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# A Job for Congress: Medical Marijuana Patients' Fight for Second Amendment Rights

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NOTE

# A JOB FOR CONGRESS: MEDICAL MARIJUANA PATIENTS' FIGHT FOR SECOND AMENDMENT RIGHTS

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## INTRODUCTION

In the United States, an individual's right to possess firearms is protected by the Second Amendment.[1] The United States Supreme Court has held that the individual right to own firearms applies to "law-abiding, responsible citizens" to utilize firearms for self-defense.[2] Given that marijuana is classified as a Schedule I controlled substance under federal law, meaning it has "no currently accepted medical use in treatment in the United States,[3]" medical marijuana patients are prohibited from possessing and purchasing firearms.[4] However, the majority of states in the Ninth Circuit do not share this view regarding the use of medical marijuana.[5] In fact, eight out of the nine states in the Ninth Circuit have enacted laws that permit their citizens to use marijuana for medical purposes.[6] Of those eight states, five have legalized marijuana for adult use.[7] Nationally, 29 states, the District of Columbia, and the territories of Guam and Puerto Rico have medical marijuana laws.[8]

In *Wilson v. Lynch*, a medical marijuana cardholder from Nevada sought to purchase a firearm from a federally licensed dealer in 2011.[9] The dealer refused to sell Wilson a firearm because he knew Wilson possessed a medical marijuana card; his decision was consistent with an Open Letter sent by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to all federally licensed firearms dealers.[10] The Open Letter interpreted existing laws, which prohibit "unlawful users of controlled substances" from purchasing and possessing firearms, to incorpo-

[1] U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

[2] District of Columbia v. Heller, 554 U.S. 570, 635, 645 (2008).

[3] 21 U.S.C. § 812(b) (1970).

[4] 18 U.S.C. § 922(d)(3) (1948); 18 U.S.C. § 922(g)(3) (1948).

[5] *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGS., http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last visited Sept. 19, 2017).

[6] *Id*. (Alaska, Arizona, California, Hawaii, Montana, Nevada, Oregon, and Washington).

[7] *Id*.

[8] *Id*.

[9] Wilson v. Lynch, 835 F.3d 1083, 1089 (9th Cir. 2016).

[10] *Id*.

rate medical marijuana patients regardless of whether the state legalized marijuana for medical purposes.[11]

Notwithstanding the numerous state laws allowing for medicinal cannabis use,[12] there are no federal exemptions that would permit an individual to lawfully possess or consume cannabis, even if a doctor has recommended that a patient use cannabis. Through a reexamination of the Ninth Circuit's application of the *Chovan* Second Amendment test to *Wilson*, this Note highlights the reason why the Ninth Circuit could not strike down the Open Letter's interpretation of federal firearms laws and why Congress needs to create an exception for medical marijuana patients.[13]

The Supremacy Clause in the United States Constitution prevents a state from enacting laws that federal law expressly prohibits.[14] In *Wilson*, the Supremacy Clause prevented the Ninth Circuit from applying strict scrutiny to a medical marijuana patient's Second Amendment challenge because the core right established in the seminal Second Amendment case, *District of Columbia v. Heller,* is for "law-abiding responsible citizens."[15] Under federal law, medical marijuana patients are not considered law-abiding citizens.[16] Therefore, because of the Supremacy Clause, only a significant change in federal law through congressional action will protect medical marijuana patients' Second Amendment rights.

This Note begins with Part I section (A), describing the administrative rule and factual background, leading up to the suit in *Wilson v. Lynch*. Part I section (B) explains the arguments made at the U.S. District Court in Nevada and how the case progressed from the district court to the Ninth Circuit Court of Appeals. Then, Part I section (C) analyzes

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[11] Arthur Herbert, *Open Letter to All Federal Firearm Licensees*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (Sept. 21, 2011), https://www.atf.gov/file/60211/download; *Wilson*, 835 F.3d at 1089.

[12] Cannabis and Marijuana are different names for the same plant. As a fiber crop, it was known as cannabis sativa; as a pharmaceutical, it was known as cannabis indica, but the term "Marijuana" came from the Mexican name for the drug. Dale H. Gieringer, *The Origins of Cannabis Prohibition in California*, 26 CONTEMP. DRUG PROBS. 1, 4 (1999) ("Marijuana" was associated with Mexicans immigrating to the United States in ever-larger numbers in the early 1900's.). Racial prejudice was the real reason for the first laws criminalizing cannabis in the United States, which mainly took place in the southern and western states. Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry Into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1011-13 (1970). This Note will refer to the plant as both cannabis and marijuana.

[13] *Wilson*, 835 F.3d at 1091-93.

[14] U.S. CONST. art. VI, cl. 2.

[15] District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

[16] Arthur Herbert, *Open Letter to All Federal Firearm Licensees*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (Sept. 21, 2011), https://www.atf.gov/file/60211/download; *see also* Wilson v. Holder, 7 F. Supp. 3d 1104, 1110 (D. Nev. 2014).

the Ninth Circuit's application of the two-step test for Second Amendment challenges established in *Chovan.*

After evaluating the application of the two-step test in *Wilson v. Lynch*, Part II section (A) reviews the history of cannabis and medical marijuana regulations in the United States. Part II section (B) briefly covers firearms regulations in the U.S. and the seminal Second Amendment case, *District of Columbia v. Heller*, which provides the foundation for the argument that medical marijuana patients should be granted an exemption under federal firearms laws.

Part III discusses the Supremacy Clause and the difficulty this clause causes for medical marijuana patients hoping to have their Second Amendment rights maintained by the courts. Part IV section (A) discusses a model rider amendment upheld in *U.S. v McIntosh*, upon which a proposed amendment is grounded. Part IV section (B) states this Note's proposed rider appropriation amendment, the arguments that should be used in support of the amendment, and rebuttals to previous arguments made against the amendment in *McIntosh*. Part IV section (C) concludes this Note with a discussion of the loopholes available to medical marijuana patients to obtain firearms despite the decision in *Wilson*.

## I. WILSON V. LYNCH

### A. FACTUAL AND REGULATORY BACKGROUND

In 2000, the state of Nevada amended its constitution to provide its citizens with access to medical marijuana.[17] In 2011, the ATF drafted an "interpretative rule" entitled "Open Letter to All Federal Firearms Licensees" ("Open Letter") in response to the increasing number of states that permit the use of medical marijuana and the resulting inquiries regarding medical marijuana's use in relation to federal firearms laws.[18] In the Open Letter, the ATF interpreted existing restrictions on the sale to and possession of firearms by "unlawful users of controlled substances" to include medical marijuana patients regardless of whether their state authorized marijuana use for medicinal purposes.[19]

The Open Letter was intended to give guidance to federally licensed firearm dealers about administering Form 4473, which confirms eligibil-

[17] *Wilson*, 835 F.3d at 1088.

[18] Arthur Herbert, *Open Letter to All Federal Firearm Licensees*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (Sept. 21, 2011), https://www.atf.gov/file/60211/download; *see also* Wilson v. Holder, 7 F. Supp. 3d 1104, 1110 (D. Nev. 2014).

[19] Arthur Herbert, *Open Letter to All Federal Firearm Licensees*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (Sept. 21, 2011), https://www.atf.gov/file/60211/download.

ity for gun ownership.[20] To prospective purchasers of firearms, question 11.e. asks, "Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?"[21] Given that the firearms dealer knew Wilson had acquired a medical marijuana card, he refused to sell her a firearm.[22] Rowan Wilson acquired her medical marijuana card in the fall of 2010, due to her suffering from "severe dysmenorrhea."[23]

## B. PROCEDURAL BACKGROUND

Against this regulatory backdrop, Wilson filed a lawsuit in the U.S. District Court of Nevada to challenge 18 U.S.C. sections 922(d)(3) and (g)(3), 27 C.F.R. section 478.11, and the ATF's Open Letter that prevented her from purchasing and possessing a firearm.[24] The district court, relying on the Ninth Circuit case *U.S. v. Dugan*, concluded that Wilson's Second Amendment challenges failed under the holding in *Dugan* because "the Second Amendment does not protect the rights of unlawful drug users to bear arms."[25]

In her First Amended Complaint ("FAC"), Wilson alleged that section 922(g)(3) infringed on her right to possess firearms.[26] Wilson argued that *Dugan* "lack[ed] any meaningful analysis" and that the "law is over-

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[20] *Wilson*, 835 F.3d at 1089.

