would be no mechanism for enforcing the law. 359 F. Supp. 3d. at 781.

[94] *See* 935 N.W.2d at 112 ("[T]he [Michigan Medical Marijuana Act] does not provide carte blanche to registered patients in their use of marijuana." (quoting People v. Koon, 832 N.W.2d 724, 726 (Mich. 2013))). Carte blanche in its literal sense refers to a blank sheet upon which someone might propose their own terms, leading to the figurative definition meaning "[f]ull discretionary power." *Carte Blanche*, OXFORD ENG. DICTIONARY ONLINE, https://www.oed.com/view/Entry/28274 [https://perma.cc/59WL-5NLZ]. An immunity provision provides a statutory "exemption from a duty, liability, or service of process," such as the exemption from "arrest, prosecution, and penalty" provided for in both the Michigan Medical Marijuana Act and the Arizona Medical Marijuana Act. *See* ARIZ. REV. STAT. ANN. § 36-2811(B) (immunizing medical marijuana patients from state prosecution for their medical marijuana use); MICH. COMP. LAWS § 333.26424 (same); *Immunity*, BLACK'S LAW DICTIONARY, *supra* note 48 (explaining what constitutes an immunity provision).

[95] *See* 2018 WL 6655670, at *6 (holding that allowing an implied right of private action is the only way to execute the remedial purpose of the law).

action; otherwise, the statute would be meaningless.[96] Despite some disagreement between courts, the majority of state courts that have addressed this issue have recognized an implied right of action in their state medical marijuana legislation.[97] In states without such a recognition, medical marijuana patients are left with no way to enforce their statutory rights through the court system.[98]

### 3. Lawful Activities Statutes and Their Application to Legal Marijuana Use

Despite some state legislatures opting to leave anti-discrimination protections to implication, other states' legislation explicitly protects employees from discrimination.[99] Twenty-nine states have enacted so-called "lawful activities statutes" protecting against adverse employment action for lawful, off-duty conduct, including seventeen states that explicitly protect off-duty tobacco product use, eight that protect off-duty use of lawful consumable products, and four that protect a broader range of lawful activity.[100] Nevertheless, only one state court has decided the issue of whether legal medical marijuana use under

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[96] *See id.* (determining that a private right of action is the sole process for vindicating the rights included in a state medical marijuana statute because the legislature did not task any government agency or commission with the enforcement of those rights).

[97] *See, e.g.*, *Whitmire*, 359 F. Supp. 3d at 781 (finding that the state medical marijuana statute contained a private right of action with which patients can enforce their right to be free from discrimination on the basis of their medical marijuana use); *Chance*, 2018 WL 6655670, at *6 (same); *Noffsinger*, 273 F. Supp. 3d at 340 (same).

[98] *See Chance*, 2018 WL 6655670, at *6 (reasoning that the legislature's inclusion in the statute of anti-discrimination provisions coupled with its exclusion of any explicit remedy would render the rights under the law unenforceable without an implied private right of action).

[99] *Compare supra* notes 89–98 and accompanying text (demonstrating the uncertainty of relying on an implied right of action), *with infra* notes 100–104 (illustrating how some states explicitly protect lawful conduct from employment discrimination).

[100] *Compare* CONN. GEN. STAT. § 31-40s (2021) (prohibiting discrimination in the employment context against individuals who use tobacco products on their personal time), *and* IND. CODE ANN. § 22-5-4-1 (2021) (same), *and* KY. REV. STAT. ANN. § 344.040 (West 2022) (same), *and* LA. STAT. ANN. § 23:966 (2021) (same), *and* ME. STAT. tit. 26, § 597 (2021) (same), *and* MISS. CODE. ANN. § 71-7-33 (2021) (same), *and* N.H. REV. STAT. ANN. § 275:37-a (2021) (same), *and* N.J. STAT. ANN. § 34:6B-1 (2021) (same), *and* N.M. STAT. ANN. § 50-11-3 (2021) (same), *and* OKLA. STAT. tit. 40, § 500 (2021) (same), *and* OR. REV. STAT. § 659A.315 (2021) (same), *and* 23 R.I. GEN. LAWS § 23-20.10-14 (2022) (same), *and* S.C. CODE ANN. § 41-1-85 (2021) (same), *and* S.D. CODIFIED LAWS § 60-4-11 (2021) (same), *and* VA. CODE ANN. § 2.2-2902 (2021) (same), *and* W. VA. CODE ANN. § 21-3-19 (2021) (same), *and* WYO. STAT. ANN. § 27-9-105 (2021) (same), *with* 820 ILL. COMP. STAT. § 55/5 (2021) (prohibiting employers from discriminating against employees for their off-duty use of any lawful product), *and* MINN. STAT. § 181.938 (2021) (same), *and* MO. ANN. STAT. § 290.145 (West 2021) (same), *and* MONT. CODE ANN. § 39-2-313 (2021) (same), *and* NEV. REV. STAT. § 613.333 (2020) (same), *and* N.C. GEN. STAT. § 95-28.2 (2020) (same), *and* TENN. CODE ANN. § 50-1-304 (2021) (same), *and* WIS. STAT. ANN. § 111.321 (2022) (same), *with* COLO. REV. STAT. § 24-34-402.5 (2021) (prohibiting employers from discriminating against employees for a broader variety of lawful conduct), *and* CONN. GEN. STAT. § 31-51q (same), *and* N.Y. LAB. LAW § 201-d (McKinney 2022) (same), *and* N.D. CENT. CODE § 14-02.4-01 (2021) (same).

state law falls within the protection of a lawful activities statute.[101] In the 2015 decision *Coats v. Dish Network, LLC.*, the Colorado Supreme Court determined that the definition of protected "lawful activities" required not just legal conduct under state law, but federal law as well, thus excluding medical marijuana use from the range of protected conduct.[102] Some states have explicit provisions in their lawful activities statutes that define "lawful" as lawful according to state law, but courts in these states have not had the opportunity to determine these statutes' application to state-sanctioned, off-duty medical marijuana use.[103] Additionally, some states explicitly exempt the use of medical marijuana as protected conduct under their lawful activities statutes.[104]

### 4. State Discrimination Statutes: Their Employment Protections and Application to Medical Marijuana

Unlike lawful activities statutes, the vast majority of states have enacted disability discrimination laws that may provide a more uniform path to prohibiting employment discrimination against medical marijuana patients but can often pose the same challenges as the ADA.[105] Although each state has enacted its own protections for employment discrimination based on disability, many of these state laws track the language of the ADA and have similar exceptions for illegal drug use.[106] A number of these state disability statutes specifically define "illegal use of drugs" as the use of drugs prohibited under the federal CSA, including marijuana, even when state law allows its use for medical treatment.[107] Even where legislation is ambiguous in defining "illegal use of

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[101] *See* Coats v. Dish Network, LLC, 2015 CO 44, ¶¶ 14, 18–20, 350 P.3d 849, 852–53 (applying the state lawful activities statute to lawful medical marijuana consumption).

[102] *Id.*

[103] *See* 820 ILL. COMP. STAT. § 55/5 (specifically defining conduct that is allowed under state law); NEV. REV. STAT. § 613.333(1)(b) (same).

[104] *See* 820 ILL. COMP. STAT. § 55/5 (specifically excepting medical marijuana use from the lawful off-duty product consumption protected from employment discrimination); MONT. CODE ANN. § 39-2-313 (same). Despite the exception in the state lawful activities statute, Illinois protects medical marijuana patients from employment discrimination in the medical marijuana statute itself. 410 ILL. COMP. STAT. § 130/40.

[105] *See* Alex Long, *State Anti-discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 601–02 (2004) (noting that forty-eight states enacted their own disability discrimination laws before the ADA became effective and that although many states have since come in line with federal law, they are still free to "chart their own course"); *supra* note 100 and accompanying text (listing states with statutes protecting off-duty, lawful conduct, from specific conduct to broad protections).

[106] *See, e.g.*, IND. CODE § 22-9-5-24 (2021) (stating that protections for employment discrimination based on disability are inapplicable to employees partaking in illegal drug use); KAN. STAT. ANN. § 44-1002 (2021) (same); OR. REV. STAT. § 659A.124 (2021) (same).

[107] *See, e.g.*, IND. CODE § 22-9-5-6(b) (defining "illegal use of drugs" as consumption of substances "the possession or distribution of which is unlawful under the [CSA]"); KAN. STAT. ANN. § 44-1002(j) ("Disability does not include current, illegal use of a controlled substance as defined in

drugs," some courts hesitate to recognize medical marijuana as "legal."[108] Nevertheless, a recent decision by the Massachusetts Supreme Judicial Court has opened the door to protecting medical marijuana patients from employment discrimination under state disability statutes.[109]

In 2017 in *Barbuto v. Advantage Sales Marketing*, the Massachusetts Supreme Judicial Court considered whether a plaintiff may state a claim under state disability discrimination statutes after their discharge for off-duty medical marijuana use.[110] The court held that the plaintiff qualified as disabled and satisfied the initial inquiry of proving that her employer failed to make reasonable accommodations for her disability by allowing her off-duty medical marijuana use.[111] Despite this initial finding, the court cautioned that the employer may be able to prevail on the assertion that such an accommodation would pose an undue burden.[112] This objection would be particularly persuasive if the employer could show such an accommodation would impair their business by violating federal law or if the plaintiff's position required a certain standard of safety.[113] Although this decision serves as a step toward providing disability discrimination protections for medical marijuana patients, preemption issues and varying approaches by different states leave their rights in a state of precarity.[114]

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[the CSA] . . . ."). *But see* OR. REV. STAT. § 659A.122 (referencing the CSA in defining "illegal use of drugs" but noting that the definition does not include "other uses authorized under the [CSA] or under *other provisions of state* or federal law" (emphasis added)).

