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6 Stetson J. Advoc. & L. 335 (2019)

## **From Reefer Madness to Medicinal Marijuana: How Elders Have Looked Past the Stigma and Why the Federal Government Should Too**

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## I. Introduction

335. Betty Green has lived a long, adventurous life. From raising kids, to decades of working as a seamstress and travelling the United States with her late husband, a cross-country truck driver, she painfully feels her journey throughout her body. She suffers from neuropathy, which causes pain in her shoulders, arms, and hands, as well as arthritis, which causes swelling and numbness in her fingers, and glaucoma, which causes severe headaches and pain in her eyes. Betty, like many other elders, uses medical marijuana to ease her pain. She does not smoke or get high, she instead takes a pill filled with cannabis oil, and it makes her feel better.<sup>2</sup>

336. Betty can no longer safely live alone, and, like many older Americans, has reluctantly decided to move into a Skilled Nursing Facility (“SNF”). Betty is currently enrolled in Medicare and receives a monthly check from the Social Security Administration (“SSA”), but has depleted her retirement funds and does not have any other source of income. Her access to medical marijuana will soon come to a halt for two widely different reasons. First, because she must use her SSA income for room and board at the SNF, Betty will no longer be able to afford the out-of-pocket cost of her cannabis pills, and Medicare does not cover medical marijuana.<sup>3</sup> Second, the SNF she is moving into has a strict ban on all federally illegal substances because it receives Medicare and Medicaid funds and must follow federal guidelines.<sup>4</sup> As an attempt to replace her cannabis pills, her physician has provided her with a variety of analgesic and anti-inflammatory options to reduce pain and inflammation.<sup>5</sup>

337. SNFs and Assisted Living Facilities (“ALFs”) in Florida, receiving federal funding, such as Medicaid and Medicare, will be affected by the recent legalization of medical marijuana at the state level. This paper argues that Florida SNFs, ALFs, their residents, and doctors should be able to lawfully utilize their federally funded health insurance

2 Winnie Hu, *When Retirement Comes with a Daily Dose of Cannabis*, [N.Y. TIMES](#) (Feb. 2017).

3 Centers for Medicare & Medicaid Services, *Medicare Plan Finder, Step 2 of 4: Enter Your Drugs*, [PLAN-COMPARE.MEDICARE.GOV](#).

4 Carlo Calma, *How SNFs Can Reduce the Stigma Around Legal Marijuana*, [SKILLEDNURSINGNEWS.COM](#) (Jan. 2018).

5 Mayo Clinic Staff, *Diseases & Conditions: Arthritis*, [MAYOCLINIC.ORG](#) (Mar. 2018); Mayo Clinic Staff, *Diseases & Conditions: Peripheral Neuropathy*, [MAYOCLINIC.ORG](#) (Aug. 2017).

(Medicare and Medicaid) to pay for medical marijuana, if they qualify.<sup>6</sup> Part II of this paper provides a history of marijuana laws in Florida and the federal government, while part III analyzes several medical studies and findings relating to medical marijuana use. Finally, part IV explains the current challenges associated with conflicting laws, reveals the top special interest groups fighting against legalizing marijuana, and presents two arguments to depict the irrationality of regulating marijuana, but not alcohol or tobacco.

## II. Historical Background

338. Marijuana is statutorily regulated by Congress at the federal level and by state legislatures at the state level, although these laws conflict. This section will first discuss federal regulation, then Florida regulation, and finally relevant court opinions.

### ***Federal Regulation***

339. The Marihuana Tax Act of 1937 was the first time Congress addressed the regulation of marijuana. The Act did not ban marijuana, it imposed registration and reporting requirements as well as a tax on the growers, sellers, and buyers of marijuana.<sup>7</sup> Thirty years later, President Nixon urged Congress to enact legislation to control narcotics and dangerous drugs, because “the abuse of drugs ha[d] grown from essentially a local police problem into a serious national threat to the personal health and safety of millions of Americans.”<sup>8</sup> As a result, Congress passed the Controlled Substances Act of 1970, which outlawed marijuana federally.<sup>9</sup>

340. The United States Drug Enforcement Administration’s (“DEA”) explains that “[t]he Controlled Substances Act (CSA) places all substances which were in some manner regulated under existing federal law into one of five schedules. This placement is based upon the substance’s medical use, potential for abuse, and safety or dependence liability.”<sup>10</sup> Marijuana is a Schedule I drug,<sup>11</sup> which according to the CSA’s classification system means “(A) [t]he drug or other substance has a high potential for abuse. (B) The drug or other substance has no currently accepted medical use in treatment in

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6 FLA. CONST. art. X §29(b)(10).

7 *History of Marijuana as Medicine — 2009 BC to Present*, PROCON.ORG.

8 Richard Nixon: [Special Message to the Congress on Control of Narcotics and Dangerous Drugs](#) (July 14, 1969).

9 Controlled Substances Act, 21 U.S.C. §812(c)(Schedule I)(c)(10), (17) (2016).

10 *Controlled Substances Act*, DEA.GOV.

11 Controlled Substances Act, 21 U.S.C. §812(c)(Schedule I)(c)(10), (17) (2016).

the United States. [and] (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.”<sup>12</sup> Because it falls under the most stringent schedule under the CSA, marijuana users and prescribers are faced with the possibility of federal imprisonment and/or fines, regardless of what their state’s laws say.