[21] *Id*.; FORM 4473, FIREARMS TRANSACTION RECORD PART 1, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, DEP'T OF JUSTICE, (Oct. 2016) (11 e. was revised to expressly state a warning that marijuana is still illegal under federal law whether it has been "legalized or decriminalized for medical or recreational purposes in the state where you reside"), https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download.

[22] *Wilson*, 835 F.3d at 1089-90.

[23] Wilson v. Holder, 7 F. Supp. 3d 1104, 1110 (D. Nev. 2014). Dysmenorrhea is menstruation pain. Karim Anton Calis, *Dysmenorrhea*, MEDSCAPE, (Nov. 02, 2017), https://emedicine.medscape.com/article/253812-overview.

[24] Wilson v. Lynch, 835 F.3d 1083, 1089 (9th Cir. 2016); 18 U.S.C. § 922(d)(3) ("It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is an unlawful user of or addicted to any controlled substance."); 18 U.S.C. § 922(g)(3) ("It shall be unlawful for any person who is an unlawful user of or addicted to any controlled substance to . . . possess . . . or to receive any firearm or ammunition."); 27 C.F.R. § 478.11 (meaning of terms: *Controlled substance.* "A drug or other substance, or immediate precursor . . . The term includes, but is not limited to, marijuana, depressants, stimulants, and narcotic drugs. The term does not include distilled spirits, wine, malt beverages, or tobacco . . . .").

[25] *Wilson*, 835 F.3d at 1091; *see* United States v. Dugan, 450 F. App'x 633, 636 (9th Cir. 2011) (holding that the Second Amendment does not protect the rights of unlawful drug users to bear arms).

[26] Wilson v. Holder, 7 F. Supp. 3d 1104, 1116 (D. Nev. 2014); *see also* Plaintiff's First Amended Complaint at 54, Wilson v. Holder, 7 F. Supp. 3d 1104 (No. 2:11cv01679) (D. Nev. 2014), ECF No. 34.

broad because it affect[ed] nearly half of the U.S. population."[27] However, the district court reasoned that Wilson's FAC failed as a matter of law because the Ninth Circuit in *Dugan* already upheld the constitutionality of section 922(g)(3).[28] Further, the court reasoned that, regardless of whether half the population engages in illegal conduct, the illegality of that conduct is not affected.[29] Therefore, the district court dismissed Wilson's challenge to section 922(g)(3).[30]

Wilson then alleged in her FAC that section 922(d)(3), in combination with the Open Letter, imposed an "impermissible burden on her right to keep and bear arms."[31] The district court found that for the same reason Wilson's challenge to section 922(g)(3) failed, her challenge to section 922(d)(3) failed.[32] The court reasoned that because Congress can prohibit unlawful users of controlled substances from possessing firearms, Congress could also prevent federally licensed firearms dealers from selling weapons to unlawful drug users.[33] Therefore, the court dismissed Wilson's challenge to section 922(d)(3).[34]

The district court additionally found that Wilson failed to sufficiently allege that 27 C.F.R. section 478.11 infringed upon her Second Amendment right, but found that her claim failed regardless.[35] The court reasoned that her claim failed because "[section] 478.11 is consistent with 21 U.S.C. [section] 802, which provides that the possession and use of marijuana is prohibited by federal law."[36] In reviewing section 478.11, the court noted that the section excludes any person using a controlled substance, prescribed by a physician, in its definition of "unlawful users."[37] However, marijuana is categorized under federal law as a Schedule I controlled substance.[38] Therefore, medical marijuana patients cannot fall under the exception because Schedule I substances have no accepted medical use according to the federal government.[39] Also, in states where medical marijuana is legal, doctors do not prescribe medical

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[27] *Wilson*, 7 F. Supp. 3d at 1116-17.
[28] *Id*. at 1116.
[29] *Id*. at 1117.
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] *Id*. (citing United States v. Dugan, 657 F.3d 998, 999-1000 (9th Cir. 2011)).
[34] *Id*. at 1117.
[35] *Id*. at 1117-18.
[36] *Id*. at 1118.
[37] *Id*. at 1118; *see also* 27 C.F.R. § 478.11.
[38] *Id*. (citing 27 C.F.R. § 478.11).
[39] 21 U.S.C. § 812 (b)(1)(B); *see also* 21 U.S.C. § 802 (6).

marijuana; rather, they instead make recommendations that their patients use medical marijuana.[40]

The district court dismissed Wilson's complaint with prejudice and Wilson appealed.[41] On review in the Ninth Circuit, Wilson alleged that section 922(d)(3), 27 C.F.R. section 478.11, and the Open Letter unconstitutionally burdened her Second Amendment right to bear arms.[42] Although Wilson challenged 18 U.S.C. sections 922(d)(3) and (g)(3), which respectively prohibit the sale to and possession of firearms by "unlawful user[s] of . . . controlled substances," she conceded that she did not have standing to challenge 18 U.S.C. section 922(g)(3) because she did not allege that she was an unlawful drug user, or that she possessed or received any firearm.[43]

Wilson argued that, although she obtained a registry card, she chose not to use medical marijuana for various reasons.[44] The Ninth Circuit, taking Wilson's allegations as true, found that Wilson was not actually an unlawful drug user.[45] As a result, the court agreed with Wilson that her claims did not fall squarely within the scope of *Dugan*.[46] Because the Ninth Circuit found that Wilson was not an illegal drug user, the court held that Wilson's claims did not fail categorically, and instead adopted the two-step test, established in *Chovan*, to determine whether 18 U.S.C. section 922(d)(3), 27 C.F.R. section 478.11, and the Open Letter violated Wilson's Second Amendment right.[47]

### C. Analysis of the Ninth Circuit's Application of the Two-Step *Chovan* Test for Second Amendment Challenges

The two-step test for determining whether a law violates the Second Amendment was established in *U.S. v. Chovan*.[48] In *Chovan*, the defendant lost his Second Amendment challenge to 18 U.S.C. section 922(g)(9), which prevented persons convicted of domestic violence mis-

[40] Mark Crane, *Doctors' Legal Risks With Medical Marijuana*, MEDSCAPE (Jun. 04, 2015), http://www.medscape.com/viewarticle/845686.

[41] *Wilson*, 7 F. Supp. 3d at 1125.

[42] Wilson v. Lynch, 835 F.3d 1083, 1091 (9th Cir. 2016).

[43] *Id*. at 1090.

[44] *Id*. at 1091 (finding that the reasoning behind Wilson's decision not to use medical marijuana: (1) difficult to acquire in Nevada; and (2) Wilson acquired the registry card to make a political statement).

[45] *Id*.

[46] *Id*.

[47] *Id*. at 1092. Wilson asserted five causes of action at the Ninth Circuit, but this Note will only address Wilson's claim for the violation of her Second Amendment right; United States v. Chovan, 735 F.3d 1127, 1136-37 (9th Cir. 2013).

[48] United States v. Chovan, 735 F.3d 1127, 1136-37 (9th Cir. 2013).

demeanors from possessing firearms for life, with limited exceptions.[49] The *Chovan* court relied on the holding in *District of Columbia v. Heller* that the core purpose of the Second Amendment is to allow "law-abiding, responsible citizens" to bear arms.[50] The two-step process used to evaluate Second Amendment challenges asks: (1) whether the challenged law burdens conduct protected by the Second Amendment, and (2) if so, then directs courts to determine and apply an appropriate level of scrutiny.[51]

In evaluating whether a challenged law burdens conduct protected under the Second Amendment, a court must look to the "historical understanding of the scope of the Second Amendment right, or whether the challenged law falls within a well-defined and narrowly limited category of prohibitions that have been historically unprotected."[52]

Under the first step, Wilson's core right was burdened because "Wilson insist[ed] that she [was] not an unlawful drug user, a convicted felon, or a mentally-ill person."[53] The Ninth Circuit found that Wilson was not using marijuana and that she only possessed the medical marijuana registry card.[54] Therefore, the law burdened her core Second Amendment right to possess a firearm because Wilson was prohibited from purchasing a firearm for self-defense purposes.[55]

Under the second step, to determine the appropriate level of scrutiny for laws that burden conduct protected by the Second Amendment, the court relied on a two-prong analysis, by examining: "(1) how close the law comes to the core of the Second Amendment right; and (2) the severity of the law's burden on the right."[56]

The Ninth Circuit's analysis of the first prong of the second step in the *Chovan* test was guided by the holding in *District of Columbia v. Heller*.[57] While addressing how close the law comes to the core of the Second Amendment right, the court in *Wilson* quotes *Heller's* holding: "[The Second Amendment] surely elevates above all other interests the right of *law-abiding, responsible citizens* to use arms in defense of hearth and home."[58] Based on this interpretation, the Ninth Circuit held that the

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[49] *Id*. at 1151 n.6.

