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Connecticut Workers' Compensation Coverage for Medical Cannabis in the Age of the Opioid Crisis

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Note

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In 2019 the Connecticut Workers' Compensation Review Board (CRB) in Caye v. Thyssenkrupp Elevator *rejected the employer and its workers' compensation insurer's argument that the Workers' Compensation Commission cannot compel them to reimburse the cost of medical cannabis because such an order would require them to engage in conduct that is criminalized under the Controlled Substances Act (CSA). The CRB* in Caye *instead affirmed the trial commissioner's order that the respondent must reimburse the claimant's expenses in obtaining medical cannabis.*

This Note argues that when the issue of workers' compensation reimbursement for medical cannabis is inevitably reviewed by the Connecticut Appellate or Supreme Court, the reviewing court can and should compel employers and their insurance carriers to reimburse claimants for the cost of medical cannabis. Despite the legal haziness the CSA creates, employers and their insurers can avoid knowingly breaking federal law by reimbursing the cost of cannabis as an out-of-pocket expense.

In addition to the legal reasoning set forth in this Note, the CT Appellate or Supreme Court should rule on the side of workers as a matter of public interest. The opioid epidemic in the United States claimed the lives of nearly 500,000 people from 1999 to 2019. The opioid epidemic is far from over, and, as a result, hundreds of Connecticut residents' lives continue to be cut short. Although increasing workers' compensation coverage for medical cannabis is not a cure-all solution to the epidemic, increasing access to an effective, less deadly alternative is a step in the right direction.

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Connecticut Workers' Compensation Coverage for Medical Cannabis[1] in the Age of the Opioid Crisis

SYDNEE SOUSA[*]

INTRODUCTION

The opioid epidemic in the United States claimed the lives of nearly 500,000 people from 1999 to 2019.[2] Prescription opioid overdoses in particular claimed the lives of over 247,000 people from 1999 to 2019.[3] "In Connecticut, residents are more likely to die from unintentional drug overdose than a motor vehicle accident . . . . [and] [t]he majority of these deaths are linked to overdose of prescription opioid painkillers and illicit opioids."[4] Thankfully, prescription opioid misuse is declining,[5] and corporations like Johnson & Johnson and opioid distributors are being held accountable for their role in this epidemic.[6] Still, in the United States, an

[*] University of Connecticut, J.D., 2021. Smith College, B.A., 2017. I would like to extend my thanks to Attorney Joseph Passaretti, for his thoughtful feedback and expertise during my drafting process. I would also like to thank the entire *Connecticut Law Review* team for their careful edits. Thank you to my friends and family for their endless support, especially my Mom for her unwavering encouragement; my Dad, Attorney Bob Sousa, for his guidance and for providing me the opportunity to work with injured workers directly, inspiring this Note; and my partner James, for always believing in me. Finally, I would like to dedicate this Note to my loved ones who have lost their lives to opioid overdoses; I carry you with me every day.

[1] I use the word cannabis, as opposed to the word marijuana, whenever possible throughout this Note, as the word marijuana has "racist roots." I make an exception when I directly quote certain material, for example, many medical cannabis statutes. *See* Alex Halperin, *Marijuana: Is It Time to Stop Using a Word with Racist Roots?*, GUARDIAN (Jan. 29, 2018, 5:00 PM), https://www.theguardian.com/society/2018/jan/29/marijuana-name-cannabis-racism (discussing the historical roots of the word marijuana and, in particular, its racist roots).

[2] *Opioids: Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/opioids/basics/epidemic.html (last reviewed Mar. 17, 2021).

[3] *Drug Overdose: Overview*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/deaths/prescription/overview.html (last reviewed Mar. 17, 2021). In 2020, "[a]s Covid raged, so did the country's other epidemic. Drug overdose deaths rose nearly 30 percent in 2020 to a record 93,000 . . . . It's the largest single-year increase recorded. . . . Several grim records were set [including] the most deaths from opioid overdoses." Josh Katz & Margot Sanger-Katz, '*It's Huge, It's Historic, It's Unheard-of': Drug Overdose Deaths Spike,* N.Y. TIMES (July 14, 2021), https://www.nytimes.com/interactive/2021/07/14/upshot/drug-overdose-deaths.html.

[4] *Opioids and Prescription Drug Overdose Prevention*, CONN. STATE DEP'T OF PUB. HEALTH, https://portal.ct.gov/DPH/Health-Education-Management-Surveillance/The-Office-of-Injury-Prevention/Opioids-and-Prescription-Drug-Overdose-Prevention-Program#Data (last visited July 11, 2020).

[5] Austin Frakt, *Can Marijuana Help Cure the Opioid Crisis?*, N.Y. TIMES (June 17, 2019), https://www.nytimes.com/2019/06/17/upshot/marijuana-opioids-research-connection.html; *Opioid Overdose: Prescribing Practices*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/data/prescribing/prescribing-practices.html (last reviewed Aug. 13, 2019); *Opioids: Understanding the Epidemic*, supra note 2.