341. The CSA does have wiggle room for change. One option, according to the CSA, is for “[t]he Attorney General [to] promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter.”<sup>13</sup> Secondly, the CSA prescribes a method by which marijuana could be rescheduled, or removed altogether:

**(c) Factors determinative of control or removal from schedules**

In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

- (1) Its actual or relative potential for abuse.
- (2) Scientific evidence of its pharmacological effect, if known.
- (3) The state of current scientific knowledge regarding the drug or other substance.
- (4) Its history and current pattern of abuse.
- (5) The scope, duration, and significance of abuse.
- (6) What, if any, risk there is to the public health.
- (7) Its psychic or physiological dependence liability.
- (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.<sup>14</sup>

342. To date, marijuana has never been rescheduled. However, Attorney Generals Ogden, Cole, and Sessions have all issued memorandum to serve as guidance, discussed in detail below.

343. In 2009, Deputy Attorney General, David W. Ogden issued a memorandum (“Ogden Memo”) to provide “clarification and guidance to federal prosecutors in states that had enacted laws authorizing the medical use of marijuana.” Essentially, the Ogden Memo instructed federal prosecutors (in states with medical marijuana laws) to make “efficient and rational use of limited investigative and prosecutorial resources,” that the

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12 Controlled Substances Act, 21 U.S.C. §812(b)(1)(A)—(C) (2016).

13 Controlled Substances Act, 21 U.S.C. §871(b) (2016).

14 Controlled Substances Act, 21 U.S.C. §811(c) (2016).

core priority of the Department of Justice (“DOJ”) should be on “traffickers of illegal drugs” and “the disruption of illegal drug manufacturing and trafficking networks,” and that “the pursuit of these priorities should not focus on individuals whose actions are in clear compliance with existing state laws providing for medical use of marijuana.”<sup>15</sup>

344. Also under the Obama Administration, Deputy Attorney General, James M. Cole issued a series of memorandums for all United States Attorneys (“Cole Memos”).<sup>16</sup> The first Cole Memo, issued in 2011, clarified that although “several jurisdictions have considered or enacted legislation to authorize multiple large-scale, privately-operated industrial marijuana cultivation centers,” the Ogden Memo “was never intended to shield such activities from federal enforcement action and prosecution.”<sup>17</sup> The second Cole Memo, issued in 2013, served as “guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution or organizations whose conduct interferes with any one or more of [the DOJ’s] priorities, regardless of state law.” The priorities that Attorney General Cole referenced included keeping marijuana out of the hands of minors, criminal enterprises, and other objectively immoral settings—such as growing marijuana on public lands and drugged driving. Further, Deputy Cole explained that “outside of those enforcement priorities, the federal government has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property,”<sup>18</sup> which, in hindsight, likely encouraged states to move forward with marijuana laws. In the third and final Cole Memo, Deputy Cole addressed the impact that the 2013 guidance “would have on certain financial crimes for which marijuana-related conduct is a predicate.”<sup>19</sup>

345. Under the current administration, Attorney General Jefferson B. Sessions, rescinded all “previous nationwide guidance specific to marijuana enforcement” as “unnecessary” in a memorandum for all United States Attorneys (“Sessions Memo”), released on January 4, 2018. The Sessions Memo states that the CSA, and related penalties, “reflect

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15 Memorandum from David W. Ogden, Deputy Attorney Gen., to U.S. Attorneys, [Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana](#) (Oct. 19, 2009).

16 Memorandum from James M. Cole, Deputy Attorney Gen., to U.S. Attorneys, [Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use](#) (June 29, 2011); Memorandum from James M. Cole, Deputy Attorney Gen., to U.S. Attorneys, [Guidance Regarding Marijuana Enforcement](#) (Aug. 29, 2013); Memorandum from James M. Cole, Deputy Attorney Gen., to U.S. Attorneys, [Guidance Regarding Marijuana Related Financial Crimes](#) (Feb. 14, 2014).

17 Memorandum from James M. Cole, Deputy Attorney Gen., to U.S. Attorneys, [Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use](#) (June 29, 2011).

18 Memorandum from James M. Cole, Deputy Attorney Gen., to U.S. Attorneys, [Guidance Regarding Marijuana Enforcement](#) (Aug. 29, 2013).

19 Memorandum from James M. Cole, Deputy Attorney Gen., to U.S. Attorneys, [Guidance Regarding Marijuana Related Financial Crimes](#) (Feb. 14, 2014).