[50] *Id*. at 1138 (citing District of Columbia v. Heller, 554 U.S. 570, 635 (2008)).

[51] *Id*. at 1136; Wilson v. Lynch, 835 F.3d 1083, 1092 (9th Cir. 2016).

[52] *Wilson*, 835 F.3d at 1092; *see also* Jackson v. City & County of San Francisco, 746 F.3d 953, 960 (9th Cir. 2014).

[53] *Wilson*, 835 F.3d at 1092.

[54] *Id*.

[55] *Id*.

[56] *Id*.; United States v. Chovan, 735 F.3d 1127, 1138 (citing Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011)).

[57] *Wilson*, 835 F.3d at 1092.

[58] *Jackson*, 746 F.3d at 961 (alteration in original) (italics added) (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008)); *Wilson*, 835 F.3d at 1092.

Open Letter, 18 U.S.C. section 922(d)(3), and 27 C.F.R. section 478.11 burdened Wilson's core Second Amendment right to purchase firearms and to use those arms for defense because Wilson was not an illegal drug user.[59] Therefore, the court held the laws and the administrative interpretation preventing Wilson from purchasing a firearm burdened her core Second Amendment right.[60]

Although the Ninth Circuit in *Wilson* found that Wilson's Second Amendment right was burdened, in evaluating the second prong, the court used the following guidance to determine that Wilson's Second Amendment right was not severely burdened.[61] "[L]aws which regulate only the *manner* in which persons may exercise their Second Amendment rights are less burdensome than those which bar firearm possession completely."[62] The court's rationale was that the laws and their executive branch interpretations "bar only the sale of firearms to Wilson, not her possession of firearms."[63] The court noted that "Wilson could have amassed legal firearms before acquiring a registry card, and 18 U.S.C. section 922(d)(3), 27 C.F.R. section 478.11, and the Open Letter would not impede her right to keep her firearms or to use them to protect herself and her home."[64]

Additionally, the Ninth Circuit noted that Wilson would have the right to purchase a firearm legally after "surrendering" her medical marijuana card, "thereby demonstrating to a firearms dealer that there is no reasonable cause to believe she is an unlawful drug user."[65] The court's rationale was that the burden on medical marijuana patients is not severe because patients can keep the firearms they already own and if they want to buy a new firearm, they can give up their medical marijuana card.[66] In *Wilson*, the Ninth Circuit concluded it would apply intermediate scrutiny because these regulations did not severely burden Wilson's core right to use firearms for self-defense.[67]

Even though the court found that Wilson was not an unlawful user of a controlled substance, the court still restricted Wilson's ability to legally purchase firearms from federally licensed firearms dealers. Much of the evidence used to support the government's position against Wilson was derived from questionable studies, but Wilson failed to challenge the

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[59] *Wilson*, 835 F.3d at 1092.
[60] *Id*.
[61] *Id*. at 1093.
[62] *Id*. at 1092 (quoting *Chovan*, 735 F. 3d at 1138).
[63] *Id*. at 1093.
[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] *Id*.

studies' methodology, leaving the court no choice but to accept the studies as probative.[68]

The following section reveals the xenophobia and hypocrisy behind the federal government's prohibition on the medical use of cannabis.

## II. HISTORY

### A. BRIEF HISTORY OF CANNABIS LAWS IN THE UNITED STATES

Cannabis has not always been illegal in the United States.[69] Medical cannabis was once sold over-the-counter in pharmacies and through mail-order.[70] Around 1910, states began to criminalize "marihuana" due to its association with Mexican immigrants, many years before federal legislators took any notice of cannabis.[71] However, by 1932, the Bureau of Narcotics ("Bureau") under the leadership of Harry Anslinger, "began arousing public opinion against marijuana by 'an educational campaign describing the drug . . . and its evil effects.'"[72] The Bureau was responsible for disseminating propaganda regarding the dangers of the drug throughout the country.[73]

On August 3, 1937, President Roosevelt signed the Marihuana Tax Act, which aimed to reduce "marihuana" trafficking through heavy taxes.[74] The American Medical Association opposed the measure, but legislators who argued on the basis of marijuana's association with crime and minority groups prevailed.[75] Dr. Timothy Leary, a leading figure in the 1960's counter-culture, challenged the Marihuana Tax Act, claiming it violated his Fifth Amendment right against self-incrimination.[76] Dr. Leary was successful in challenging that law, but in 1970, the passage of the Controlled Substances Act ("CSA") solidified marijuana's "verboten status."[77]

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[68] *Id*.

[69] Dale H. Gieringer, *The Origins of Cannabis Prohibition in California*, 26 CONTEMP. DRUG PROBS. 1, 4 (1999).

[70] *Id*. (Cannabis was included in the US pharmacopoeia from 1850-1915.).

[71] Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry Into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1011 (1970). ("From a survey of contemporary newspaper and periodical commentary we have concluded that there were three major influences. The most prominent was racial prejudice.").

[72] *Id*. at 1036.

[73] *Id*. at 1052.

[74] *Id*. at 1053.

[75] Erwin Chemerinsky, et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 82 (2015).

[76] Leary v. United States, 395 U.S. 6, 12–13 (1969).

[77] Erwin Chemerinsky, et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 82 (2015).

Modernly, marijuana continues to be governed by the CSA, where it is grouped with LSD, Heroin, MDMA, Mescaline, Peyote, and Psilocybin as Schedule I controlled substances, which are defined as drugs that: (1) have high potential for abuse; (2) are not currently accepted for use as medical treatment in the United States; (3) have a lack of accepted safety for use of the drug.[78]

In 1976, Robert C. Randall became the first federal medical marijuana patient in the United States, despite marijuana's federal illegality.[79] After successfully using a medical necessity defense against marijuana charges, Randall filed a lawsuit, which resulted in a settlement agreement allowing him access to the government's Compassionate Investigational New Drug ("IND") program.[80] The program provided Randall with rolled marijuana cigarettes grown by the federal government at the University of Mississippi.[81] In 1992, the IND program was closed.[82] However, there are still four patients remaining in the program who receive free monthly tins of marijuana cigarettes.[83]

Although federally illegal and classified as a Schedule I controlled substance, Delta-9-tetrahydrocannabinol ("THC"), the psychoactive ingredient in cannabis, has been approved by the Food and Drug Administration ("FDA") in synthetic form, known as Marinol, since 1985.[84] Marinol is a Schedule III controlled substance, which may only be prescribed to treat: "(1) anorexia associated with weight loss in patients with AIDS; and (2) nausea and vomiting associated with cancer chemotherapy."[85]

Even though the FDA allows patients to access synthetic THC, the majority of medical marijuana patients do not qualify for the drug because they do not have the very specific conditions for which Marinol is prescribed. Patients limited accessibility to cannabinoids was greatly expanded in 1996 when Californians successfully passed Proposition 215, the Compassionate Use Act.[86] This act led the way for other successful

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[78] 21 U.S.C. § 812 (2015).

[79] Kevin B. Zeese, *History of Medical Marijuana Policy in U.S.,* INT'L J. OF DRUG POL'Y 319, 319 (1999), http://documentslide.com/documents/history-of-medical-marijuana-policy-in-us.

[80] *Id*.

[81] *Id*.