[108] *See, e.g.*, Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus., 230 P.3d 518, 529 (Or. 2010) (finding that preemption mandates that the exception for "illegal use of drugs" in the state disability protection statute refers to the federal CSA); Harrisburg Area Cmty. Coll. v. Pa. Hum. Rels. Comm'n, 245 A.3d 283, 289–90, 297 (Pa. Commw. Ct. 2020) (holding that because the state legislature looked to the definition of "controlled substances" under the CSA, "illegal use of drugs" encompasses medical marijuana under the state definition).

[109] Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37, 50 (Mass. 2017) (reversing the lower court's decision to dismiss the plaintiff's claim of disability employment discrimination based on medical marijuana use).

[110] *Id.* at 43. Cristina Barbuto accepted employment with Advantage Sales & Marketing (ASM) contingent on her passage of a preemployment drug screening. *Id.* at 41. Ms. Barbuto notified her soon-to-be supervisor that she was a medical marijuana cardholder pursuant to state law; she used marijuana a few times per week to treat her debilitating Crohn's disease, and the marijuana use was under the supervision of her doctor. *Id.* An ASM supervisor reassured Ms. Barbuto that her medical marijuana use should not impact her employment and confirmed this to her over the phone after checking with other ASM management. *Id.* Despite this, ASM terminated Ms. Barbuto for her positive marijuana test during a preemployment drug screening, with ASM citing the drug's federal illegality. *Id.*

[111] *Id.* at 46; *see supra* notes 55–61 and accompanying text (outlining how federal law defines a qualifying person with a disability and what constitutes a reasonable accommodation under the ADA).

[112] *Barbuto*, 78 N.E.3d at 47–48.

[113] *Id.*

[114] *See id.* at 48 (exemplifying a court's potential receptiveness to expanding protections for medical marijuana patients in employment); *supra* notes 38–54 and accompanying text (describing how conflicts between state law and the federal CSA can leave medical marijuana user's rights uncertain).

### 5. Wrongful Termination in Violation of Public Policy and Its Application in the Context of Off-Duty Medical Marijuana Use

Outside of statutory employment protections, the common law also offers a remedy for adverse employment actions in some instances where such actions would result in violation of a clear public policy.[115] Forty-nine states adhere to the at-will employment doctrine, meaning that either party can choose to end the employment relationship without notice.[116] In recognition that some incidents of employee discharge could run counter to broader social policy, courts began to recognize the common-law tort of wrongful discharge in violation of public policy as an exception to the doctrine of at-will employment.[117] To prevail on a claim for wrongful discharge in violation of public policy, the plaintiff must adequately prove the following: (1) that there exists "a clear public policy" that the common law, statute, constitution, or some other government prerogative evinces ("the clarity element"); (2) that allowing discharge of employees in situations comparable to the plaintiff's would "jeopardize the public policy" ("the jeopardy element"); (3) that plaintiff's conduct related to the public policy provoked their dismissal ("the causation element"); and (4) that the employer did not have an "overriding legitimate business justification" for terminating the employee ("the overriding justification element").[118]

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[115] *Compare* ARIZ. REV. STAT. ANN. § 36-2813 (2021) (prohibiting employment discrimination on the basis of status as a medical marijuana cardholder), *and* CONN. GEN. STAT. § 31-40s (2021) (prohibiting employment discrimination on the basis of off-duty tobacco use), *and* IND. CODE § 22-9-5-19 (2021) (prohibiting employment discrimination on the basis of disability), *with* Stevenson v. Super. Ct., 941 P.2d 1157, 1158 (Cal. 1997) (holding that the plaintiff adequately pleaded a common law tort claim of wrongful discharge in violation of public policy due to employer discrimination based on age).

[116] *See* Donald C. Robinson, *The First Decade of Judicial Interpretation of the Montana Wrongful Discharge from Employment Act (WDEA)*, 57 MONT. L. REV. 375, 376 (1996) ("[N]o state but Montana has chosen to statutorily modify the so-called 'termination-at-will' doctrine of employment law which has existed throughout American jurisprudence."); *Employment*, BLACK'S LAW DICTIONARY, *supra* note 48 (describing the at-will employment doctrine). Although at-will employment is the default rule, state and federal anti-discrimination legislation as well as the common-law public policy doctrine are exceptions to the ability of the employer to end the employment relationship for any reason. *See* 42 U.S.C. § 2000e-2(a) (prohibiting employment discrimination based on "race, color, religion, sex, or national origin"); Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 656 (2000) (explaining the doctrine of wrongful discharge in violation of public policy). The only state that does not adhere to the at-will employment doctrine is Montana, which requires cause for discharge. MONT. CODE ANN. § 39-2-904 (2021); *see* Robinson, *supra*, at 376 (describing how Montana's Wrongful Discharge from Employment Act modified the longstanding at-will employment doctrine).

[117] *See* Ballam, *supra* note 116, at 657–58 (outlining the development of the tort of wrongful discharge in violation of public policy); Debra Davis, *Following the Public Policy Exception: Does This Exception Still Accomplish Its Original Goal?*, 41 OKLA. CITY U. L. REV. 501, 503 (2016) (describing the negative social implications of an absolute at-will employment doctrine).

[118] Perritt, *supra* note 21, at 398–99; *see also* Collins v. Rizkana, 652 N.E.2d 653, 657–58 (Ohio 1995) (outlining the elements of a wrongful discharge in violation of public policy claim); Rose v. Anderson Hay & Grain Co., 358 P.3d 1139, 1143 (Wash. 2015) (same).

Despite the availability of the wrongful discharge exception, courts hesitate to protect employee rights through erosion of the at-will employment doctrine, as many of them view this responsibility within the province of the legislature.[119] The narrow application that courts give this exception typically places successful claims into four categories: (1) termination for refusal to violate the law; (2) termination for compliance with a legal duty; (3) termination for utilizing some legal right; and (4) retaliatory termination for reporting employer misconduct.[120] The first court even to consider this public policy argument in the context of medical marijuana use was the Supreme Court of Washington, in 2011, in *Roe v. Teletech Customer Care Management (Colorado)*.[121] In *Roe*, the court agreed that a clear policy exists supporting marijuana use for medical treatment, but it would not go so far as to say such a policy existed to protect off-duty medical marijuana use from adverse employment consequences.[122] In making this determination, the court pointed to the fact that Washington's Medical Use of Marijuana Act (MUMA) makes no reference to employment at all.[123] Following the Supreme Court of Washington's lead, a number of other courts have also refused to protect employee marijuana use as a matter of public policy.[124]

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[119] *See* Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86, 89 (N.Y. 1983) (holding that a change to the at-will employment doctrine to recognize the tort of wrongful discharge would be best left in the hands of the legislature); McGowan v. Medpace, Inc., 2015-Ohio-3743, 42 N.E.3d 256, ¶¶ 25–27 (Ohio Ct. App. 2015) *appeal dismissed and ordered not precedential*, 150 Ohio St. 3d 296, 2017-Ohio-1340, 81 N.E.3d 435 (Ohio 2017) (finding that failure to apply the tort of wrongful discharge narrowly would swallow the at-will rule and that such change is within the province of the legislature); Sedlacek v. Hillis, 36 P.3d 1014, 1019 (Wash. 2001) (determining that courts should apply the tort of wrongful discharge cautiously in order to prevent usurping the role of the legislature); *see also* Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1937 (1983) (pondering courts' rare expansion and application of the tort of wrongful discharge in violation of public policy, despite the seemingly broad judicial discretion).

[120] *See* Gantt v. Sentry Ins., 824 P.2d 680, 684 (Cal. 1992), *overruled by* Green v. Ralee Eng'g Co., 960 P.2d 1046 (Cal. 1998) (describing four common categories of wrongful discharge claims); *Rose*, 358 P.3d at 1142 (same); Gardner v. Loomis Armored Inc., 913 P.2d 377, 379 (Wash. 1996) (same); Note, *supra* note 119, at 1937 (same). Some examples of discharges that courts have recognized as in violation of public policy include termination for attending jury duty, termination for filing a worker's compensation claim, and termination for reporting an employer's illegal activities. *See Murphy*, 448 N.E.2d at 89 (providing examples of successful wrongful discharge claims).

[121] 257 P.3d 586, 594 (Wash. 2011).

[122] *See id.* at 596 (holding that a clear public policy "does not exist merely because a plaintiff can point to legislation or judicial precedent that addresses the relevant issue").

[123] *See id.* (determining that the only reference to employment in the state's medical marijuana law is a provision explicitly stating that employers are *not* required to accommodate employee medical marijuana use and likewise that proponent-supplied voter information noted that the initiative would not require employers to accommodate such use).

[124] *See* Noffsinger v. SSC Niantic Operating Co. LLC, 273 F. Supp. 3d 326, 341 (D. Conn. 2017) (refusing to recognize a public policy exception to the at-will employment doctrine for off-duty employee medical marijuana use); Coles v. Harris Teeter, LLC, 217 F. Supp. 3d 185, 188 (D.D.C. 2016) (same); Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 209 (Cal. 2008) (same). The U.S. District Court for the Western District of Washington appeared open to the argument that terminating an

### *C. Federal Preemption of State Medical Cannabis Legislation*

Notwithstanding some states' efforts to legalize medical marijuana and protect patients, marijuana state legislation continues to raise questions of federal preemption.[125] Federal preemption occurs when a federal law supplants a conflicting state law.[126] In these circumstances, a court's determination that federal marijuana law preempts state marijuana law would render any conflicting state laws invalid.[127] The doctrine of preemption comes from the Supremacy Clause of the U.S. Constitution that states "the Laws of the United States . . . shall be the supreme Law of the Land" to which laws of the states shall be subservient.[128] When deciding an issue of preemption, two cornerstones of preemption jurisprudence guide courts in their decision-making.[129] The first is that Congressional purpose will be central to any preemption analysis.[130] The second is a presumption that Congress would not supersede state police powers without establishing a clear purpose.[131]

Courts have generally divided federal preemption issues into two distinct categories—express preemption and implied preemption.[132] When Congress's intention to prohibit state legislation from touching on a particular area of law

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employee for off-duty medical marijuana use violated public policy but could not address the argument because the plaintiff did not waive the claim. Swaw v. Safeway, Inc., C15-939 MJP, 2015 WL 7431106, at *2 (W.D. Wash. Nov. 20, 2015).