Congress’s determination that marijuana is a dangerous drug and that marijuana activity is a serious crime.”<sup>20</sup> However, in the preceding year alone, Congress had been steadily introducing legislation to have marijuana rescheduled and its medicinal properties further researched.<sup>21</sup> In a letter dated March 16, 2018, bipartisan lawmakers pled with house leaders “to protect state medical marijuana policies and the patients and businesses that rely on them from federal agents and prosecutors,” by “respectfully request[ing] that [they] include language barring the Department of Justice from prosecuting those who comply with their state’s medical marijuana laws.” In a previous letter, dated March 9, 2018, lawmakers requested that appropriations leaders (Speaker Ryan, Leader Pelosi, Chairman Frelinghuysen, and Ranking Member Lowey) include language to prohibit funds from being used to support the DEA’s Domestic Cannabis Eradication / Suppression Program.<sup>22</sup>

346. From August 29, 2013, when the second Cole Memo was released, until recently when it was rescinded, states operated under a limited federal government model with respect to marijuana regulation—allowing states to lawfully implement taxes, regulatory schemes, and meaningful manufacturing and labeling.<sup>23</sup> This recent release of the Sessions Memo contradicts the general trend towards a marijuana tolerant government.<sup>24</sup>

347. Representatives from across the country addressed the House following the release of the Sessions Memo to explain the problems it will have in their state governments, and across the country. Congresswoman Bonamici of Oregon explained that “more than 700 small cannabis businesses operate across the State, where, like with alcohol, marijuana businesses are licensed, regulated, and taxed. These small businesses follow state law, create jobs in their communities, and pay taxes, yet now their livelihood is threatened because this administration wants to revive the futile war on weed.”<sup>25</sup>

348. Congresswoman Lee of California rose in opposition to the Sessions Memo’s “unproductive and backwards marijuana policies” explaining that “by rescinding the Cole memo . . . Jeff Sessions proved that he has one goal and that is reviving the failed war

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20 Memorandum from Jefferson B. Sessions III, Attorney General, to U.S. Attorneys, [Marijuana Enforcement](#), (Jan. 4, 2018).

21 United States Government, H.R.975 — Respect State Marijuana Laws Act of 2017, [CONG.GOV](#); Ending Federal Marijuana Prohibition Act, [163 CONG. REC. H2246](#) (daily ed. Mar. 21, 2017); Medical Marijuana, [163 CONG. REC. H2769](#) (daily ed. Apr. 6, 2017); Statements on Introduced Bills and Joint Resolutions, [163 CONG. REC. S5480](#); Federal Spending Bill Includes Medical Marijuana Protections, [NORML.ORG](#) (Mar. 2018).

22 Tom Angell, *Stop Jeff Sessions from Busting Medical Marijuana, Bipartisan Lawmakers Demand*, [MARIJUANA MOVEMENT.NET](#) (Mar. 2018).

23 Medical Marijuana, [164 CONG. REC. H471](#) (daily ed. Jan. 17, 2018).

24 Nat’l Conference of State Legislatures, *State Medical Marijuana Laws*, [NCSL](#) (Mar. 2018).

25 Rescinding the Cole Memo, [164 CONG. REC. H420](#) (daily ed. Jan. 17, 2018).



on drugs.” Lee further explained that “by going after legal marijuana businesses and consumers, [Sessions] is really showing a blatant disregard for the will of the American people who have voted, mind you, in their States for more reasonable and fairer laws.”<sup>26</sup>

349. Finally, a bipartisan group, Congressman Gaetz of Florida, Congressman Curbelo of Florida, Congressman Correa of California, and Congressman Sanford of South Carolina, took the House floor for thirty minutes to discuss their concerns about the Sessions Memo.<sup>27</sup> Representative Gaetz explained that rescinding the Cole Memo, first, “places into question the very channels of medicine that have helped so many Americans,” and second, is “so deeply flawed because it highlights the arrogance of a Federal Government that believes that its policies should always stand in primacy to innovation at State level.”

350. Representative Curbelo discussed “the Federal Governments overreach and unjust treatment of legally operating businesses all across [the] country,” explaining that the current administration “supposedly respects the federalist model of our government, [but] continues to take such drastic steps to ignore States’ rights and the decisions of voters and State legislatures across the country.” Next, Representative Correa explained how he personally relied on the Cole Memo when introducing legislation in his home state of California to “regulat[e] medical marijuana to make sure that it was chemical free, that it was tested, labeled, and that cannabis was kept away from our children, our neighborhoods, and our schools.” Correa explained that when he was working on this legislation, he met a doctor whose 10 year old daughter suffered from seizures and the only medication that helped, and had no side effects, was medical cannabis. Finally, Representative Sanford argued, and this author agrees, that this is a “gut-check” moment on the degree to which we really believe in the 10th Amendment.” Sanford explained, “this is about saying the Federal Government does not decide the complexion of a local business.”<sup>28</sup>

351. CNN reported that the shift from the Cole Memo to the Sessions Memo “essentially shifts federal policy from the hands-off approach adopted under the previous administration to unleashing federal prosecutors across the country to decide individually how to prioritize resources to crack down on pot possession, distribution and cultivation of the drug in states where it is legal.” The US Attorney’s Office in Colorado told CNN:

Today the Attorney General rescinded the Cole Memo on marijuana prosecutions, and directed that federal marijuana prosecution decisions be governed by the same policies that have long governed all of our prosecution

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26 Attorney General Sessions’ Cannabis Decision, [164 CONG. REC. H421](#) (daily ed. Jan. 17, 2018).