[82] *Id*. at 326.

[83] Associated Press, *4 Americans get medical pot from the feds*, CBS NEWS (Sept. 28, 2011), http://www.cbsnews.com/news/4-americans-get-medical-pot-from-the-feds/. (last viewed Sept. 19, 2017).

[84] U.S. FOOD & DRUG ADMIN., *FDA Approved Drug Products*, http://www.accessdata.fda.gov/scripts/cder/daf/index.cfm?event=overview.process&ApplNo=018651 (last viewed Sept. 19, 2017).

[85] Unimed Pharmaceuticals, Inc., *Marinol (dronabinol) Capsules*, NDA 18-651/S-021 3, 7 (2004), http://www.fda.gov/ohrms/dockets/dockets/05n0479/05N-0479-emc0004-04.pdf.

[86] Proposition 215, Compassionate Use Act, CAL. HEALTH & SAFETY CODE § 11362.5 (1996).

state medical marijuana ballot initiatives: Alaska, Oregon, and Washington in 1998; Colorado, Hawaii, and Nevada in 2000; Montana in 2004.[87] There are currently 29 medical marijuana states and eight adult-use states as of the date of this publication.[88]

### B. THE UNITED STATES SUPREME COURT'S INTERPRETATION OF THE SECOND AMENDMENT

The debate over the Second Amendment is highly controversial because there is a fundamental disagreement on how to interpret what the nation's founders sought to protect by implementing the Second Amendment.[89] For many years, the Gun Control Act of 1968 "formed the core of national gun policy in the United States."[90] Congress enacted the Gun Control Act "to keep firearms away from the persons [it] classified as potentially irresponsible and dangerous."[91] However, the Gun Control Act of 1968 contained a number of loopholes.[92] For example, it only covered shipping or receiving firearms in interstate commerce, and it did not include restrictions on possession.[93] The 1986 Firearm Owners' Protection Act eliminated these loopholes.[94] Despite Congress' efforts to limit the Second Amendment, the Supreme Court played an important role in protecting the Second Amendment rights of individuals in the US.

The analysis of the Second Amendment must start with the significant Supreme Court decision in *District of Columbia v. Heller*. In *Heller*, the District of Columbia ("D.C.") passed a law prohibiting individuals from carrying an unregistered firearm, but D.C. refused to register firearms, effectively baring individuals from carrying firearms in D.C.[95] The law also required residents to keep their firearms "unloaded and dissem-

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[87] *28 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last updated Dec. 28, 2016).

[88] *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGS., http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx. (last visited Sept. 19, 2017). 17 states allow for high CBD/low THC cannabis extracts for patients, usually children, with intractable epilepsy, for a total of 40 states. *Id.*

[89] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008) (5-4 decision) (Stevens, J., Souter, J., Ginsburg, J., Breyer, J., dissenting).

[90] William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS PUB. U. L. REV. 79, 79 (1999); *see also* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968).

[91] United States v. Carter, 669 F.3d 411, 417 (4th Cir. 2012) (alterations in the original); s*ee also* Barrett v. United States, 423 U.S. 212, 218 (1976).

[92] *Carter*, 669 F.3d at, 417.

[93] *Id*. at 417-18; FIREARMS OWNERS PROTECTION ACT, Pub. L. No. 99-308, 100 Stat. 449, 452 (1986).

[94] 18 U.S.C § 922(g)(3); *Carter*, 669 F.3d at 417-18; FIREARMS OWNERS PROTECTION ACT, Pub. L. No. 99-308, 100 Stat. 449, 452 (1986).

[95] District of Columbia v. Heller, 554 U.S. 570, 574–75 (2008).

bled or bound by a trigger lock," unless the firearm was in a place of business or being used for recreational activities.[96]

Special police officer Dick Heller was authorized to carry a handgun while on duty at the Thurgood Marshall Judiciary Building.[97] D.C. refused to grant Heller a registration certificate for a handgun, which he wished to keep at home.[98] Subsequently, Heller sought to enjoin the city from preventing the registration of firearms, carrying a firearm in a home without a license, and requiring a trigger-lock.[99]

Eventually, the United States Supreme Court held that the D.C. ban on handgun possession violated the Second Amendment, as did the restriction on keeping operable firearms in the home for "immediate self-defense."[100] When reaching this conclusion, the Court found that the Second Amendment protects an "individual right" to use firearms for "traditionally lawful purposes" unconnected with military service.[101] The Court noted that the core of the Second Amendment right "elevates above all other interests the right of *law-abiding, responsible citizens* to use arms in defense of hearth and home."[102]

## III. The Courts Cannot Solve the Deficiency of Protections for Medical Marijuana Patients Because of the Supremacy Clause

The federal government's absolute prohibition on any form of medical marijuana and the Supreme Court's interpretation that the core right only applies to "law-abiding" citizens results in the Supremacy Clause standing as the most significant barrier to medical marijuana patients reclaiming their Second Amendment right.

Although strongly debated by anti-federalists and federalists, the Supremacy Clause was adopted at the Constitutional Convention without serious dissent.[103] It was designed to be a straightforward conflict-of-laws rule.[104] This principle clause of the Constitution is the foundation

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[96] *Id*. at 575.

[97] *Id*.

[98] *Id*.

[99] *Id*. at 575-76.

[100] *Id*. at 635.

[101] *Id*. at 595, 624; *see* McDonald v. City of Chicago, 561 U.S. 742 (2010) (holding that the Due Process Clause of the Fourteenth Amendment incorporates the rights recognized in *Heller* to the states).

[102] *Heller*, 554 U.S. at 635 (emphasis added).

[103] Gary Lawson, *Supremacy Clause*, The Heritage Guide to the Const., http://www.heritage.org/constitution/#!/articles/6/essays/133/supremacy-clause (last visited Sept. 19, 2017) (anti-federalists favored a weak federal government and federalists favored a strong federal government).

[104] *Id*.

upon which the United States system of federalism was built.[105] The Supremacy Clause provides a strategy for dealing with conflicts between national and local government; it is immutable and indispensable to our system of government.[106] However, the clause does not define conflict, so the courts have established guidelines: "[s]tate law is preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."[107]

Here, there is a direct conflict with the federal Controlled Substances Act, which criminalizes marijuana without exception,[108] and Nevada's law that exempts medical marijuana cardholders from prosecution for marijuana-related offenses.[109] "If state law purports to authorize something that federal law forbids . . . then *courts* [ ] have to choose between applying the federal rule and applying the state rule, and the Supremacy Clause *requires* them to apply the federal rule."[110] Therefore, in Wilson's case, her challenge would have ended at *Chovan's* first step if she actually used medical marijuana per her registry card because under federal law, "unlawful drug user['s]" Second Amendment rights are not historically protected.[111]

However, the Ninth Circuit's analysis did not end at the first prong because Wilson alleged that she did not use medical marijuana.[112] The Ninth Circuit reviewed Wilson's challenge within the meaning of *Heller* by applying federal law as required by the Supremacy Clause, which will always result in the application of intermediate scrutiny, until there is an exception for medical marijuana patients.[113]

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[105] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.").

[106] Gary Lawson, *Supremacy Clause*, THE HERITAGE GUIDE TO THE CONST., http://www.heritage.org/constitution/#!/articles/6/essays/133/supremacy-clause (last visited Sept. 19, 2017).

[107] Rim of the World Unified Sch. Dist. v. Superior Ct., 104 Cal. App. 4th 1393, 1398-99 (2002) (quoting Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987)) (internal quotations omitted).

[108] 21 U.S.C. § 802 (2015); 21 U.S.C. § 812 (2015).

[109] NEV. REV. STAT. § 453A.200 (West).

[110] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 261 (2000) (emphasis added).

[111] Wilson v. Lynch, 835 F.3d 1083, 1092 (9th Cir. 2016).

[112] *Id*. *Cf*. *Carter*, 669 F.3d at 416 (applying the two-step test to an illegal user of marijuana, the court's analysis ends at the first prong of the second step because "Carter cannot claim to be a law-abiding citizen, and therefore his asserted Second Amendment right cannot be a core right").