[125] *See, e.g.*, City of Garden Grove v. Superior Court, 68 Cal. Rptr. 3d 656, 677–78 (Ct. App. 2007) (finding that the CSA did not preempt the state government from returning seized marijuana to patients); Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus., 230 P.3d 518, 529 (Or. 2010) (finding that the CSA preempted Oregon's medical marijuana legislation); *see also* Stacy A. Hickox, *Clearing the Smoke on Medical Marijuana Users in the Workplace*, 29 QUINNIPIAC L. REV. 1001, 1014 (2011) (dissecting the Supreme Court of Oregon's preemption analysis).

[126] *See Preemption*, BLACK'S LAW DICTIONARY, *supra* note 48 ("The principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation.").

[127] *See* CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 663 (1993) ("Where a state statute conflicts with, or frustrates, federal law, the former must give way."); Maryland v. Louisiana, 451 U.S. 725, 747 (1981) ("Of course, a state statute is void to the extent it conflicts with a federal statute . . . .").

[128] U.S. CONST. art VI, § 2; *see* English v. Gen. Elec. Co., 496 U.S. 72, 78 (1990) (noting that caselaw has established that the doctrine of preemption stems from the Supremacy Clause).

[129] *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v Lohr, 518 U.S. 470, 485 (1996)) (describing the two cornerstones of the Supreme Court's preemption analysis).

[130] *See Medtronic*, 518 U.S. at 485 ("'[T]he purpose of Congress is the ultimate touchstone' in every preemption case." (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963))).

[131] *See id.* ("[W]e 'start with the assumption that the historic police powers of the States were not to be superseded by Federal Act unless that was the clear and manifest purpose of Congress.'" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).

[132] *See* Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since* Cipollone, 92 KY. L.J. 913, 919 (2004) (describing express and implied preemption).

is explicit in the statute, express preemption occurs.[133] Two subcategories comprise the doctrine of implied preemption—field preemption and conflict preemption.[134] Field preemption occurs when a state attempts to regulate a field over which the federal government has exclusive authority.[135] Conflict preemption results when contradictory state and federal laws make compliance with both laws impossible or when state law becomes an obstacle to accomplishing the Congressional purpose behind a federal law.[136]

Not all categories of preemption are relevant in evaluating inconsistent state and federal drug laws, however.[137] Due to a CSA provision manifesting Congressional intent to neither occupy the entire field of controlled substance regulation nor explicitly preempt state law, field and express preemption are likely not the most pressing concern of medical marijuana advocates.[138] In contrast, friction between state and federal marijuana law makes a conflict preemption analysis particularly applicable.[139] Courts hesitate to find that the

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[133] Richard C. Ausness, *Federal Preemption of State Products Liability Doctrines*, 44 S.C. L. REV. 187, 192–93 (1993) (defining and providing examples of express preemption).

[134] *See* Ausness, *supra* note 132, at 921–22 (describing the sub-categories of implied preemption).

[135] *See* English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (describing field preemption). For example, in 2012, the Supreme Court of the United States held that federal law preempted an Arizona statute regulating the registration of noncitizens, because the federal government occupies the entire field of immigration to the exclusion of the states. Arizona v. United States, 567 U.S. 387, 416 (2012); *see also* Kurns v. R.R. Friction Prod. Corp., 565 U.S. 625, 637–38 (2012) (holding that the federal government's passage of the Locomotive Inspection Act, and subsequent occupation of the entire field of railroad regulation, preempted the plaintiff's state common law claims against a railroad).

[136] *Arizona v. United States*, 567 U.S. at 399 (first quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963); and then quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 873 (2000) (quoting *Hines*, 312 U.S. at 67); *English*, 496 U.S. at 79 (first quoting *Fla. Lime & Avocado Growers*, 373 U.S. at 142–43; and then quoting *Hines*, 312 U.S. at 67); *see also Obstacle Preemption*, BLACK'S LAW DICTIONARY, *supra* note 48 ("The principle that federal or state statute can supersede or supplant state or local law that stands as an obstacle to accomplishing the full purposes and objectives of the overriding federal or state law.").

[137] *See infra* notes 138–139 and accompanying text (emphasizing the applicability of the conflict preemption analysis to state medical marijuana laws).

[138] *See* 21 U.S.C. § 903.

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

*Id.*

[139] *See* Noffsinger v. SSC Niantic Operating Co. LLC, 273 F. Supp. 3d 326, 334 (D. Conn. 2017) (recognizing that there was no congressional intent for the CSA to preempt state law unless a conflict between the two existed); Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus., 230 P.3d 518, 529 (Or. 2010) (holding that the conflicting nature of state and federal law resulted in preemption of state marijuana law). Representative Diana DeGette introduced a bill into the U.S. House of Representatives that would explicitly disavow any federal preemption of state marijuana laws. *See* Respect States' and Citizens' Rights Act of 2019, H.R. 2012, 116th Cong. § 2(b) (2019) (amending the CSA in

CSA preempts state medical marijuana laws, or the employment protections contained within them, but courts' views are far from uniform on this issue.[140]

The differentiating issue bearing on conflict preemption tends to be whether the state law has granted an *affirmative right* to use medical marijuana or merely a *shield* from state prosecution.[141] Courts finding conflict preemption typically emphasize that the state's grant of an affirmative right to use medical marijuana erects an obstacle to the purposes undergirding the federal law.[142] On the contrary, courts that have declined to find that federal law preempts state law underscore that a mere shield from state prosecution does not make it impossible to adhere to both state and federal law because the state law does not grant any positive rights.[143] Other courts have gone further in finding that because the CSA does not speak to employment, it does not preempt state laws that offer discrimination protections to employees based on their medical marijuana use.[144] Because preemption strikes at the heart of competing federal and state sovereignty, courts frequently consider it when determining their approach to evaluating employment protections for medical marijuana patients.[145]

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the case of marijuana so that no "provision of this title be construed as preempting any . . . state law.").

[140] *Compare Noffsinger*, 273 F. Supp. 3d at 336 (holding that no conflict exists between the CSA and the employment protections found in Connecticut's medical marijuana law because the CSA does not prohibit hiring individuals engaged in illegal drug use), *and* Cnty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 481 (Ct. App. 2008) (holding that the CSA does not conflict with the identification card provisions of California's medical marijuana law because the California law does not provide a positive right to violate the CSA so no conflict exists), *with Emerald Steel Fabricators, Inc.*, 230 P.3d at 528–29 (holding that affirmatively authorizing marijuana use in violation of federal law "stands as an obstacle" to the "full purposes and objectives of [the CSA]" (quoting Freightliner Corp. v. Myrick, 514 U.S. 52, 287 (1995))).

[141] *Compare Emerald Steel Fabricators, Inc.*, 230 P.3d at 529, 531 (holding that when a state grants an affirmative right take an action that the federal government prohibits, it must necessarily pose an "obstacle to the accomplishment" of those federal objectives (quoting Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 478 (1984))), *with* Ter Beek v. City of Wyoming, 846 N.W.2d 531, 537 (Mich. 2014) (holding that a state's grant of immunity from prosecution does not invoke preemption issues because it does not affirmatively authorize the violation of federal law and therefore fails to result in a conflict).

[142] *See, e.g.*, *Emerald Steel Fabricators, Inc.*, 230 P.3d at 531 (holding that the CSA preempted Oregon's medical marijuana law after performing a conflict preemption analysis).

[143] *See, e.g.*, *Ter Beek*, 846 N.W.2d at 537 (holding that the Michigan Medical Marijuana Act's grant of immunity does not conflict with federal law because it does not prohibit federal enforcement under the CSA).

[144] *See Noffsinger*, 273 F. Supp. 3d at 336 (holding that the CSA does not preempt employment protections in Delaware's medical marijuana law because the CSA does not make it federally illegal to employ someone who uses marijuana); Chance v. Kraft Heinz Foods Co., CV K18C-01-056 NEP, 2018 WL 6655670, at *3 (Del. Super. Ct. Dec. 17, 2018) (same).

[145] *See, e.g.*, *Noffsinger*, 273 F. Supp. 3d at 334, 337 (considering both whether the CSA and the ADA preempt Connecticut's medical marijuana law); *Emerald Steel Fabricators, Inc.*, 230 P.3d at 529 (holding that because federal law preempts the Oregon medical marijuana statute, plaintiff's medical marijuana use was not "authorized" under the state disability protection statute); Ross v. Rag-

## II. How the Courts Have Approached Employment Protections for Medical Marijuana Patients

When weighing the rights of state-sanctioned medical marijuana patients in the employment context, courts have frequently, but not unanimously, upheld the rights of the employer to take adverse employment actions against these patients.[146] Section B of Part I discussed four common claims that employees bring against their employers after suffering discrimination based on their off-duty medical marijuana use.[147] This Part analyzes specific arguments related to the two most common of those claims and the opinions of agreeing and disagreeing courts.[148] Section A discusses arguments for and against the extension of state disability protections to medical marijuana patients.[149] Section B discusses arguments for and against allowing medical marijuana employment discrimination claims to move forward under the common law tort of wrongful discharge in violation of public policy.[150]

### *A. Wrongful Termination of Medical Marijuana Users Under State Disability Statutes*

Many employees that have suffered adverse employment actions on the basis of their medical marijuana use have brought claims under statutes prohibiting discrimination based on a disability.[151] Plaintiffs usually bring these claims under state disability protection statutes, rather than the federal disabil-

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ingWire Telecomms., Inc., 174 P.3d 200, 204–05 (Cal. 2008) (contemplating whether federal law preempts California's Compassionate Use Act).