27 Attorney General Sessions’ Cannabis Decision, [164 CONG. REC. H421](#) (daily ed. Jan. 17, 2018).

28 Medical Marijuana, [164 CONG. REC. H471, 474](#) (daily ed. Jan. 17, 2018).

decisions. The United States Attorney’s Office in Colorado has already been guided by these principles in marijuana prosecutions – focusing in particular on identifying and prosecuting those who create the greatest safety threats to our communities around the state. We will, consistent with the Attorney General’s latest guidance, continue to take this approach in all of our work with our law enforcement partners throughout Colorado.<sup>29</sup>

352. The Sessions Memo contradicts the 10th Amendment of the United States Constitution, which reads “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>30</sup> Nowhere in the United States Constitution is the power to regulate medicine mentioned. A plain reading of the 10th Amendment, implies that the power to regulate medicine, theoretically including medicinal marijuana, is a power reserved to the states respectively, or to the people.

353. As such, the regulation of medicine has traditionally fallen under this category of powers not delegated to the federal government.<sup>31</sup> In *Hawker*, the Supreme Court stated that “[n]o precise limits have been placed upon the police power of a State, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for public health is something confessedly belonging to the domain of that power.”<sup>32</sup> Further, in *Glucksberg*, the Supreme Court noted that “[t]he State also has an interest in protecting the integrity and ethics of the medical profession,” and held that Washington’s ban on assisted suicide was rationally related to a legitimate government interest (preserving human life) and did not violate the Due Process Clause of the Fourteenth Amendment.<sup>33</sup>

354. Therefore, it seems logical that the federal government should have no say in the regulation of medical marijuana.<sup>34</sup> However, the federal government created a loophole; according to the CSA, marijuana “has no currently accepted medical use in treatment in the United States,”<sup>35</sup> and therefore, is not a medicine. This distinction could be detrimental to Betty and other Floridians who find medicinal qualities in marijuana, but must use other, federally approved, medicines.

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29 Laura Jarrett, *Sessions Nixes Obama-era Rules Leaving States Alone that Legalize Pot*, [CNN](#) (Jan. 2018).

30 U.S. CONST. [amend. X](#).

31 *Hawker v. N.Y.* 170 U.S. 189, 192–194 (1989).

32 *Hawker v. N.Y.* 170 U.S. 189, 192–194 (1989).

33 *Wash. v. Glucksberg*, 521 U.S. 702, 794, (1997).

34 Florida Board of Medicine, [FLBOARDOFMEDICINE.GOV](#).

35 Controlled Substances Act, 21 U.S.C. §812(b)(1)(B) (2016).

## **Florida Regulation**

355. Florida is new to the regulation of marijuana, as it recently legalized medical marijuana by super-majority vote to amend the Florida Constitution, in November of 2016.<sup>36</sup> Section 29 of the Florida Constitution, reads, in part, “[t]he medical use of marijuana by a qualifying patient or caregiver in compliance with this section is not subject to criminal or civil liability or sanctions under Florida law.”

356. Prior to the 2016 vote, Florida had enacted a compassionate use statute. The Office of Compassionate Use was established on July 1, 2014,<sup>37</sup> under the first version of Florida Statute 381.986. The initial version of the statute required that the Florida Department of Health (“Department”) create an online compassionate use registry, authorize the establishment of five dispensing organizations, and monitor physician registration and ordering of low-THC.<sup>38</sup> From its inception in 2014, until June 23, 2017 the statute was amended three times, and is now entitled “Medical Use of Marijuana.”<sup>39</sup> Similarly, the Office of Compassionate Use is now the Office of Medical Marijuana Use.<sup>40</sup> As prescribed in the statute, the Office of Medical Marijuana Use is charged with writing and implementing the Department’s rules for medical marijuana, overseeing the statewide Medical Marijuana Use Registry, and licensing Florida businesses to cultivate, process, and dispense medical marijuana to qualified patients.<sup>41</sup>

357. The Department began accepting applications for dispensing organizations in July of 2015, and by November, five dispensing organizations were announced. By February of 2016, the first two dispensing organizations were granted cultivation authorization, with the others following shortly thereafter, but were not allowed to be dispensing until July of 2016, shortly after the Compassionate Use Registry was available.<sup>42</sup>

358. As noted above, under Florida law, patients must first be diagnosed with a qualifying medical condition to use medical marijuana.<sup>43</sup> Qualifying conditions include: cancer, epilepsy, glaucoma, HIV, AIDS, post-traumatic stress disorder (PTSD), Amyotrophic lateral sclerosis (ALS), Crohn’s disease, Parkinson’s disease, Multiple sclerosis (MS),

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36 FLA. CONST. [art. X §29](#) (adopted 2016).

37 *Low-THC Cannabis & Medical Cannabis Implementation Timeline*, [FL DEPT. OF HEALTH OFFICE OF COMPASSIONATE USE](#) (Oct. 2016).

38 FLA. STAT. [§381.986](#) (2014).

39 FLA. STAT. [§381.986](#) (2017).

40 *Low-THC Cannabis & Medical Cannabis Implementation Timeline*, [FL DEPT. OF HEALTH OFFICE OF COMPASSIONATE USE](#) (Oct. 2016).

41 FloridaHealth, *Office of Medical Marijuana Use*, [FLORIDAHEALTH.GOV](#).

42 *Low-THC Cannabis & Medical Cannabis Implementation Timeline*, [FL DEPT. OF HEALTH OFFICE OF COMPASSIONATE USE](#) (Oct. 2016).