[113] In *Heller*, the Court did not specify which level of scrutiny should be applied to Second Amendment challenges, but noted that rational basis was not the proper level to apply. District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

Patients following their doctor's medical treatment are law-abiding citizens under state law and thus, they should not be branded unlawful drug users.[114] This is especially true because sick patients are vulnerable and left defenseless due to debilitating diseases,[115] unable to protect their "hearth and home."[116] In addition, although the Ninth Circuit found that Wilson's right was not severely burdened because she could dispose of her registry card and then purchase a firearm,[117] this reasoning is not practical for medical marijuana patients. In practice, this interpretation of 18 U.S.C. section 922(d)(3) severely burdens the Second Amendment rights of medical marijuana patients, as medical marijuana is often the last resort of symptom management for many ill patients.[118] Thus, if patients had to halt cannabis treatments, the results could be devastating.[119]

Because of the Supremacy Clause, the Ninth Circuit's analysis of the legality of marijuana does not take into account the fact that Wilson is immune under state law from criminal and civil penalties. The failure to distinguish between medical and illegal marijuana use prevents the application of strict scrutiny, which could have resulted in the Open Letter to All Federal Firearms Licensees being struck down. Thus, until medical marijuana patients are deemed law-abiding under federal law, or an exception is created, their Second Amendment challenges will always fail. Because the courts cannot provide an appropriate remedy due to the Supremacy Clause, Congress or the executive branch are the proper institutions to protect medical marijuana patients' Second Amendment rights. It is unlikely, however, that the executive branch will draft a new memo rescinding the Open Letter under the Trump administration; specifically,

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[114] NEV. REV. STAT. § 453A.200 (West).

[115] Medical cannabis patients suffer from a wide host of ailments, including: Cancer, Glaucoma, Multiple Sclerosis, Crohn's disease, chronic pain, HIV/AIDS, seizures, Cachexia, PTSD, Arthritis, Anorexia, muscle spasms, Wasting Syndrome, Parkinson's disease, Hepatitis C, and Lou Gehrig's disease. Proposition 215, Compassionate Use Act, CAL. HEALTH & SAFETY CODE § 11362.5 (1996).

[116] Wilson v. Lynch, 835 F.3d 1083, 1092 (9th Cir. 2016).

[117] *Id*. at 1093.

[118] Denis Campbell, *Legalise cannabis as treatment of last resort for MS, says charity,* THE GUARDIAN (July 27, 2017, 5:19 PM), https://www.theguardian.com/society/2017/jul/27/legalise-cannabis-as-treatment-of-last-resort-for-multiple-sclerosis-says-charity; *see also* Eileen Park, *Medical marijuana last resort for some families,* WNCN NEWS (February 2014, 8:19 AM), http://wncn.com/2014/02/13/medical-marijuana-last-resort-for-some-families/; Daniel Barker, *Last Resort Treatment for Parkinson's Disease: Former Cop Finds Astounding Relief From Medical Marijuana*, MIND BODY SCIENCE NEWS (December 10, 2016), http://www.mindbodyscience.news/2016-12-10-as-last-resort-to-cure-his-parkinsons-disease-former-cop-finds-astounding-relief-from-medical-marijuana.html; see also Fred Vogelstein, *One Man's Desperate Quest to Cure His Son's Epilepsy—With Weed*, WIRED (July 2015), https://www.wired.com/2015/07/medical-marijuana-epilepsy/.

[119] Maureen Meehan, *Young Man Taken Off Kidney Transplant List for Medical Marijuana*, HIGH TIMES (March 30, 2017), http://hightimes.com/medicinal/young-man-taken-off-kidney-transplant-list-for-medical-marijuana-use/.

Attorney General Jeff Sessions' animosity toward medical marijuana patients.[120] Therefore, Congress bears the ultimate responsibility of protecting its constituents' Second Amendment rights.

At the time of this Notes publication, 29 states, D.C., and the territories of Guam and Puerto Rico each recognize a form of medical marijuana, while the federal government continues to maintain a complete ban on the use of marijuana for any purpose.[121] Additionally, eight states have legalized cannabis use for adults, with more states moving toward regulating the adult-use cannabis industry in 2018.[122]

## IV. SOLVING THE SUPREMACY CLAUSE ISSUE

### A. THE APPROPRIATIONS RIDER AMENDMENT PROVIDES A CONSTITUTIONALLY TESTED MODEL THAT SHOULD BE REPLICATED

This Note's proposed appropriations amendment is modeled after the Rohrabacher-Farr appropriation amendment.[123] Beginning in 2003, U.S. Representatives Maurice Hinchy (D-NY), Dana Rohrabacher (R-CA), and Sam Farr (D-CA) worked to pass an amendment to the current appropriations bill that would prevent the Department of Justice ("DOJ") from using federal money to interfere with states' implementation of state medical marijuana laws.[124] The proposed Rohrabacher-Farr amendment failed to pass the house each of the six years it was proposed, even though the number of states protected by the proposed amendment grew each year.[125]

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[120] Christopher Ingraham, *Trump's pick for attorney general: 'Good people don't smoke marijuana',* THE WASH. POST (Nov. 18, 2016) https://www.washingtonpost.com/news/wonk/wp/2016/11/18/trumps-pick-for-attorney-general-good-people-dont-smoke-marijuana/?utm_term=.0b84c034fa6e.

[121] *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGS., http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last visited Sept. 19, 2017). Additionally, 18 other states allow for low-THC high-CBD medicinal marijuana. *Id.*

[122] Phillip Smith, *How Many States Will Legalize Marijuana This Year? It's Not A Pretty Number*, THE NATI'L MEMO (May 31, 2017, 1:00 PM), http://www.nationalmemo.com/many-states-will-legalize-marijuana-year-not-pretty-number/.

[123] Consolidated Appropriations Act, H.R. 2029, 129 Stat. 2333 (2016). An appropriation bill authorizes the expenditure of government funds. *Id*.

[124] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, H.R. 2799, § 801 (2003-2004).

[125] *Id.*; *see also* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, H.R. 4754, 108th Cong. §801 (2004-2005); Science, State, Justice, Commerce, and Related Agencies Appropriations Act, H.R. 2862, §801 (2005-2006); Departments of Commerce and Justice, Science, and Related Agencies Appropriations Act, H.R. 5672, §801 (2006-2007); Departments of Commerce and Justice, Science, and Related Agencies Appropriations

In 2014, the amendment passed the House for the first time.[126] Although it was not voted on in the Senate, it was included in the Consolidated and Further Continuing Appropriations Act ("Cromnibus").[127] Forty-nine Republicans joined 170 Democrats to pass the amendment, a strong showing of bi-partisan support for a controversial piece of legislation, which was subsequently signed into law by former President Barack Obama.[128]

The amendment has been renewed with each consecutive appropriations bill, gaining the approval of the Senate Appropriations Committee.[129] The most recent variation, the Rohrabacher-Blumenauer Amendment, keeps patients protected until December 8, 2017.[130] The amendment in its current form states:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to any of the States of [list of 44 states with medical marijuana and Cannbidiol laws], or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.[131]

Even after the amendment passed, the DOJ continued to prosecute cases.[132] Representatives from the DOJ believed the law only prevented them from impeding states' ability to carry out their medical marijuana laws, but that they could "prosecute private individuals or private entities

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Act, H.R. 3093, §701 (2007-2008); Commerce, Justice, Science, and Related Agencies Appropriations Act, H.R. 5326, (2012-2013).

[126] Commerce, Justice, Science, and Related Agencies Appropriations Act, H.R. 4660, (2014-2015).

[127] Mike Liszewski, *Congress Set to Pass Landmark Medical Marijuana Legislation*, AM. FOR SAFE ACCESS (Dec. 10, 2014), http://www.safeaccessnow.org/congress_set_to_pass_landmark_medical_marijuana_legislation; *see also* Commerce, Justice, Science, and Related Agencies Appropriations Act, H.R. 4660, (2014-2015).

[128] *2014 CJS Medical Marijuana Amendment,* AM. FOR SAFE ACCESS, http://www.safeaccessnow.org/cjs2014; *see also* Mike Liszewski, *Congress Set to Pass Landmark Medical Marijuana Legislation*, AM. FOR SAFE ACCESS (Dec. 10, 2014), http://www.safeaccessnow.org/congress_set_to_pass_landmark_medical_marijuana_legislation.