[146] *See, e.g.*, Coats v. Dish Network, LLC, 2015 CO 44, ¶ 4, 350 P.3d 849, 850 (holding that the state's lawful activities statute does not protect medical marijuana patients from employment discrimination because marijuana is federally illegal); Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus., 230 P.3d 518, 520 (Or. 2010) (determining that medical marijuana use does not require accommodation under state disability or medical marijuana statutes because the CSA preempts them); Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC, 257 P.3d 586, 588 (Wash. 2011) (finding that the state medical marijuana statute provides no express or implied private right of action nor does it create public policy that would support a wrongful discharge claim). *But see* Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37, 50 (Mass. 2017) (reversing the lower court's decision to dismiss the claim of disability employment discrimination based on medical marijuana use).

[147] *See supra* notes 81–124 and accompanying text (outlining common claims that medical marijuana patients bring against their employer).

[148] *See infra* notes 151–209 and accompanying text.

[149] *See infra* notes 151–186 and accompanying text.

[150] *See infra* notes 187–209 and accompanying text.

[151] *See, e.g.*, Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761, 792 (D. Ariz. 2019) (evaluating the plaintiff's claim of disability discrimination based on their termination for use of medical marijuana to alleviate chronic pain from arthritis); Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 203 (Cal. 2008) (determining whether the plaintiff's termination for using medical marijuana off-duty to treat back spasms constituted disability discrimination); *Barbuto*, 78 N.E.3d at 41 (considering the plaintiff's discrimination claim based on their dismissal for treating their Crohn's Disease with medical marijuana).

ity protection statute, as courts have consistently found that the ADA does not offer protections for marijuana users due to the exception for illegal drug use.[152] In evaluating state disability discrimination claims in the context of medical marijuana, courts typically must determine: (1) whether the plaintiff is disabled; (2) whether that disability resulted in an adverse employment action; and (3) whether the disability prohibits the claimant from performing their job duties, even with reasonable accommodation.[153] Once a plaintiff successfully proves these elements, including that a reasonable accommodation would allow them to perform the job proficiently, the burden shifts to the employer to show that offering such an accommodation would result in an undue hardship on their business.[154]

Claims under state disability statutes were largely unsuccessful until the 2017 decision by the Massachusetts Supreme Judicial Court in *Barbuto v. Advantage Sales Marketing*.[155] In *Barbuto*, the plaintiff argued that she was a qualifying disabled person suffering from Crohn's disease, that she used medical marijuana in compliance with state law during non-working hours, and that her employer's failure to accommodate that off-duty use by terminating her employment constituted disability discrimination.[156] The defendant countered that the plaintiff was not a qualifying disabled person and that even if she was, accommodating even off-duty marijuana use is facially unreasonable because such use is a federal crime.[157] The Massachusetts Supreme Judicial Court held that the plaintiff was a qualifying person with disabilities because although she could manage her condition with medication, it has a debilitating impact on her life.[158] The parties did not dispute whether plaintiff's disability resulted in ad-

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[152] *Compare Whitmire*, 359 F. Supp. 3d at 792–93 (exemplifying a claim for wrongful discharge brought pursuant to state disability discrimination legislation), *with* James v. City of Costa Mesa, 700 F.3d 394, 396 (9th Cir. 2012) (exemplifying a disability discrimination claim for medical marijuana use brought under the federal ADA). In 2012, the U.S. Court of Appeals for the Ninth Circuit, in *James v. City of Costa Mesa*, held that the ADA offers no protections for people who engage in "illegal drug use," as the CSA defines the term. 700 F.3d at 397. Further, the court determined that neither the ADA's supervised use exception nor the exception allowing for drug use "authorized by . . . other provisions of federal law" applied to medical marijuana use. *Id.* at 403–04 (quoting 42 U.S.C. § 12210).

[153] *See, e.g.*, *Ross*, 174 P.3d at 203–04 (explaining the elements of an employment disability discrimination claim in the state of California).

[154] *See Barbuto*, 78 N.E.3d at 45 (explaining the undue hardship standard).

[155] *See id.* at 50–51 (holding that the plaintiff's claim for disability discrimination based on off-duty medical marijuana use survived the defendant's motion for dismissal).

[156] *See id.* at 43 (summarizing the plaintiff's claim of employment discrimination on the basis of her disability for her medical marijuana use).

[157] *See id.* at 45 (summarizing the defendant's argument that accommodating even off-site medical marijuana use for employees is unreasonable under the Massachusetts Disability Discrimination statute).

[158] *See id.* at 44 (finding that despite control of her condition through treatment, the plaintiff still suffered from a debilitating medical condition that rendered her disabled under the Massachusetts Disability Discrimination statute).

verse employment action because, viewing all facts favorable to the plaintiff, her employer terminated her for her off-duty medical marijuana use that was directly attributable to her disability.[159]

Further, the court determined that where an employer's policy prohibits such medication, the employer bore the burden of proving that accommodating such medication would cause an undue hardship to the employer's business, or in other words, is unreasonable.[160] Thus, the court went on to decide that accommodating an employee's off-duty medical marijuana use is not facially unreasonable because the state's medical marijuana act itself prevents the denial of "any right or privilege" on the basis of such use, including a reasonable accommodation.[161] The court also considered that only the employee, not the employer, risks federal prosecution for their medical marijuana use.[162] Therefore, the mere federal status of marijuana as an illegal substance does not make such an accommodation that would permit the employee to use marijuana off site facially unreasonable.[163] Finally, the court noted that it would be poor public policy to declare such an accommodation unreasonable where the overwhelming majority of states have legalized medical marijuana.[164] The opinion cautioned, however, that despite the fact that the plaintiff stated a claim in *Barbuto*, on a different set of facts, an employer could potentially meet the burden of showing that an accommodation of medical marijuana use would pose an undue burden.[165]

Despite the evolution in case law that the *Barbuto* decision illustrates, most courts still come down on the side of the employer in claims of disability

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[159] *See id.* at 45 (holding a plaintiff states a claim for disability discrimination where, after they are terminated for use of a prescribed medication, they show they could have performed the required duties adequately with the medication and that allowing such medication is a reasonable accommodation on the part of the employer). In evaluating a motion to dismiss, Massachusetts courts read the allegations of the complaint and all reasonable inferences drawn from it in favor of the plaintiff. Marram v. Kobrick Offshore Fund, Ltd., 809 N.E.2d 1017, 1021 (Mass. 2004).

[160] *Barbuto*, 78 N.E.3d at 45. The court even goes as far as comparing the prohibition of a disabled employee's use of medical marijuana with a company policy prohibiting the use of insulin that would undoubtedly be discriminatory against diabetic employees. *Id.* at 47.

[161] *Id.* State laws regarding marijuana use in Massachusetts have changed since the Massachusetts Supreme Judicial Court decided *Barbuto*, particularly the legalization of recreational marijuana, but the language that the court analyzed is still included in the updated statute. *See* MASS. GEN. LAWS ch. 94G, § 7(a) (2020) ("[A] person 21 years of age or older shall not be . . . denied any right or privilege . . . [for] possessing, using, purchasing, processing, or manufacturing 1 ounce or less of marijuana . . . .").

[162] *Barbuto*, 78 N.E.3d at 46.

[163] *Id.*

[164] *Id.*

[165] *Id.* at 48. The court provides examples of circumstances that might constitute an undue burden, such as where accommodating even off-duty medical marijuana use may pose an unacceptable safety risk or where such an accommodation would jeopardize an employer's contractual or statutory obligations. *See id.* (discussing instances where off-duty medical marijuana use may pose an undue burden to the employer).

discrimination based on medical marijuana use under state law.[166] These courts often base their reasoning on either the CSA's preemption of state marijuana laws or their interpretations of what constitutes illegal drug use under state disability protections.[167] In determining that the CSA preempts state medical marijuana laws by conflict, the courts often focus on the extent to which state law poses an obstacle to the federal drug regulatory regime under the CSA.[168] When interpreting state legislatures' intentions in exempting illegal drug users from state disability protections, the ultimate issue for courts is whether legislatures were referring to state law, federal law, or both.[169]

The Oregon Supreme Court, in 2010, in *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*, established the current jurisprudence regarding federal preemption of state marijuana laws, thereby preventing many state courts from vindicating a patient's discrimination claims even under state law.[170] The plaintiff in *Emerald Steel Fabricators* argued that his employer discriminated against him on the basis of a disability when the employer failed to reasonably accommodate the employee's off-duty medical marijuana use.[171] The defendant argued, and the court held, that the CSA preempts the Oregon

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[166] *See, e.g.*, Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761, 795 (D. Ariz. 2019) (finding that the plaintiff failed to prove that she is a disabled person due to her medical marijuana use); Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus., 230 P.3d 518, 520 (Or. 2010) (holding the CSA preempts state medical marijuana laws and state disability discrimination laws to the point that they conflict with federal law).

[167] *See* Rodd, *supra* note 85, at 1781 (describing how courts have applied the phrase "illegal use of drugs" either through preemption of state law or simply by incorporating the federal definition into state versions of the law).

[168] *See Emerald Steel Fabricators, Inc.*, 230 P.3d at 529 (finding that a state law that authorizes conduct that federal law makes illegal "stands as an obstacle to the . . . execution of the full purposes . . . of [the CSA]" (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); *see also* Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225, 1230 (D.N.M. 2016) (holding that mandating reasonable accommodations for medical marijuana patients in the employment context would "mandate [the employer] to permit the very conduct the CSA proscribes").

[169] *See* ARIZ. REV. STAT. ANN. § 41-1461 (2021) (exempting disability discrimination protections for individuals engaging in illegal drug use); ARK. CODE ANN. § 16-123-102(3)(B) (2021) (same); OR. REV. STAT. § 659A.124(1) (2021) (same); Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 204 (Cal. 2008) (holding that interpreting "illegal use of drugs" required looking to the federal definition as well as the state definition); Coats v. Dish Network, LLC, 2015 CO 44, ¶¶ 7, 13, 350 P.3d 849, 851 (interpreting "lawful activities" within the state's lawful activities statute to include lawful under both state and federal law (quoting COLO. REV. STAT. § 24-34-402.5(1) (2021)); *Emerald Steel Fabricators, Inc.*, 230 P.3d at 535 (finding that the language in Oregon's disability discrimination protection legislation referred to the CSA).