43 FLA. CONST. [art. X §29\(b\)\(10\)](#).

Medical conditions of the same kind or class as or comparable to those listed, a terminal condition diagnosed by a physician other than the qualified physician issuing the physician certification, and chronic nonmalignant pain caused by a qualifying medical condition or that originates from a qualifying medical condition and persists beyond the usual course of that qualifying medical condition. Once diagnosed with a qualifying illness, patients and their caregivers are entered into the Medical Marijuana Use Registry and given a Patient ID number by their qualified physician. With this ID number, patients and caregivers must apply for their Registry Identification Card. Once approved, the patients and caregivers may fill orders for medical marijuana with one of the state's approved medical marijuana treatment centers.<sup>44</sup>

359. Although Betty obtained her medical marijuana through the channels prescribed above, she will have to find an alternative form of pain relief, because like many elders, she has to play by the federal government's rules.

## Cases

360. Perhaps the most infamous case regarding marijuana regulation is *Gonzales v. Raich*. In *Raich*, the Supreme Court held that regulating marijuana is within Congress' police power because the production of marijuana meant for home consumption had a substantial effect on supply and demand in the national market. In *Raich*, two California residents who suffered from a variety of serious medical conditions had sought to avail themselves of medical marijuana pursuant to a California state law, grew marijuana plants in their home, and were found to have violated the CSA.<sup>45</sup> This author argues that the Supreme Court's argument in *Raich* does not hold water because the federal government doesn't cultivate marijuana so there is no supply and demand in the national market.

361. In *Jenks v. State*,<sup>46</sup> the court held that a medical-necessity defense was merely a more particular application of the necessity defense, and that appellants had met their burden of establishing the defense at trial.<sup>47</sup> In *Jenks*, the appellants were arrested and charged with manufacturing marijuana,<sup>48</sup> which they did in order to control their nausea,<sup>49</sup> keep down their AIDS medicine, and maintain a healthy weight.<sup>50</sup> This author

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44 *Medical Marijuana Treatment Centers*, [FLORIDAHEALTH.GOV](http://FLORIDAHEALTH.GOV).

45 *Gonzales v. Raich*, 545 U.S. 1 (2005).

46 *Jenks v. State*, 582 So. 2d 676 (Fla. Dist. Ct. App. 1991).

47 *Jenks v. State*, 582 So. 2d 676, 679 (Fla. Dist. Ct. App. 1991).

48 *Jenks v. State*, 582 So. 2d 676, 677 (Fla. Dist. Ct. App. 1991).

49 *Jenks v. State*, 582 So. 2d 676, 678 (Fla. Dist. Ct. App. 1991).

50 *Jenks v. State*, 582 So. 2d 676 (Fla. Dist. Ct. App. 1991).

believes that the court in *Jenks* accurately analyzed applicable law and surrounding circumstances and came to a superior conclusion than the court in *Raich*.

362. In *Barbuto v. Advantage Sales and Marketing, LLC*,<sup>51</sup> Christina Barbuto, the plaintiff, sued her employer for discrimination for rescinding hire based on off-duty medical marijuana use. “Barbuto has Crohn’s disease, and irritable bowel syndrome. She has little to no appetite and finds it difficult to maintain a healthy weight. When she started using marijuana she gained 15 pounds and has been able to maintain a healthy weight. The supervisor told her that her use of medicinal marijuana would not be a problem.” While the court did not find that there was an implied statutory private cause of action under the medical marijuana act, the court held that the Barbuto may seek a remedy through claims of handicap discrimination in violation of G.L. c. 151B, and therefore reversed the dismissal of the plaintiff’s discrimination case. In reporting this holding, the American Bar Association stated “Employers need to reconsider blanket drug policies” and that because the “court finds that some accommodations may not be unduly burdensome, employment policies should be interactive between employer and employee.”<sup>52</sup>

### III. Medical Status

363. Medical marijuana can benefit elderly persons more effectively than some mainstream medications due to the virtually nonexistent side-effects.<sup>53</sup> In New Mexico, a recent study showed that medical cannabis helped one-third of chronic pain patients quit prescription opioid drug, and concluded that legal access to cannabis may reduce the use of multiple classes of dangerous prescription medications in certain patient populations. The study looked at 37 patients enrolled in the New Mexico Cannabis Program (“MCP”) and 29 participants who used opioids alone. In just 10 months, participants enrolled in MCP has significantly reduced their prescription drug use, and more than a third of the MCP participants stopped using prescription drugs altogether, whereas only two percent of the non-MCP group stopped using their prescription drugs by the last six months of the observation period.<sup>54</sup>

364. National Public Radio (NPR) discussed a recent study, which analyzed the correlation between states that have medical marijuana laws and usage of prescription drugs.

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<sup>51</sup> *Barbuto v. Advantage Sales & Mktg., LLC*, 477 Mass. 456 (2017).

<sup>52</sup> Josephine Bahn, *Off-Duty Medical Marijuana Use Not Grounds to Rescind Hire*, AMERICANBAR.ORG (Jan. 2018).

<sup>53</sup> Ending Federal Marijuana Prohibition Act, 163 CONG. REC. H2246 (daily ed. Mar. 21, 2017).

<sup>54</sup> Tibi Puiu, *Medical Cannabis Helps One-Third of Chronic Pain Patients Quit Prescription Opioid Drug*, ZMESCIENCE.COM (Dec. 2017).