[129] Mike Liszewski, *Senate Committee Approves Mikulski Medical Marijuana Amendment with Strong Bipartisan Support*, AM. FOR SAFE ACCESS (Jun. 11, 2015), http://www.safeaccessnow.org/senate_committee_approves_mikulski_medical_marijuana_amendment_with_strong_bipartisan_support.

[130] John Schroyer, *Rohrabacher-Blumenauer Amendment extended until December,* MARIJUANA BUSINESS DAILY, (Sept. 8, 2017), https://mjbizdaily.com/rohrabacher-blumenauer-amendment-extended-december/.

[131] Consolidated Appropriations Act, H.R. 244, § 537 (2017).

[132] United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016).

who [violate] the Controlled Substances Act."[133] This led to litigation involving 10 consolidated cases from three district courts in two states within the Ninth Circuit's jurisdiction.[134] This litigation became known as *United States v. McIntosh.*[135]

In *McIntosh*, the various plaintiffs were indicted for manufacturing 1,000 or more marijuana plants, which is a federal offense under the Controlled Substances Act.[136] The plaintiffs sought injunctive relief, prohibiting the DOJ from spending funds from the relevant appropriations act on its prosecutions.[137]

The Ninth Circuit noted that the "rider is not a model of clarity" because the terms of the amendment, specifically the word "implement," were not defined.[138] To interpret the meaning of "implement," the judges consulted dictionaries and utilized the term's plain meaning, and found implement to mean: "to put into practical effect; carry out."[139] Therefore, the appropriations rider amendment prohibits the DOJ from utilizing funds granted to them by Congress to "prevent the Medical Marijuana States giving practical effect to their state laws."[140]

Ultimately, the court concluded that the appropriations amendment "prohibits [the] DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws."[141] Furthermore, the court noted that the appropriations bill was not permanent.[142] Thus, the protections for the medical marijuana industry are in effect until Congress appropriates funds.[143] The spending appropriation is a legitimate model to emulate for this Note's proposed amendment because the Ninth Circuit upheld the enforcement provision. Additionally, there are two practical reasons why a rider appropriation would be the most effective solution: (1) the amendment is only temporary and (2) appropriations riders can be passed more quickly than a federal statute.

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[133] Matt Ferner, *Congressmen Say DOJ's Interpretation Of Their Medical Marijuana Amendment Is 'Emphatically Wrong'*, HUFFINGTON POST (Apr. 3, 2015), http://www.huffingtonpost.com/2015/04/03/doj-medical-marijuana_n_6997016.html.

[134] *McIntosh*, 833 F.3d at 1168-69.

[135] *Id.* at 1163.

[136] *Id*. at 1169.

[137] *Id*. at 1172.

[138] *Id*. at 1175.

[139] *Id*. at 1175-76.

[140] *Id.* at 1176.

[141] *Id.* at 1177.

[142] *Id.* at 1179.

[143] *Id*.

### B. The Proposed Appropriations Rider Amendment Will Resolve the Equation of Medical Marijuana Patients with Illegal Users of Marijuana

In *McIntosh*, the court encouraged the use of rider amendments, but warned that "[i]f Congress intends to prohibit a wider or narrower range of DOJ actions, it certainly may express such an intention, hopefully with greater clarity, in the text of any future rider."[144] The Ninth Circuit's warning is a consideration that must be examined while drafting the legislative rider appropriation. The proposed rider provides:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to any State, the District of Columbia, or any U.S. territory, which have laws allowing for the use of medical marijuana, to prevent medical marijuana patients in those jurisdictions from purchasing firearms from federally licensed firearms dealers, so long as the patient is in compliance with state medical marijuana and firearms laws.

Based on the arguments that persuaded Congress to pass the Rohrabacher-Farr Amendment in 2014,[145] this rider appropriation would attract bi-partisan support. For the purposes of this amendment, congressional members should advance similar arguments made by proponents of the Rohrabacher-Farr Amendment because they have already been effective in gaining bi-partisan support. During Rohrabacher's testimony in support of his amendment, he expressed concern that "at a time of severely limited resources, it makes sense to target terrorists [and] criminals" and not use federal money to supersede states that have legalized medical use of marijuana.[146]

For example, in the United States an individual on the FBI's Known or Suspected Terrorist File, or on the Transportation Security Administration's "No Fly" list, is not prevented from purchasing firearms from federally licensed gun dealers.[147] In fact, according to a study by the Government Accountability Office published in 2010, using data acquired by the FBI, 91% of background checks involving individuals on

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[144] *Id*.

[145] 114 Cong. Rec. H3,745 (2015) (daily ed. June 2, 2014) (statement of Rep. Rohrabacher), https://www.congress.gov/crec/2015/06/02/CREC-2015-06-02.pdf.

[146] *Id*.

[147] U.S. Gov't Accountability Office, GAO-10-703T, *Terrorist Watchlist Screening: FBI Has Enhanced Its Use of Information from Firearm and Explosives Background Checks to Support Counterterrorism Efforts* (2010), http://www.gao.gov/new.items/d10703t.pdf. ("In general, persons on the No Fly list are deemed to be a threat to civil aviation or national security and therefore should be precluded from boarding an aircraft.").

the FBI's watch lists were allowed to proceed because no prohibiting factors were found.[148] Ironically, these prohibiting factors include unlawful users of controlled substances (i.e. medical marijuana patients).[149]

Representative Rohrabacher also challenged opponents in his own party to support the amendment as a states' rights issue: "we Republicans claim to base our decisions on individual freedom, on states' rights as mandated by the 10th Amendment to the Constitution."[150] This argument will be equally, if not more effective, in garnering support in 2018 because Republicans have a majority in both houses of Congress, control the executive branch, and many believe in a strong Tenth Amendment.

Under this Note's proposal, state legislatures and, in some instances, individual citizens in state ballot initiatives, would control whether medical marijuana patients in their own state would be prohibited from purchasing firearms. Currently, firearms laws, like medical marijuana laws, vary greatly by state.[151] Supporters of the Tenth Amendment ("Tenthers") argue that when states and localities make policy, the people are closer to it and therefore, policy makers are more accountable to the people.[152] Because the ability to regulate medicine and firearms are "powers not delegated to the United States by the Constitution, nor prohibited by it to the States," regulating these areas of the law should be "reserved" to the states.[153] This proposal supports states' rights by allowing states to limit their citizens' access to firearms based on the state's evaluation of the relative dangers associated with medical marijuana.

There will be pushback because this proposed amendment changes the way the executive branch can enforce the CSA. Notably, the pushback would be in a similar vain to the executive branch's attack on the Rohrabacher-Farr Amendment. In an attempt to undermine the amendment protecting the medical marijuana industry, while signing the appropriations bill maintaining the protection until September 2017, President Trump issued a signing statement saying, "I will treat this provision consistently with my constitutional responsibility to take care that

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[148] *Id*. (Individuals on the FBI's lists were involved in background checks 1,228 times; 1,119 were allowed to proceed).

[149] *Id.*

[150] 114 CONG. REC. H3,745 (2015) (daily ed. June 2, 2014) (statement of Rep. Rohrabacher), https://www.congress.gov/crec/2015/06/02/CREC-2015-06-02.pdf.

[151] *Private Fun Sale Laws by State*, FINDLAW, http://consumer.findlaw.com/consumer-transactions/private-gun-sale-laws-by-state.html (last visited Sept. 11, 2017).

[152] *About the Tenth Amendment*, TENTH AMEND. CENTER, http://tenthamendmentcenter.com/about/about-the-tenth-amendment/ (last visited Sept. 11, 2017).