[170] *See* 230 P.3d at 529; *see also Garcia*, 154 F. Supp. 3d at 1230 (relying on *Emerald Steel Fabricators, Inc.* in determining that federal law preempts employment protections for medical marijuana users).

[171] *Emerald Steel Fabricators, Inc.*, 230 P.3d at 520–21. The plaintiff in *Emerald Steel Fabricators, Inc.* used medical marijuana to treat extreme anxiety, panic attacks, nausea, vomiting, and excruciating stomach cramps. *Id.* at 520.

medical marijuana law, and therefore, the plaintiff could not adequately state a claim for relief.[172]

The court reasoned that although it is possible to comply with both the CSA and Oregon's medical marijuana law simultaneously, the medical marijuana law poses an insurmountable obstacle to the purposes behind the CSA.[173] The court explained that inclusion of marijuana in Schedule I of the CSA obviated Congress's view that it has no medical benefits and that state medical marijuana laws contradict that legislative purpose.[174] The majority reasoned that affirmatively authorizing conduct that federal law prohibits interferes with the Congressional purpose undergirding that law.[175] Thus, the state statute failed the second prong of the conflict preemption analysis requiring that state laws not pose an obstacle to achievement "of the full purposes and objectives of Congress."[176]

The dissent countered that the majority should have begun with the presumption that federal law does not supersede acts pursuant to the state police power.[177] The dissent further argued that the state medical marijuana law does not pose an obstacle to the purpose of the CSA because it does not prevent federal enforcement of the CSA.[178] Finally, the dissent contended that "words of authorization" alone in the Oregon Medical Marijuana Act do not result in an obstacle to the CSA because they merely allow enforcement of the included exceptions, not violation of federal law.[179]

A number of courts have also disposed of employees' disability discrimination claims by interpreting state statutes' reference to illegal drug use in conformance with federal law.[180] In 2008, the Supreme Court of California held in *Ross v. RagingWire Telecommunications, Inc.* that the exception for "illegal drugs" in California's Fair Employment and Housing Act must necessarily consider the federal definition.[181] The majority reasoned that no state can completely legalize medical marijuana while it remains federally illegal as the state

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[172] *Id.* at 526, 529.

[173] *Id.* at 529.

[174] *Id.*

[175] *Id.*

[176] *Id.* at 528 (quoting Freightliner Corp. v. Myrick, 514 U.S. 52, 287 (1995)); *see also supra* note 31 and accompanying text (discussing conflict preemption in more detail).

[177] *Id.* at 537 (Walters, J., dissenting).

[178] *Id.*

[179] *Id.* at 538.

[180] *See, e.g.*, Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 203–04 (Cal. 2008) (holding that courts must consider both state and federal definitions when considering exceptions in state law for using illegal drugs); Coats v. Dish Network, LLC, 2015 CO 44, ¶ 13, 350 P.3d 849, 851 (refusing to exclude considerations of federal law in determining what constitutes a "'lawful' activity" under a state lawful activities statute (quoting COLO. REV. STAT. § 24-34-402.5 (2021))); *Emerald Steel Fabricators, Inc.*, 230 P.3d at 535 (finding that the language in Oregon's disability discrimination protection legislation referred to the CSA).

[181] 174 P.3d at 204–05; *see* CAL. GOV'T CODE § 12926(j)(5) (West 2021) (excepting individuals who use illegal drugs from employment and housing protections).

statute tracks with the federal statute in determining what drugs are illegal.[182] In 2015, the Supreme Court of Colorado reached a similar outcome in *Coats v. Dish Network, LLC* when it interpreted the term "lawful" in the Colorado lawful activities statute to exclude the use of medical marijuana.[183] The court interpreted the term "lawful" by its plain meaning, "not contrary to law," including federal law.[184] Thus, the court held that medical marijuana, even when lawful within the state, cannot fall within the lawful activity that state law protects from adverse employment action.[185] Alternatively, the common law may offer medical marijuana patients a different path to vindication of their rights through the tort of wrongful discharge.[186]

### *B. Wrongful Termination of Medical Marijuana Users in Violation of Public Policy*

Another frequent claim that medical marijuana patients suffering employment discrimination bring is the common-law tort of wrongful discharge in violation of public policy.[187] Despite the regularity of these claims in the context of medical marijuana employment discrimination, courts have so far unanimously refused to grant relief on these claims.[188] Courts dispose of many of these public policy claims for a failure to satisfy the first element, requiring demonstration of a clear public policy, without further evaluation of the re-

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[182] *Ross*, 174 P.3d at 203–04.

[183] *Coats*, ¶ 17, 350 P.3d at 852 (first quoting Hougum v. Valley Mem'l Homes, 574 N.W.2d 812, 821 (N.D. 1998); and then quoting *In re* Adoption of B.C.H., 22 N.E.3d 580, 585 (Ind. 2014)).

[184] *Id.*

[185] *Id.* ¶¶ 19–20, 350 P.3d at 853.

[186] *See supra* note 118 and accompanying text (listing the elements a plaintiff must prove to prevail on a common law wrongful discharge claim); *infra* notes 187–209 and accompanying text (discussing claims brought via the common law tort of wrongful discharge in violation of public policy).

[187] *See, e.g.*, *Ross*, 174 P.3d at 209 (evaluating plaintiff's claims of wrongful termination in violation of public policy); Chance v. Kraft Heinz Foods Co., CV K18C-01-056 NEP, 2018 WL 6655670, at *12 (Del. Super. Ct. Dec. 17, 2018) (same); Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37, 50 (Mass. 2017) (same); Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC, 257 P.3d 586, 594–95 (Wash. 2011) (same); *supra* notes 115–124 and accompanying text (describe the common law tort of wrongful discharge and how courts have applied it in circumstance involving medical marijuana discrimination).

[188] *See Ross*, 174 P.3d at 208 (holding that California's Compassionate Use Act does not address the subject of employment, therefore resulting in plaintiff's failure to show that a public policy exists supporting employment protections for medical marijuana users); *Chance*, 2018 WL 6655670, at *15 (granting the defendant's motion for summary judgement as to the plaintiff's wrongful termination claim based on his status as a medical marijuana cardholder); *Roe*, 257 P.3d at 597 (finding that the plaintiff failed to show that a clear public policy exists in the state's medical marijuana law supporting employment protections for medical marijuana users); *see also Barbuto*, 78 N.E.3d at 50 (declining to reach the question of the plaintiff's wrongful termination in violation of public policy claim due to granting relief through the state disability discrimination statute).

maining elements.[189] Additionally, courts interpret the public policy exception to the at-will employment doctrine very narrowly, so courts that have addressed the issue hesitate to find a clear policy for employment protections based on state laws merely authorizing the use of medical marijuana.[190]

For example, the Supreme Court of Washington held, in 2011, in *Roe v. TeleTech Customer Care Management (Colorado) LLC* that the Medical Use of Marijuana Act (MUMA) does not support a sufficient public policy exception to the at-will employment doctrine in the face of a fierce dissent on the issue.[191] The plaintiff in *Roe* argued that her employer violated public policy in retracting her job offer based on her status as a medical marijuana patient because MUMA established a policy that medical marijuana use is a "personal, individual decision" with which the employer should not interfere.[192] The court rejected this argument, noting that the legislature's "mandate of public policy . . . must be clear and truly public" and not just demonstrated via the existence of legislation that happens to touch on the issue.[193] The court went on to hold that the language in MUMA allowing for medical marijuana use is insufficient to support such a broad policy as prohibiting the discharge of employees for off-duty medical marijuana use.[194] The majority further undercut the plaintiff's argument in holding that the broad policy of medical marijuana use as a "personal, individual decision" actually refers to the recommending physician's decision, not the patient's.[195] Finally, because of the conflict with federal law, the majority refused to recognize a broad public policy that would allow employees to violate federal law.[196]

In quoting the esteemed Oliver Wendell Holmes, Justice Thomas Chambers filed a fiery dissent vigorously arguing that the jury should be able to hear

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[189] *See, e.g.*, Brown v. Home Depot, C14-0896 RSM, 2015 WL 9839773, at *5 (W.D. Wash. Feb. 5, 2015) (finding that the plaintiff failed to satisfy the clarity element of the wrongful termination in violation of public policy analysis); *Ross*, 174 P.3d at 209 (same); *Roe*, 257 P.3d at 597 (same).

[190] *See Ross*, 174 P.3d at 208 (finding that California's medical marijuana law "simply does not speak to employment" and therefore expresses no clear policy prerogative for employment protections); *Roe*, 257 P.3d at 597 ("[The Washington medical marijuana law] does not proclaim a public policy that would remove any impediment (including employer drug policies) to the decision to use medical marijuana."); Note, *supra* note 119, at 1932 n.10 (noting that courts typically read the public policy exception "very narrowly").

[191] 257 P.3d at 597–98.

[192] *Id.* at 596.

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.* at 597. In reaching this conclusion, the Supreme Court of Washington relied on *Thompson v. St. Regis Paper Co.*, that requires that courts "'proceed cautiously' when finding a public policy exception to the at-will employment doctrine" "absent some prior legislative or judicial expression on the subject." *Id.* at 595, 597 (quoting Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (Wash. 1984)).

the plaintiff's claim for wrongful termination in violation of public policy.[197] He began his analysis by arguing that a clear public policy does in fact exist for employment protections for medical marijuana patients, thus easily satisfying the clarity element.[198] Justice Chambers pointed to the purpose of MUMA that declares the policy of "humanitarian compassion necessitates" the authorization of medical marijuana use.[199] Further, he argued that the legislature's inclusion of language clearly indicating that on-duty marijuana use does not require accommodation implicitly indicates a policy prerogative that employers *should* accommodate off-duty medical marijuana use.[200] In an amicus brief filed in support of the petitioner, the American Civil Liberties Union similarly argued that Washington legislators exhibited a clear public policy of accommodating off-site use through their amendment clarifying that employers do not have to accommodate on-duty use.[201] The dissent accused the majority, in declining to find a broad public policy protecting medical marijuana patients from adverse employment actions, of undermining the democratic will of the people.[202]

After establishing an argument in favor of a clear public policy and thus satisfying the clarity elements, the dissent then moved on to the remaining elements of plaintiff's claim.[203] In discussing the second element, the jeopardy element, Justice Chambers argued that Roe met the burden of showing that dissuading her conduct would "jeopardize public policy."[204] Justice Chambers reasoned that allowing someone to suffer adverse employment actions for their legal use of a medical treatment discourages use of the treatment and therefore undermines the policy behind its legalization.[205] The dissent acknowledged

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[197] *See id.* at 597–98 (Chambers, J., dissenting) (arguing that the court should allow the plaintiff's wrongful termination claim to go before a jury for determination on the final element).