“The researchers found that in states with medical marijuana laws on the books, the number of prescriptions dropped for drugs to treat anxiety, depression, nausea, pain, psychosis, seizures, sleep disorders and spasticity. Those are all conditions for which marijuana is sometimes recommended.”<sup>55</sup>

365. A survey administered in California found that 92% of medical marijuana patients said that medical marijuana alleviated symptoms of their serious medical conditions. The authors explained that “the most common reasons for use [of medical marijuana] include medical conditions for which mainstream treatments may not exist, such as for migraines, or may not be effective, including for chronic pain and cancer.” Of the 7,525 medical marijuana patients surveyed in California, the Public Health Institute reports that 3,381 were over the age of 55.

366. The New England Journal of Medicine reported that nearly 8 in 10 doctors approved the use of medical marijuana.<sup>56</sup> “Doctors surveyed were given a hypothetical case about a woman named Marilyn, a 68-year-old woman with breast cancer that had metastasized to her lungs, chest cavity and spine. They were asked if they would give her medical marijuana to help with her symptoms.” The New England Journal of Medicine included responses from 1,446 doctors from 72 different countries. “More than three-quarters of the North American physicians approved the use of medical marijuana in this scenario.”<sup>57</sup>

367. Doctors are not the only health care professionals that believe there are medicinal properties in marijuana. “Psychiatrist Tod H. Mikuriya began researching m[a]rijuana’s therapeutic possibilities in the 1960s, he believed the symptoms of over 200 ailments could be treated with marijuana including stuttering, insomnia, premenstrual syndrome, and writer’s cramp.” “The National Cancer Institute agrees that the use of marijuana is beneficial for treatment of side effects of chemotherapy, preventing nausea and vomiting, increasing appetite, relieving pain, and improving sleep.”<sup>58</sup> Additionally, Business Insider reports that Marijuana: (1) can be used to prevent blindness from glaucoma, (2) it’s better for your lungs than tobacco – tobacco smokers lost lung function over time, but pot users actually showed an increase in lung capacity, (3) it controls epileptic seizures, a chemical found in marijuana stops cancer from spreading, (4) it may decrease anxiety, (5) THC slows the progression of Alzheimer’s disease,<sup>59</sup> (6) eases the

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55 Shefali Luthra, *After Medical Marijuana Legalized, Medicare Prescriptions Drop for Many Drugs*, [NPR](#) (July 2016).

56 Christopher Ingraham, *92% of Patients Say Medical Marijuana Works*, [WASHINGTONPOST.COM](#), Oct. 2014.

57 Michelle Castillo, *Survey: 76 Percent of Doctors Approve of Medical Marijuana Use*, [CBSNEWS.COM](#) (May 2013).

58 Randy Astaiza, *All the Reasons Pot is Good for you*, [BUSINESSINSIDER.COM](#) (Nov. 2012).

59 Alissa Sauer, *The Effects of Medical Marijuana on Alzheimer’s Treatment*, [ALZHEIMERS.NET](#) (Dec. 2016).

pain of multiple sclerosis, (7) lessens side-effects from treating hepatitis C, (8) treats inflammatory bowel diseases (Crohn's and ulcerative colitis), and (9) relieves arthritis discomfort.

## IV. Why Legalize It?

368. Like Betty, other Florida residents living in SNFs are being denied access to the medical marijuana they have a legal prescription to take. A Pasco county SNF sent a statement to ABC stating “Our top priority is the care, safety, and comfort of our patients. Like all health care facilities in Florida, and in other states that permits the use of medical marijuana, we are seeking to balance and comply with federal law with the flexibility afforded under state law.”<sup>60</sup>

### Challenges

369. The University of South Florida Healthcare Vice President, Jay Wolfson, explained that although “[Florida] law says that this is a legitimate medical therapy and [patients have] gotten a legal medical prescription . . . [SNFs] have the prerogative under medical decision-making and their medical director to say we do not believe that this is something that we want to offer and administer in our facility because there are alternatives, and it’s going to be very difficult to force them to do that.”<sup>61</sup> Some states, like Massachusetts, are implementing new regulations to help bridge the access gap for elders in SNFs and ALFs, which permit staff to act as personal caregivers and assist with a registered qualifying patient’s medical use of marijuana.

370. As explained by Dr. Jordan Tishler in a recent blog, “there are numerous medical reasons for older adults to use Cannabis. Cannabis generally provides safe and fast-acting relief for seniors who suffer from joint pain, neuropathic pain, muscle wasting, appetite loss, and can even help seniors with cognitive impairments (such as dementia or Alzheimer’s disease).”<sup>62</sup>

371. So what is the problem? Many health care providers think it’s the stigma associated with using marijuana, while others believe that there a serious health concerns. According to Dr. Zachary Palace, Chief Medical Officer at Hebrew Home at Riverdale,

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60 Adam Walser, *Florida Nursing Home Denies Use of Medical Marijuana by Chronic Pain Patient*, [ABCAC-TIONNEWS.COM](http://ABCAC-TIONNEWS.COM) (Oct. 2017).

61 Adam Walser, *Florida Nursing Home Denies Use of Medical Marijuana by Chronic Pain Patient*, [ABCAC-TIONNEWS.COM](http://ABCAC-TIONNEWS.COM) (Oct. 2017).