[153] U.S. CONST. amend. X.

the laws be faithfully executed."[154] As of the publication of this Note, no action has been taken on this statement. Additionally, after Trump signed the appropriations bill, Attorney General Jeff Sessions wrote a letter urging members of Congress to oppose the inclusion of the Rohrabacher-Farr Amendment in future appropriations bills, which would then allow the DOJ to prosecute individual medical marijuana patients and the businesses that provide those patients their medicine.[155]

Hopefully, similar executive statements regarding the proposed amendment would be as ineffective, considering Congress' willingness to remain steadfast in its support of medical marijuana patients' rights, even in the face of threatened executive strong-arming.[156] Nevertheless, the proposed amendment would return the power to the state, which will be a source of reverie for supporters of the Tenth Amendment. As a medicine, cannabis has become more accepted by Americans, evidenced by an upswing in successful state ballot initiatives and legislative actions; the people have determined cannabis to be a necessary form of medicine.[157] Therefore, it should be up to the states to determine if their medical marijuana patients should be able to purchase firearms.

The opposition to the Rohrabacher-Farr Amendment made it clear that medical marijuana use is a concern.[158] Republican representative and physician John Fleming tried to make the case against the rider amendment, but in doing so, he provided an argument for this proposal: "[Marijuana] has no accepted medical use . . . . There are synthetic marijuana equivalents that are useful—yes, indeed—but the drug itself, which is the smokeable part of it, is not safe and has not been ac-

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[154] *Statement by President Donald J. Trump on Signing H.R. 244 into Law*, OFF. OF THE PRESS SECRETARY (May 5, 2017), https://www.whitehouse.gov/the-press-office/2017/05/05/statement-president-donald-j-trump-signing-hr-244-law.

[155] Christopher Ingraham, *Jeff Sessions Personally Asked Congress to Let Him Prosecute Medical-Marijuana Providers*, WASH. POST, (June 13, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/06/13/jeff-sessions-personally-asked-congress-to-let-him-prosecute-medical-marijuana-providers/?utm_term=.679c05670f76.

[156] Beth Mole, *Senators Buck Sessions, Move to Protect State Medical Marijuana Laws*, ARS TECHNIA (July 28, 2017, 8:34 AM), https://arstechnica.com/tech-policy/2017/07/despite-sessions-pleas-senators-push-to-protect-state-medical-marijuana-laws/; Polly Washburn, *Senate Committee, Rejecting Request From Sessions, Keeps Protection for Medical Marijuana States*, THE CANNABIST (July 27, 2017, 1:24 PM), http://www.thecannabist.co/2017/07/27/senate-appropriations-medical-marijuana/84714/.

[157] *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGS., http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last visited Sept. 19, 2017) (17 states do not have "medical marijuana laws," but have laws allowing for high Cannabidiol (CBD), a chemical compound extracted from cannabis. These laws are frequently named after the children they are intended to help such as: Carly's law, Alabama; Haleigh's Hope Act, Georgia; Harper Grace's Law, Mississippi; Julian's Law, South Carolina; Charlee's Law, Utah).

[158] 114 CONG. REC. H3,746 (2015) (daily ed. June 2, 2014) (statement of Rep. Rohrabacher), https://www.congress.gov/crec/2015/06/02/CREC-2015-06-02.pdf.

cepted."[159] Marinol is useful, evinced by FDA approval for medical use in 1985.[160] However, the naturally occurring form of the chemical compound found in cannabis, THC, is no different from the synthetic chemical compound found in Marinol.[161] Therefore, based on Fleming's argument, medical marijuana would also be "useful."[162] Even if the opposition's argument is framed as "smoking is not safe," smoking is certainly not the only way to ingest medical marijuana.[163]

Even more compelling for this Note's proposal is the fact that Marinol patients are not restricted from purchasing firearms because the FDA has approved this form of synthetic marijuana. Patients prescribed synthetic marijuana by their doctors, like Marinol, are not "unlawful users" under 18 U.S.C. sections 922(g)(3) and (d)(3), 27 C.F.R. section 478.11, and therefore, are not prohibited by the Open Letter, or federal firearms laws, from purchasing or possessing firearms. Thus, the existing law is hypocritical in the way it treats medical marijuana patients' right to purchase firearms. However, even with these severe restrictions, it is not difficult for a medical marijuana patient to obtain a firearm legally.

### C. STATES' RIGHTS AND THE LOOPHOLES AVAILABLE TO MEDICAL MARIJUANA PATIENTS

State courts have already shown an inclination to support medical marijuana patients' rights to possess and purchase firearms. This was most profoundly demonstrated in *Willis v. Winters*, the 2011 en banc opinion by the Oregon Supreme Court.[164] In *Willis*, the court held that "[s]tate law requires sheriffs to issue concealed [firearm] licenses without regard to whether the applicants use medical marijuana [in violation of federal law]."[165] The United States Supreme Court denied certiorari, thus upholding the decision of the Oregon Supreme Court.[166] Further evidence supporting this Note's rider amendment was a proposed ballot

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[159] *Id*.

[160] *Id*.

[161] *Marinol vs. Natural Plant*, NORML: WORKING TO REFORM MARIJUANA LAWS, http://norml.org/component/zoo/category/marinol-vs-natural-cannabis (last visited Sept. 19, 2017).

[162] 114 CONG. REC. H3,746 (2015) (daily ed. June 2, 2014) (statement of Rep. Rohrabacher), https://www.congress.gov/crec/2015/06/02/CREC-2015-06-02.pdf.

[163] *Ways of Consuming Medical Marijuana,* UNITED PATIENTS GROUP, https://unitedpatientsgroup.com/resources/methods-of-consumption (last visited Sept. 5, 2017). The most severely ill medical cannabis patients use concentrated forms, which are not combusted, but vaporized, ingested orally, topically, or through a suppository.

[164] Willis v. Winters, 350 Or. 299 (2011).

[165] *Id*. at 313.

[166] Willis v. Winters, 350 Or. 299 (2011), *cert. denied*, 565 U.S. 1110 (2012).

initiative in Colorado.[167] Although it failed to make the ballot because the requisite number of signatures was not achieved, the proposed initiative would have prohibited law enforcement from citing a concealed-carry applicant's lawful use of marijuana as a reason for permit denial.[168]

Similar to the decision in *McIntosh*,[169] under this Note's proposal, gun owners would have to remain compliant with state laws regulating firearms and medical marijuana to be free from prosecution. Additionally, firearm purchases would still be restricted by the same state and federal laws, which currently prevent dangerous individuals from acquiring firearms.[170] Medical marijuana patients *are* permitted to possess firearms under the Ninth Circuit's holding in *Wilson*.[171] Therefore, if the federal government allows patients to possess firearms, it should also allow them to purchase firearms from federally licensed firearms dealers. In addition to the already existing Gun-Show Loophole (discussed below), the court in *Wilson* created another loophole for medical marijuana patients to acquire firearms.[172]

The problem with the Ninth Circuit's interpretation is that medical patients can undermine the regulations by giving up their medical cards on the expiration date, purchasing firearms, and then re-registering as a medical marijuana patient.[173] Following this protocol, no medical marijuana patient would be in violation of federal law under the Ninth Circuit's interpretation of current law in *Wilson*.[174] Strangely enough, medical marijuana patients can also purchase firearms from private sellers, under what is called the Gun-Show Loophole, because the federal government does not regulate non-commercial private sales.[175] For example, in Alaska, Arizona, Idaho, Montana, and Nevada, all states within the jurisdiction of the Ninth Circuit, a National Instant Criminal Background Check is not required for private sales — this is known as the Gun-Show Loophole.[176] Firearms sales in these states by private individuals do not require the seller to obtain a Form 4473 from the pur-

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[167] *Colorado Concealed Handgun Permits Initiative (2016)*, BALLOTPEDIA, https://ballotpedia.org/Colorado_Concealed_Handgun_Permits_Initiative_(2016) (last visited Sept. 19, 2017).

[168] *Id*.

[169] *See* United States v. McIntosh, 833 F.3d 1163, 1178 (9th Cir. 2016).

[170] 18 U.S.C. § 922(d)(1); 18 U.S.C. § 922(d)(2); 18 U.S.C. § 922(d)(4); 18 U.S.C. § 922(d)(5); 18 U.S.C. § 922(d)(6); 18 U.S.C. § 922(d)(7); 18 U.S.C. § 922(d)(8); 18 U.S.C. § 922(d)(9).

[171] Wilson v. Lynch, 835 F.3d 1083, 1093 (9th Cir. 2016).