[198] *See id.* at 598 (arguing that a clear public policy exists in favor of protecting medical marijuana patients from adverse employment actions).

[199] *Id.*

[200] *Id.* at 598–99.

[201] *See* Brief Amicus Curiae of the American Civil Liberties Union of Washington in Support of Petitioner at 18–19, *Roe*, 257 P.3d 586 (No. 83768-6) (making the argument that by explicitly amending Washington's medical marijuana statute to exclude accommodation of on-site marijuana use, the legislature was implicitly supporting a clear public policy that requires employers to accommodate off-site use).

[202] *Roe*, 257 P.3d at 598.

[203] *Id.* at 599. In order to satisfy the elements of a common law wrongful discharge claim, plaintiff must show: (1) "[t]hat a clear public policy exist[s]" and that some kind of government action supports this policy ("the clarity element"); (2) that allowing "plaintiff's dismissal would jeopardize [that] policy" ("the jeopardy element"); (3) that plaintiff's conduct resulted in the discharge ("the causation element"); and (4) that the employer had no overriding justification ("the overriding justification element"). Perritt, *supra* note 21, at 398–99; *see supra* note 118 and accompanying text (denoting the requirements for a plaintiff to state a claim of wrongful discharge in violation of public policy).

[204] *Roe*, 257 P.3d at 599 (quoting Danny v. Laidlaw Transit Servs., 193 P.3d 128, 139 (Wash. 2008)).

[205] *Id.*

that neither party disputed the third element, the causation element, as Roe was undoubtedly fired for her medical marijuana use.[206] Finally, in evaluating the fourth element, the overriding justification element, Justice Chambers relented that the court should leave this decision to a jury.[207] Although the dissent remained unpersuaded that federal law prohibited TeleTech from following state law, Justice Chambers admitted that the company may have a prevailing reason to prohibit employees' off-duty use of medical marijuana.[208] Despite these potential hurdles, the common law presents a promising avenue for medical marijuana patients to assert their right to the treatment of their choice without fear of negative employment consequences.[209]

## III. The Common-Law Wrongful Termination Claim Is a Better Vehicle for Protecting Patient Rights Than Claims Under State Disability Law

Despite the positive developments in the jurisprudence surrounding employment protections for medical marijuana patients, advocates have a long way to go in ensuring adequate protection of medical marijuana patients in the workplace.[210] Although protecting the rights of patients through state disability discrimination statutes suggests promise, these state laws actually offer little protection in the face of marijuana's federal illegality.[211] This Part argues that courts should be more accepting of claims of wrongful termination in violation of public policy with regard to employees whom employers terminate for their off-duty medical marijuana use.[212] This Part contends that by allowing claims

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[206] *Id.*

[207] *Id.*

[208] *Id.*; *see also* Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37, 50 (Mass. 2017) (holding that an employer may be able to prove that accommodating medical marijuana use would impose an undue burden on their business).

[209] *See infra* notes 225–258 and accompanying text (arguing that the common law tort of wrongful discharge is the most effective way forward for preserving medical marijuana patients' rights).

[210] *Compare* Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37, 50 (Mass. 2017) (holding that an employee can state a claim for disability discrimination under state law for adverse employment actions due to their state-sanctioned medical marijuana use), *with* Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761, 795 (D. Ariz. 2019) (holding that the plaintiff failed to prove that they are a disabled person due to their medical marijuana use), *and* Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus., 230 P.3d 518, 520 (Or. 2010) (determining that medical marijuana use does not require accommodation under state disability or medical marijuana statutes because the CSA federally preempts them).

[211] *See Barbuto*, 78 N.E.3d at 47 (warning that despite the plaintiff making a prima facie case of disability discrimination, the defendant-employer may still be able to prove that offering accommodations for off-site marijuana use would impose an undue burden); *Emerald Steel Fabricators, Inc.*, 230 P.3d at 533–34 (holding that the CSA preempts state medical marijuana laws and disability protections relating to medical marijuana use); *supra* notes 110–114 and accompanying text (discussing how the protections offered to medical marijuana patients by state disability statutes are often precarious).

[212] *See infra* notes 210–258 and accompanying text.

to move forward under the public policy exception to at-will employment, courts will remove the impediments that the federal prohibition of marijuana creates by preemption and the "illegal use of drugs" exception.[213] Section A of this Part argues that, despite recent positive developments, state disability statutes do not provide enough protections for medical marijuana patients in the context of employment.[214] Section B makes the argument that the common law wrongful discharge claim is a better approach to protecting the rights of medical marijuana patient employees.[215]

### *A. State Disability Statutes Do Not Provide Sufficient Employment Protections for Medical Marijuana Patients*

Some medical marijuana proponents have advocated for including patients under the umbrella of state or federal disability protections, either through legislation or judicial action, in order to prevent employment discrimination on the basis of their use of medical marijuana.[216] Indeed, medical marijuana patients have made some progress on this front recently, but with this progress also comes a fresh set of challenges.[217] The ability of employers to demonstrate that an accommodation for off-site marijuana use is unreasonable or would cause an undue burden on their business carries significant weight in

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[213] *See infra* notes 210–258 and accompanying text.

[214] *See infra* notes 216–224 and accompanying text.

[215] *See infra* notes 225–258 and accompanying text.

[216] *See, e.g.*, Brief and Addendum of Amicus Curiae Massachusetts Commission Against Discrimination at 36–37, *Barbuto*, 78 N.E.3d 37 (SJC-12226) (arguing that the Massachusetts state discrimination statute does not support categorical exclusion of medical marijuana as a potential disability accommodation); Rodd, *supra* note 85, at 1786–87 (arguing for the protection of medical marijuana patients in the employment context by state disability discrimination statutes); Scannell, *supra* note 45, at 417 (advocating for extending the protections that the ADA offers to cover medical marijuana patients).

[217] *See Barbuto*, 78 N.E.3d at 47–48 (holding that an employer may show an undue hardship on the basis of an employee's potential safety risk to the public or another employee, or by contractual and statutory obligations that federal law imposes). Following the Massachusetts Supreme Judicial Court's lead, other state supreme courts have since recognized or enforced employment protections for medical marijuana patients. *See, e.g.*, Noffsinger v. SSC Niantic Operating Co. LLC, 273 F. Supp. 3d 326, 336 (D. Conn. 2017) (holding that the CSA does not preempt Connecticut's medical marijuana law and that its anti-discrimination provisions apply to employers in the state); Chance v. Kraft Heinz Foods Co., CV K18C-01-056 NEP, 2018 WL 6655670, at *4, 7 (Del. Super. Ct. Dec. 17, 2018) (holding that federal law does not preempt the Delaware medical marijuana law and that plaintiffs are entitled to a private right of action to enforce their rights under the law). The Massachusetts Supreme Judicial Court's 2017 decision in *Barbuto v. Advantage Sales Marketing* allowed a medical marijuana patient's claim against an employer merely to survive dismissal, a much lower standard than that required to prevail on such a claim. 78 N.E.3d at 50–51. *Compare* FED. R. CIV. P. 8(a)(2) (requiring a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to survive a motion to dismiss), *with* FED. R. CIV. P. 56(a) (stating that to prevail on a motion for summary judgement, the movant must show that there are no factual disputes and that they are "entitled to judgement as a matter of law").

light of federal prohibition.[218] Although courts have not yet had the opportunity to evaluate an employer's undue burden defense to providing a reasonable accommodation for off-site medical marijuana use, current jurisprudence seems to find safety concerns and the conflict with federal law as persuasive justifications.[219] An employer could easily claim such an accommodation is unreasonable, and many have, arguing that even off-duty use jeopardizes the employee's ability to perform their necessary responsibilities during working hours.[220]

Further, several courts have declined to extend state disability protections to medical marijuana patients because the employee lacked a qualifying disability or because of the employee's exemption from discrimination protections due to their illegal use of drugs.[221] As such, the many oppositional arguments to extending disability protections to medical marijuana patients in the employment context render even facially successful claims uncertain given that an employer can escape liability by showing some negative impact on their business.[222] It makes little sense to fight the uphill battle of encouraging courts

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[218] *See* Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761, 794 (D. Ariz. 2019) (determining that the medical marijuana patient who faced termination for off-duty marijuana use did not have a disability and therefore did not qualify for protections under the state's disability discrimination law); Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 205 (Cal. 2008) (holding that California's disability discrimination protections do not protect individuals using illegal drugs); Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus., 230 P.3d 518, 523, 535 (Or. 2010) (holding that state disability protections cannot apply to an individual using "illegal drugs" as the CSA defines them, including marijuana).

[219] *See Barbuto*, 78 N.E.3d at 47–48 (admitting that concerns of safety and the economic impact of marijuana's federal illegality, such as ineligibility for federal contracts, may be enough for a business to demonstrate an undue burden). For example, the federal Drug-Free Workplace Act makes employers who refuse to adopt certain workplace drug policies ineligible for federal contracts. 41 U.S.C. §§ 8101–8106. Under these circumstances, an employer would argue that federal law preempts state marijuana law, and to accommodate employee marijuana use would pose a considerable financial hardship to their business. *See, e.g.*, *Barbuto*, 78 N.E.3d at 48 (conceding that the Drug-Free Workplace Act requires recipients of federal money to enact policies maintaining a drug-free workplace).