62 Jordan Tishler, *Is Medical Marijuana Allowed in Nursing Homes or Assisted Living Communities*, [IN-HALEMD.COM](http://IN-HALEMD.COM) (Aug. 2017).

“[l]ooking at medical cannabis as a recreational drug can limit people’s objectivity of the real benefits it can have when it’s used as a pharmacological agent [and] to treat specific diagnoses . . . [t]he stigma associated with it, due to its . . . abuse recreationally — we need to try to remove that stigma.” Joseph Friedman, the Chief Operations Officer at PDI Medical, believes that “education is key to combatting the stigma that persists with the usage of marijuana in the medical setting.”<sup>63</sup>

372. Dispensing organizations in Florida cannot get bank accounts because most credit card, debit card, and electronic transactions in marijuana commerce violate banking regulations. This creates a variety of problems for every party involved. For the customers, there is a lack of convenience: they cannot legally use their preferred method of payment, there are high ATM fees for cash withdrawals at stores, and because there is no discreet method of payment, in-person cash purchases also affects the consumer’s reputation. For the producer, processor, and retailer, the lack of bankability causes a lack of security and accountability because of the risks of violent crime and leakage due to holding and transporting large amounts of cash. For the landlord, there are a variety of issues involving taxes and rent payments made in cash.<sup>64</sup> Finally, law enforcement concerns include illegal sales, money laundering, violent crime, and drug cartel / gang involvement.<sup>65</sup>

373. Branding is an important part of any business. However, cannabis brands cannot be federally registered because registration requires lawful use in commerce, and as mentioned above, the CSA states that sales of cannabis and paraphernalia primarily related to it are unlawful.<sup>66</sup> Additionally, businesses that provide services to a business that operates under state marijuana laws may be violating federal law, and subject to prosecution.<sup>67</sup>

374. While medical and recreation marijuana use is legal in some states such as Colorado, some senators do not believe that recreational marijuana should be legalized. Regardless of his opposition to recreational marijuana use, Senator Hatch expressed concern for a lack of oversight, explaining that:

millions of Americans are using marijuana for medicinal purposes without there being the rigorous scientific evidence that we require all medications

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63 Carlo Calma, *How SNFs Can Reduce the Stigma Around Legal Marijuana*, [SKILLEDNURSINGNEWS.COM](http://SKILLEDNURSINGNEWS.COM) (Jan. 2018).

64 Enabling Legal Marijuana Commerce, CLE: What Attorneys Need to Know When Representing Cannabis Clients (Aug. 2017).

65 Enabling Legal Marijuana Commerce, CLE: What Attorneys Need to Know When Representing Cannabis Clients (Aug. 2017).

66 David Schnider, Partner at Nolan Heimann, LLP, CLE: What Attorneys Need to Know When Representing Cannabis Clients (Aug. 2017).

67 Thomson Reuters, *Federal Marijuana Laws*, [CRIMINALFINDLAW.COM](http://CRIMINALFINDLAW.COM).



to have before we allow them to be prescribed in this country. There are currently no Federal quality control measures for marijuana grown for medicinal purposes, nor is there any quality control for the marijuana-based medications that patients eventually use. Prescribers do not have guidance on appropriate doses, routes of administration, or even the safety of this medication for populations such as children or the elderly. This lack of oversight creates a dangerous environment that puts American lives at risk. As we continue to encourage the development of new therapies for those with severe medical problems, we must be unrelenting in our insistence on scientific rigor. Using only anecdotal information poses a significant public health risk. We lack the science to support the use of medical marijuana products like CBD oils, not because researchers are unwilling to do the work but because of bureaucratic red-tape and overregulation. Under current law, those who want to complete research on the benefits of medical marijuana must engage in a complex application process and interact with several Federal agencies. These regulatory acrobatics can take researchers over a year, if not more, to complete, and the longer researchers have to wait, the longer patients have to suffer.<sup>68</sup>

375. In order to effectively regulate marijuana, this author proposes looking at the benefits reported by patients using medical marijuana. As noted in the Washington Post, “in considering the efficacy of any kind of medical treatment, we should listen first and foremost to the patients. The debate over medical marijuana has largely been dominated by vested interest and advocacy groups on either side – patients’ voices have been either silent or ignored completely.”<sup>69</sup>

### ***Anti-Legalization Special Interest Groups***

376. So who is preventing marijuana from becoming legalized? There are many people that believe that lobbyists are behind the effort to maintain marijuana’s illegality. According to one source, police unions, private prison corporations, alcohol and beer companies, pharmaceutical corporations, and prison guard unions are the top five special interest groups lobbying to keep marijuana illegal. Police unions receive federal drug war grants that finance their budgets; in California, police union lobbyists coordinated an effort to defeat a ballot measure in 2010 to legalize marijuana, while helping its police department collect tens of millions in federal marijuana eradication grants.

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68 Statements on Introduced Bills and Joint Resolutions [163 CONG. REC. S5480](#).