[172] *Id*.

[173] Medical marijuana patients must renew their physician's recommendation each year. *Id.* at 1089.

[174] *Id*. at 1093.

[175] *See Private Gun Sale Laws by State*, FINDLAW, http://consumer.findlaw.com/consumer-transactions/private-gun-sale-laws-by-state.html (last visited Sept. 11, 2017).

[176] *See id*.

chaser.[177] Therefore, the Open Letter is nothing more than a barrier to law-abiding medical marijuana patients purchasing firearms because there are two loopholes.

The Ninth Circuit's current interpretation only bars law-abiding medical marijuana patients from purchasing firearms from federally licensed dealers. Under the current interpretation of the law, medical marijuana patients can possess firearms and purchase firearms sold by private individuals in states where the Gun-Show Loophole exists. Also, under the court's interpretation in *Wilson*, medical marijuana patients can obtain firearms by allowing their medical marijuana registry to lapse, then purchasing a firearm the following day. Thus, this rider appropriation is a sufficient immediate solution to limiting these loopholes and protecting medical marijuana patients' Second Amendment right.

A long-term solution could be achieved by federal legalization of cannabis,[178] revocation of the Open Letter by the executive branch, removing "marihuana" and Tetrahydrocannabinols from the list of controlled substances in 21 U.S.C. section 812(c),[179] adding medical marijuana to the current list of exceptions in 27 C.F.R. section 478.11, or legislation specifically addressing the issue of marijuana users' Second Amendment rights.[180] However, attempts to implement more permanent solutions have already failed.[181] For example, in January 2014, Representative Jared Polis (D-CO) introduced legislation in direct response to the Open Letter.[182] The legislation would have removed marijuana as a disqualifying substance in the sale to and possession of firearms as expressed in 18 U.S.C. sections 922(d)(3) and (g)(3).[183] Unfortunately, Representative Polis' legislation never made it past the committee.[184]

Due to the relative difficulty associated with achieving any legislative solution, this Note finds that a rider appropriation would be the most efficient method, although not a permanent solution, to protect the Second Amendment rights of law-abiding medical marijuana patients. This

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[177] *See id*.

[178] *See* Marijuana Justice Act of 2017, S. 1689, 115th Cong. (2017) (a proposed bill amending the Controlled Substances Act to provide for a new rule regarding the application of the Act to marihuana, and for other purposes).

[179] *See* Ending Federal Marijuana Prohibition Act of 2017, H.R. 1227, 115th Cong. (2017).

[180] *See* Protecting Individual Liberties and States' Rights Act, H.R. 3483, 113th Cong. (2014) ("[I]f the controlled substance involved is marijuana, the possession of marijuana is lawful under the law of the State, and the person is a resident of the State.").

[181] *See, e.g.,* Respect State Marijuana Laws Act of 2015, H.R. 1940, 114th Cong. (2015); Regulate Marijuana Like Alcohol Act, H.R. 1013, 114th Cong. (2015); *but cf.* Respect State Marijuana Laws Act of 2017, H.R. 975, 115th Cong. (2017); Regulate Marijuana Like Alcohol Act, H.R. 1841, 115th Cong. (2017).

[182] Protecting Individual Liberties and States' Rights Act, H.R. 3483, 113th Cong. (2014).

[183] *Id*.

[184] *Id*.

proposal is more likely to pass because it only addresses the medical use of marijuana and not all marijuana use. In addition, the rider amendment only applies to states that are expressly listed in the rider. This Note should not be viewed as an endorsement of preventing states or the federal government from regulating firearms within the meaning of *Heller*, but as a critique of the indiscriminate limitation of the rights of medical patients abiding by their state's laws.

## V. CONCLUSION

The Ninth Circuit could not have protected Wilson's right to purchase firearms from federally licensed dealers due to the holding in *Heller* and the Supremacy Clause requirement that the court apply federal law. In the court's analysis of the first prong of *Chovan's* second step, how close the law comes to the core of the Second Amendment right, the court applied *Heller's* interpretation that the core right extends to "law-abiding, responsible citizens."[185] When the Ninth Circuit, or any other federal court, applies the *Chovan* test to a medical marijuana patient's challenge, it must apply federal law because of the Supremacy Clause.[186] Therefore, federal courts cannot find medical marijuana patients to be law-abiding because there is no federal exemption for medical use of marijuana in the CSA.[187] This results in the equation of illegal users of marijuana and medical marijuana patients strictly following state law.

All Second Amendment challenges by medical marijuana patients could end at the first prong of *Chovan's* second step, because medical marijuana patients are treated the same as illegal users of marijuana under federal law. The prevalent issue that needs to be resolved is: illegal marijuana users may not deserve the core rights established in *Heller* because they are not compliant with their state's laws, but medical marijuana patients are not illegal users under state law.

The Ninth Circuit partially upheld the constitutionality of the ATF's Open Letter, prohibiting medical marijuana card holders from purchasing firearms, but not, as the Open Letter suggests, from possessing firearms.[188] The Open Letter prevents medical marijuana patients from possessing and purchasing firearms, whereas the *Wilson* holding only

[185] District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

[186] *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

[187] 21 U.S.C. § 802 (2015); 21 U.S.C. § 812 (2015).

[188] Wilson v. Lynch, 835 F.3d 1083, 1093 (9th Cir. 2016).

prevents medical marijuana patients from purchasing firearms.[189] Fortunately, the proposed amendment would provide medical marijuana patients with the protections needed against the federal executives overreaching "interpretative rule" by returning the power to regulate firearms sales and possession to states.[190]

The history of cannabis regulations shows how xenophobia and the lack of scientific information led to the eventual criminalization of cannabis. Additionally, with the unabated progression of the medical marijuana industry in the U.S. as the backdrop, the federal government's hypocrisy is accentuated because of its acknowledgement that THC in cannabis has medical benefits.

The federal government must distinguish between medical use and illegal use because currently there is no way for federal firearms dealers to determine who is a medical marijuana patient versus any unlawful user of a controlled substance. Failure to de-stigmatize medical marijuana will have negative consequences for the wider medical marijuana community in licensing programs, social assistance programs, employment, and potential organ transplants. Therefore, any solution will require Congress to reconcile tensions between state-sanctioned medical marijuana and federal prohibition.

If the rider is not implemented, medical marijuana patients will be in the same position they are in today: able to possess firearms they own but prevented from purchasing new firearms from federally licensed dealers. Regardless, patients will still be able to purchase firearms legally through private sales, as demonstrated by the Gun-Show Loophole, or by purchasing firearms the day after their doctor's recommendation expires, as shown in *Wilson*.

There are an estimated 1,105,963 medical marijuana users within the jurisdiction of the Ninth Circuit.[191] With an estimated 310 million guns in the U.S., there is a high probability that many of these medical marijuana patients already maintain firearms for recreational or self-defense purposes.[192] This Note proposes a federal budgetary amendment to protect the Second Amendment rights of medical marijuana patients who strictly follow state law. Because the issue of cannabis use and gun own-

[189] Arthur Herbert, *Open Letter to All Federal Firearm Licensees*, U.S. DEP'T OF JUSTICE: BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (Sept. 21, 2011), https://www.atf.gov/file/60211/download.

[190] *Id*.; *see also* Wilson v. Holder, 7 F. Supp. 3d 1104, 1110 (D. Nev. 2014).

[191] *Number of Legal Medical Marijuana Patients*, PROCON.ORG: THE LEADING SOURCE FOR PROS & CONS OF CONTROVERSIAL ISSUES, https://medicalmarijuana.procon.org/view.resource.php?resourceID=005889 (last updated Mar. 3, 2016).

[192] WILLIAM J. KROUSE, CONG. RESEARCH SERV., RL 32842, GUN CONTROL LEGISLATION, 1, 8 (2012), https://fas.org/sgp/crs/misc/RL32842.pdf.

ership is highly contentious and unlikely to be resolved quickly, it is imperative to advocate for medical marijuana patients' constitutional rights now. Failure to protect the Second Amendment rights of patients could result in a slippery slope, where patients are stripped of other constitutional rights because of the federal government's failure to recognize cannabis as a legitimate medicine.