[220] *See* Brief of Defendants-Appellees at 42–43, *Barbuto*, 78 N.E.3d 37 (SJC-12226) (arguing that requiring the defendant to substantially modify its drug testing policy as applied to plaintiff is an unreasonable accommodation); Amicus Brief for NFIB Small Business Legal Center in Support of Defendant-Appellees at 12–14, *Barbuto*, 78 N.E.3d 37 (SJC-12226) (arguing that even off-duty use of marijuana can impair an employee's ability to perform their work functions and therefore accommodating such use is unreasonable); Brief Amicus Curiae of Pacific Legal Foundation in Support of RagingWire Telecommunications, Inc. at 14, *Ross*, 174 P.3d 200 (S138130) (arguing that to accommodate even off-duty use of medical marijuana would put employers in an untenable situation of choosing which laws to follow).

[221] *See Whitmire*, 359 F. Supp. 3d at 795 (holding that the plaintiff failed to adequately allege that they were "disabled" under the Arizona Civil Rights Act); *Emerald Steel Fabricators, Inc.*, 230 P.3d at 520–22 (determining that medical marijuana use does not require accommodation under state disability or medical marijuana statutes because the CSA federally preempts their definition of "illegal drugs").

[222] *See supra* notes 18–23 and accompanying text (describing the tenuousness of even facially viable claims). The myriad gaps in a theory of disability discrimination for medical marijuana patients

to recognize such disability protections when the exceptions essentially allow employers a substantial loophole to liability, that is, the opportunity to argue that offering these protections impacts their business negatively.[223] Alternatively, offering employment protections to medical marijuana patients through the common-law wrongful discharge tort is not as susceptible to the pitfalls of doing so under disability protections because courts are unrestrained by statutory interpretation and much more amenable to policy arguments.[224]

### *B. Courts Should Allow Wrongful Termination in Violation of Public Policy Claims to Move Forward in the Context of Medical Marijuana*

Courts should allow the claims of medical marijuana patients to move forward under the framework for wrongful termination in violation of public policy.[225] Not only is protecting medical marijuana patients from adverse employment actions good policy, but the recently successful claims under state disability discrimination statutes have not offered sufficient protections because courts have only had the opportunity to evaluate preliminary issues as opposed to reach a definitive resolution.[226] A common-law wrongful termination claim, however, does not suffer from the same deficiencies, so long as the plaintiff can overcome the employer's frequent opposition to the clarity ele-

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allows courts to attack the plaintiff's argument from a number of directions. *See supra* notes 105–114 (providing an overview of the challenges that medical marijuana patients face when trying to enforce their rights under state disability statutes).

[223] *See Barbuto*, 78 N.E.3d at 47–48 (describing how an employer might show that an accommodation for off-duty medical marijuana use would be unreasonable or cause the employer to suffer an undue burden); Burns, *supra* note 74, at 647 (arguing that the Massachusetts Supreme Judicial Court's foreclosure of alternative protections for medical marijuana patients in the employment context actually *harms* these patients, especially if the employer can escape liability by demonstrating such an accommodation to be unreasonable).

[224] *See* Rose v. Anderson Hay & Grain Co., 358 P.3d 1139, 1143 (Wash. 2015) (outlining the elements of a tortious wrongful discharge claim that considers implications of public policy rather than statutory interpretation).

[225] *See* Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC, 257 P.3d 586, 598 (Wash. 2011) (Chambers, J., dissenting) (arguing that courts should allow common-law tortious wrongful discharge claims to move forward in the context of medical marijuana patients); *see also* Phillips, *supra* note 43, at 137 (arguing that discharge for medical marijuana use meets the elements of a wrongful discharge in violation of public policy claim); *supra* note 118 and accompanying text (describing what a plaintiff must prove to win a wrongful discharge claim).

[226] *See Barbuto*, 78 N.E.3d at 47 (warning that despite the plaintiff making a prima facie case of disability discrimination, the defendant may still be able to prove that offering accommodations for off-site marijuana use would impose an undue burden). In 2017, the Massachusetts Supreme Judicial Court in *Barbuto v. Advantagae Sales & Marketing* also refused to hold accommodations for off-duty medical marijuana use per se unreasonable on public policy grounds as it would contravene the will of Massachusetts voters and fly in the face of the vast majority of states that have decided to legalize medical marijuana use. *Id.* at 46.

ment, requiring evidence of a clear public policy.[227] Subsection 1 argues that plaintiffs can easily satisfy the clarity element if courts refuse to take such a unnecessarily narrow view of what constitutes public policy.[228] Subsection 2 contends that the jeopardy and causation elements are rarely at issue and easily satisfied.[229] Finally, Subsection 3 maintains that the advocates can meet the overriding justification element more easily than the undue burden defense available to employers in disability discrimination claims.[230]

1. Satisfying the Clarity Element

The first element in a claim for wrongful termination in violation of public policy is the clarity element that, in the context of medical marijuana patients' claims, requires the plaintiff to demonstrate that there is a clear public policy in favor of providing employment protections to them for their off-duty marijuana use.[231] Courts have unanimously declined to find a clear public policy in favor of employment protections for medical marijuana users, but unlike legislation, policy aims tend to evolve over time merely through social change.[232] The fact is, with forty-seven states and four territories allowing for some form of medical cannabis use and ninety percent of the population in favor of legalization, the federal government is out of step with prevailing public policy in its continued prohibition of marijuana.[233] Further, state laws legalizing marijuana has evinced a clear policy preference for protecting the rights of

[227] *See, e.g.*, Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 208–09 (Cal. 2008) (holding that California's Compassionate Use Act does not speak on the subject of employment, thus resulting in the plaintiff's failure to show that a public policy existed supporting employment protections for medical marijuana users); Chance v. Kraft Heinz Foods Co., CV K18C-01-056 NEP, 2018 WL 6655670, at *15 (Del. Super. Ct. Dec. 17, 2018) (granting the defendant's motion for summary judgement as to the plaintiff's wrongful termination claim based on his status as a medical marijuana cardholder); *Roe*, 257 P.3d at 597 (finding that the plaintiff failed to show that a clear public policy existed in the state's medical marijuana law supporting employment protections for medical marijuana users).

[228] *See infra* notes 231–245 and accompanying text.

[229] *See infra* notes 246–249 and accompanying text.

[230] *See infra* notes 250–258 and accompanying text.

[231] *See Ross*, 174 P.3d at 208–09 (summarizing the plaintiff's argument that the Compassionate Use Act evinces a "fundamental public polic[y]" supporting employment protections for medical marijuana patients); *Chance*, 2018 WL 6655670, at *12 (rejecting the plaintiff's argument that the Delaware medical marijuana law illustrated a strong public interest in protecting medical marijuana patients from employment discrimination); *Roe*, 257 P.3d at 597 (recounting the plaintiff's argument that the Washington medical marijuana law supports a broad public policy protecting the rights of patients to use medical marijuana).

[232] *See Roe*, 257 P.3d at 598 (Chambers, J., dissenting) (claiming that treating the broad purposes of California's Compassionate Use Act as merely decorative would undermine the will of the people); *see, e.g.*, *Ross*, 174 P.3d at 208–09 (holding that the plaintiff failed to satisfy the clarity element); *Chance*, 2018 WL 6655670, at *15 (same); *Roe*, 257 P.3d at 597 (same).

[233] *See State Medical Cannabis Laws*, *supra* note 10 (reporting the current status of marijuana legalization in states across the country); *supra* note 15 and accompanying text (describing popular opinion polls on marijuana legalization).

medical marijuana patients.[234] Courts that have declined to find a sufficiently clear public policy to protect the employment of medical marijuana patients have cited the lack of a mention of employment in state medical marijuana statutes.[235] These courts interpret this absence to indicate that the voters supporting medical marijuana initiatives did not intend to provide employment protections to patients as a matter of policy.[236]

This interpretation, however, takes an unnecessarily narrow view of the clarity element by refusing to consider how state medical marijuana laws fit into the overall state regulatory scheme as a matter of policy, including other regulations concerning employment and discrimination.[237] Although it is true that precedent requires courts to "proceed cautiously" in finding a public policy exception to at-will employment, it *does not* require a legislative enactment to spell out the policy explicitly.[238] In fact, courts should consider whether the employer's conduct violates not only the letter of the law, but the *purpose* behind the statute or scheme.[239] When evaluated in the context of a state's comprehensive anti-discrimination statute that works with other state statutes to protect other medical treatments, a policy pronouncement in favor of protecting medical marijuana patients from discrimination becomes much clearer.[240] If an employer discharged an employee for other necessary medical treatments,

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[234] *See* ARIZ. REV. STAT. ANN. § 36-2811(B) (2021) ("A registered qualifying patient or registered designated caregiver is not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau."); MASS. GEN. LAWS ch. 94G, § 7(a) (2020) ("[A] person 21 years of age or older shall not be . . . denied any right or privilege . . . [for] possessing, using, purchasing, processing, or manufacturing 1 ounce or less of marijuana . . . ."); MICH. COMP. LAWS § 333.26424(a) (2021) ("A qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including . . . civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau . . . .").

[235] *See, e.g.*, *Ross*, 174 P.3d at 208 (citing that the Compassionate Use Act "simply does not speak to employment law"); *Roe*, 257 P.3d at 596 (citing the fact that Washington's medical marijuana law does not mention employment).

[236] *See, e.g.*, Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 437 (6th Cir. 2012) (explaining that Michigan voters could not have possibly intended sweeping changes to the state's employment law in passing the Michigan medical marijuana statute).

[237] *See* Parnar v. Americana Hotels, Inc., 652 P.2d 625, 631 (Haw. 1982) ("In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision *or scheme*." (emphasis added)).

[238] *See* Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (Wash. 1984) (requiring courts to "proceed cautiously" in the absence of "some prior legislative or judicial expression on the subject" (quoting *Parnar*, 652 P.2d at 631) (emphasis omitted)).

[239] *See id.* (citing *Parnar*, 652 P.2d at 631) (emphasizing that courts can declare a public policy absent legislation or judicial decision but that they should "proceed cautiously").