69 Christopher Ingraham, *92% of Patients Say Medical Marijuana Works*, [WASHINGTONPOST.COM](#) (Oct. 2014).

Private prison corporations are full of marijuana law offenders.<sup>70</sup>

377. Alcohol and beer distributors, in California, contributed to a committee set up to prevent marijuana from being legalized and taxed. Pharmaceutical corporations are in direct competition with marijuana on Capitol Hill because “marijuana can replace everything from Advil to Vicodin and other expensive pills.” Finally, prison guard unions, in California, the “correctional peace officers association spent a whopping one million dollars to defeat a measure that would have reduced sentences and parole times for nonviolent drug offenders while emphasizing drug treatment over prison.”<sup>71</sup>

378. Another source claims that “the crusaders against weed constitute a long list of suspiciously self-interested folks.” Big tobacco and big pharma fund anti-marijuana tv and billboards advertisements to get Floridians to believe medical marijuana is harmful, while lobbyists work hard to secure for police departments millions of dollars in federal grants towards eradicating weed. “Pharmaceutical companies compensate leading anti-marijuana researchers in order to keep their customers on painkillers over cannabis, which is cheaper.”<sup>72</sup> Additionally, the Florida Sheriffs Association led a campaign entitled “Don’t Let FL Go to Pot.”<sup>73</sup> The Association’s head has cited “seizures from marijuana grow houses as a key revenue source for his department.” Finally, “the prison-industrial complex would like to keep making money on building more prisons to fill with non-violent grass smokers” and “the alcohol and beer industries have also lobbied for years to keep marijuana illegal because they fear the competition that legalized weed would bring.”<sup>74</sup>

379. Supporters of anti-marijuana laws typically argue that the negative effects of marijuana include “short-term memory impairment and slowness of learning, impaired lung functions, decreased sperm count and sperm mobility, interference with ovulation and pre-natal development, impaired immune response, possible adverse effects on heart function, by-products of marijuana remaining in body fat for several weeks, with unknown consequences,” becoming addicted, and be at risk of using other drugs.<sup>75</sup>

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70 Lee Fang, *The Top Five Special Interest Groups Lobbying To Keep Marijuana Illegal*, [REPUBLICREPORT.ORG](http://REPUBLICREPORT.ORG) (Apr. 2012).

71 Lee Fang, *The Top Five Special Interest Groups Lobbying To Keep Marijuana Illegal*, [REPUBLICREPORT.ORG](http://REPUBLICREPORT.ORG) (Apr. 2012).

72 Ben Cohen, *Who’s Really Fighting Legal Weed*, [USNEWS.COM](http://USNEWS.COM) (Dec. 2014).

73 Scott Powers, *Sheriffs Take Lead Against Legalizing Medical Pot*, [ORLANDOSENTINEL.COM](http://ORLANDOSENTINEL.COM), May 2014.

74 Ben Cohen, *Who’s Really Fighting Legal Weed*, [USNEWS.COM](http://USNEWS.COM) (Dec. 2014).

75 Centers for Disease Control and Prevention, *The Surgeon General’s Warning on Marijuana*, [CDC.GOV](http://CDC.GOV) (Aug. 13, 1982).

## ***Alcohol Argument***

380. Under the CSA's classification system alcohol could be a Schedule I drug: “[t]he drug or other substance has a high potential for abuse . . . no currently accepted medical use in treatment in the United States . . . [and] there is a lack of accepted safety for use of the drug or other substance under medical supervision.”<sup>76</sup> However, it is legal, and highly regulated. Alcohol is also taxed, and thereby contributes to the economy. Even if the federal government finds that there truly is no medical use to marijuana, and that it does have a high potential for abuse, it does not explain the disconnect with alcohol. Alcohol is consumed exclusively for pleasure and alters the drinker's perceptions. This author believes that by continuing to regulate citizens' access to marijuana, the federal government is disregarding the 10th Amendment, and the will of its citizens.

381. During Prohibition, there was an illegal market for alcohol.<sup>77</sup> When the 18th Amendment was repealed,<sup>78</sup> the illegal alcohol market was futile, and dissolved. This author believes that if marijuana was legal, medically and recreationally, there would be a significant decrease in trafficking of marijuana and related criminal enterprise activity.

## ***Tobacco Argument***

382. The same logic above applies to tobacco. Under the CSA's classification system, tobacco could be a Schedule I drug.<sup>79</sup> However, through taxes and regulation, the sale of tobacco contributes to the economy and there are no cartel related smuggling issues. As mentioned above, even if the federal government finds that there truly is no medical use to marijuana, and that it does have a high potential for abuse, it similarly does not explain the disconnect with tobacco.

## **V. Conclusion**

383. With respect to the regulation of marijuana, the CSA is stale law and should be reformed. Based on the wide array of research regarding the positive medicinal benefits of marijuana, Congress' persistence in introducing new legislation, gradual legalization by state legislatures, contradiction to the 10th Amendment of the U.S. Constitution, and evidence of self-interested lobbyists group influence, the federal government should

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76 Controlled Substances Act, [21 U.S.C. §812\(b\)\(1\)](#) (2016).

77 *Prohibition: Speakeasies, Loopholes and Politics*, NPR (June 2011).

78 U.S. CONST. [amend. XXI](#).

79 Controlled Substances Act, [21 U.S.C. §812\(b\)\(1\)](#) (2016).

reevaluate its position regarding marijuana. Elders should be able to choose marijuana as medicine and use their federally funded health insurance to pay for it, just as they can for other prescription drugs.