[240] *See* Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37, 47 (Mass. 2017) (comparing a company that bars its employees' use of insulin, an obvious violation of anti-discrimination laws, to a company doing the same regarding medical marijuana).

an employee's off-duty use of insulin, chemotherapy, or even vaccinations, courts would likely view such conduct as an obvious violation of discrimination statutes.[241] So why not medical marijuana?[242]

Although the U.S. Court of Appeals for the Sixth Circuit in its 2012 decision *Casias v. Wal-Mart Stores, Inc.* is probably correct in its assertion that Michigan voters did not expressly contemplate employment when voting on the measure, it is not improbable that they did consider how the initiative might affect other laws, including those touching on employment and discrimination.[243] Because laws do not exist in a vacuum, courts can overlook indications of public policy when they do not consider the entire statutory framework.[244] As such, requiring such an explicit admission of public policy, as courts have done up until this point, renders the public policy exception to at-will employment moot by essentially requiring legislatures to explicitly write the policy into a statute.[245]

2. The Causation and Jeopardy Elements Are Easily Met

If the plaintiff can overcome the hurdle that the clarity element imposes, then they can easily satisfy both the jeopardy and causation elements, requiring the plaintiff to show that the employer's conduct jeopardized this clear public policy and that conducted exemplifying this policy resulted in the employee's termination.[246] Presupposing a clear public policy in favor of employment protections for medical marijuana patients, allowing termination for the use of such a treatment necessarily jeopardizes that policy.[247] Additionally, because the de-

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[241] *See id.* (considering whether discrimination would exist in other instances where employers deny employees' off-duty medical treatments).

[242] *See id.* (comparing the employer's refusal to accommodate off-duty medical marijuana treatment with other prescribed medical treatments).

[243] *See* 695 F.3d 428, 437 (6th Cir. 2012) (restricting its analysis to the immediate intent of Michigan voters in passing the medical marijuana law as opposed to a broader analysis of how Michigan voters would perceive the medical marijuana law to fit into Michigan law overall).

[244] *See* Bombero v. Plan. & Zoning Comm'n of Town of Trumbull, 591 A.2d 390, 393 (Conn. 1991) ("[S]tatutes do not exist in a vacuum."); Marsh v. Overland, 905 P.2d 1088, 1092 (Mont. 1995) ("Statutes do not exist in a vacuum. They must be read in relationship to one another to effectuate the intent of the statutes as a whole.").

[245] *See Casias*, 695 F.3d at 437 (holding that such a broad extension of employment protections would betray the ideal that such large modifications to Michigan law should be explicit in statute); Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 203 (Cal. 2008) (describing the clarity that a statute must have in describing prohibited conduct to provide notice of the public policy the law that exhibits to employers).

[246] *See* Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC, 257 P.3d 586, 599 (Wash. 2011) (Chambers, J. dissenting) (arguing that plaintiffs typically satisfy the jeopardy element and causation element after courts find a clear public policy favoring employment protections for medical marijuana patients).

[247] *See id.* ("Allowing someone to be fired from their job using the treatment allowed by law when sanctioned by a doctor jeopardizes the clear policy of the act. It will discourage other [employ-

fendant-employers in this line of cases argue that no legal protections exist for off-duty medical marijuana use, the parties rarely argue over whether termination was due to this use, thereby meeting the causation element through admission.[248] Although plaintiffs often easily satisfy these two elements, the final overriding justification element may still pose a challenge to a plaintiff's claim.[249]

### 3. Overcoming the Overriding Justification Element

The last element that the plaintiff must prove in the public policy claim is the overriding justification element, which allows an employer to escape liability when they have sufficient justification for the discharge.[250] Although this element poses an obstacle similar to the affirmative defense of undue burden that employers invoke in disability discrimination claims, it is not insurmountable.[251] Firstly, allowing employees to use medical marijuana to treat a debilitating illness while off-duty neither requires employers to violate federal law nor to accommodate *on-duty* use of medical marijuana.[252] Additionally, public policy would not require an employer to accommodate off-duty medical marijuana use where doing so would jeopardize the safety of anyone or severely

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ees] from availing themselves of the treatment the voters decided should be available."); Brief Amicus Curiae of the American Civil Liberties Union of Washington in Support of Petitioner, *supra* note 201, at 15–16 (arguing that there is little dispute that the employer's termination of the plaintiff for her off-duty medical marijuana use discourage such use and is "'directly' related to the policy favoring protection of patients' right to use medical marijuana").

[248] *See Roe*, 257 P.3d at 599 (Chambers, J. dissenting) (stating that the causation element is undisputed because the defendant admits to terminating the plaintiff based on her off-duty medical marijuana use); *see also Ross*, 174 P.3d at 203 (summarizing the employer's admission that the employee's termination was the result of off-duty medical marijuana use); Chance v. Kraft Heinz Foods Co., 2018 WL 6655670, at *14–15 (Del. Super. Ct. Dec. 17, 2018) (allowing plaintiff's wrongful termination claim to move forward where plaintiff's employer terminated the plaintiff for off-duty medical marijuana use).

[249] *See* Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37, 48 (Mass. 2017) (cautioning that an employer may be able to escape liability if the employer can show a sufficient burden on their business).

[250] *See* Perritt, *supra* note 21, at 399 (explaining the overriding justification element).

[251] *See Roe*, 257 P.3d at 599 (Chambers, J., dissenting) (arguing that the dissent remains "unpersuaded that federal law prohibits [the employer] from following [state] law on this subject," but conceding that a jury would best decide the question). *Compare* Gardner v. Loomis Armored Inc., 913 P.2d 377, 386 (Wash. 1996) (describing the overriding justification element as recognizing that even some clearly mandated public policies are not strong enough to interfere with an employer's management of employees), *with* US Airways, Inc. v. Barnett, 535 U.S. 391, 402 (2002) (recognizing that an employer may escape liability by showing an employee's requested accommodation would be an undue burden on the employer's business).

[252] *See Roe*, 257 P.3d at 599 (Chambers, J., dissenting) (arguing that the notion that federal law prohibits an employer from adhering to state law on the subject of medical marijuana is unpersuasive); Brief for Plaintiff/Appellant Cristina Barbuto at 42, *Barbuto*, 78 N.E.3d 37 (SJC-12226) (arguing that it is not a violation of federal law for an employer to continue to employ a medical marijuana patient who complies with state medical marijuana laws and only medicates off-the-clock).

impact an employee's performance while at work.[253] In the context of medical treatment, generalized concerns about impaired employees offer no more justification than any other medication that *may* cause impairment when taken off-duty and in the privacy of one's home.[254] Finally, whereas statutory barriers frequently prevent courts from reaching the issue of an undue burden on the employer, a wrongful termination in violation of public policy claim is available in the vast majority of states.[255] This approach would result in a more uniform and convenient strategy in obtaining these patient-employee protections than through state disability statutes, the interpretation and language of which varies based on the choices that individual state legislatures make.[256] In contrast, the common law, including the tort of wrongful discharge, tends to evolve similar characteristics throughout different states, thus rendering a plaintiff's arguments in one state more readily applicable in another state.[257] Accordingly, courts should begin to recognize a remedy for medical marijuana patients in the tort of wrongful discharge and advocates should continue to bring such claims.[258]

## CONCLUSION

Despite the progress made in states that have allowed chronically-ill patients to seek treatment through the use of medical marijuana, a lack of employment protections continues to forestall to that treatment. This cruel Catch-22 forces medical marijuana patients to choose between the most effective treatment for their condition and their ability to maintain an adequate standard

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[253] *See* Brief Amicus Curiae of the American Civil Liberties Union of Washington in Support of Petitioner, *supra* note 201, at 18–19 (arguing that recognizing a public policy in favor of employment protections for medical marijuana patients based on their off-duty marijuana use would not require employers to accommodate such use where it jeopardizes the safety or the employee's performance).

[254] *See id.* at 19–20 (arguing that generalized concerns about liability due to an employee's off-the-clock medical marijuana use do not justify interfering with an employee's supervised medical treatment).

[255] *See* Nancy Modesitt, *Wrongful Discharge: The Use of Federal Law as a Source of Public Policy*, 8 U. PA. J. LAB. & EMP. L. 623, 623 (2006) (stating that forty-five states have recognized a public policy exception to the at-will employment doctrine).

[256] *See* Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761, 795 (D. Ariz. 2019) (finding that the plaintiff failed to prove that she was a person with a disability on the basis of her marijuana use because she has not shown that such use is "required in the prudent judgement of the medical profession"); Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus., 230 P.3d 518, 520 (Or. 2010) (determining that medical marijuana use does not require accommodation under state disability or medical marijuana statutes because the CSA's definition of "illegal use of drugs" federally preempts them).

[257] *See, e.g.*, Perritt, *supra* note 21, at 398–99 (emphasizing the similarities in state common law by stating the elements of the tort of wrongful discharge with certainty, despite the independent evolution of the common law throughout the individual states).

[258] *See supra* notes 187–209 and accompanying text (describing common arguments that plaintiffs have made in advancing a common law claim for wrongful discharge on the basis of their off-duty medical marijuana use).

of living through continued employment. This tension is certainly not what voters and legislators had in mind when they made medical marijuana legally available as a treatment. Although some states have written specific discrimination protections into law for medical marijuana users, these states constitute a small minority. Other states have attempted to provide protections for patients by allowing them to state claims of disability discrimination under state law, but even this engenders problems. With marijuana's federal prohibition, courts are reluctant to interpret state disability statutes as protecting what federal law prohibits. Further, the ease with which an employer could defeat a discrimination claim by proving the unreasonableness of the accommodations that the employee seeks are uncertain. A better path toward protection is to allow claims of wrongful termination in violation of state law to move forward. These claims are based on the common law and are uniquely distinct from federal law in a way that state statutes are not. Further, the continued state legalization efforts and vast majority of support for legalization make employment protections for patients a growing public policy prerogative. Although a common-law wrongful discharge claim still has its fair share of obstacles, it remains the most effective way of ensuring judicially created employment protections for medical marijuana patients.

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