[6] *See* Jan Hoffman, *Drug Distributors and J.&J. Reach $26 Billion Deal to End Opioid Lawsuits*, N.Y. TIMES (Nov. 11, 2021), https://www.nytimes.com/2021/07/21/health/opioids-distributors-settleme

average of thirty-eight people died each day in 2019 from prescription opioid overdoses, a number that does not account for people who overdosed on illicit drugs, such as heroin, after transitioning from prescription opioids.[7]

In a perfect world, no one would need an opioid prescription, but as people continue to get seriously injured and have surgeries, the disappearance of opioid prescriptions are extremely unlikely. However, given the fact that since 1999, the amount of overdoses and deaths from prescription opioids has increased in line with the increase of opioids prescribed, we should make every effective and relatively safe alternative for pain management accessible.[8] Luckily, medical cannabis is an effective alternative for chronic pain, and medical cannabis use has been associated with decreased opiate medication use.[9] People in Connecticut and throughout the United States, however, are unable to access medical cannabis as an alternative for pain relief. Namely, injured workers in Connecticut cannot easily access medical cannabis because of the conflict between the federal Controlled Substances Act (CSA) and Connecticut's Palliative Use of Marijuana Act (PUMA).[10]

Over five years ago, in *Petrini v. Marcus Dairy, Inc*, the Connecticut Compensation Review Board (CRB) affirmed the decision of the trial commissioner finding that medical cannabis was a reasonable and necessary medical treatment and was therefore compensable.[11] Nonetheless, employers and their workers' compensation insurers asserted that there was still an issue as to whether the Workers' Compensation Commission could compel them to reimburse the cost of medical cannabis, and, as a result, engage in conduct made criminal by the CSA.[12] Consequently, the vehicle to reimburse medical cannabis remained in question, which meant injured workers in Connecticut still faced obstacles to find alternatives to opioid prescriptions. Then, on October 29, 2019, in *Caye v. Thyssenkrupp Elevator*, the CRB directly took up this outstanding issue, finding "the matter of

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nt.html ("[T]he country's three major drug distributors and a pharmaceutical giant have reached a $26 billion deal with states that would release some of the biggest companies in the industry from all civil liability in the opioid epidemic . . . . The agreement . . . lays the framework for billions of dollars to begin flowing into communities across the country for addiction treatment, prevention services and other steep expenses from the epidemic.").

[7] *Drug Overdose: Prescription Opioid Overdose Death Maps*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/deaths/prescription/maps.html (last reviewed Mar. 24, 2021); *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE (May 27, 2020), https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis.

[8] *Drug Overdose: Overview*, *supra* note 3.

[9] Kevin F. Boehnke, Evangelos Litinas & Daniel J. Clauw, *Medical Cannabis Use Is Associated with Decreased Opiate Medication Use in a Retrospective Cross-Sectional Survey of Patients with Chronic Pain*, 17 J. PAIN 739, 739 (2016).

[10] 21 U.S.C. § 841(a)(1) (2018); CONN. GEN. STAT. §§ 21a-408–408v (2020).

[11] Petrini v. Marcus Dairy, Inc., No. 6021 CRB-7-15-7, 2016 WL 6659149, at *1 (Conn. Workers' Comp. Comm'n Rev. Div. May 12, 2016).

[12] Craig Abbott, *Medical Marijuana Update*, 29 COMP. Q. 6, 6–7 (2019). Throughout this Note, I use the word "respondent" to refer to both workers' compensation employers and their workers' compensation insurers.

federal preemption of Connecticut law to be potential and not actual" and thus affirmed the trial commissioner's order that the respondent must reimburse the claimant's cost associated with his medical cannabis prescription.[13]

The respondents subsequently withdrew their appeal to the Connecticut Appellate Court.[14] Accordingly, neither the Connecticut (CT) Appellate Court nor the CT Supreme Court have reviewed a CRB case presenting the issue in *Caye*, which is whether "the federal Controlled Substances Act . . . proscribe[s] a state agency from ordering an insurance carrier to pay or reimburse for marijuana prescriptions."[15] This Note argues that when this issue is reviewed by the CT Appellate or Supreme Court, the reviewing court can and should compel employers and their insurance carriers to reimburse claimants for the cost of medical cannabis.

This Note proceeds in four parts. Part I discusses the devastating opioid crisis, in particular opioid prescription misuse, and how medical cannabis is an available and effective medication to treat chronic pain. Part II analyzes the relevant federal and state regulations of medical cannabis and how many state laws conflict with the CSA. Part III addresses how this conflict affects workers' compensation coverage of medical cannabis. Part III reviews PUMA and the CT Workers' Compensation Act, noting the standard of what is considered reasonable or necessary treatment.[16] Part III then introduces the *Petrini* and *Caye* opinions, including the dissenting opinion in *Caye*. Part IV argues the CT Appellate or Supreme Court can and should compel respondents and their insurance carriers to cover the cost of medical cannabis prescribed to injured workers. As the CRB found in *Caye*, Part IV argues that employers and insurers can avoid knowingly breaking federal law by reimbursing the cost of the cannabis as an out-of-pocket expense.[17]

Part IV reasons that CRB cases *Petrini* and *Caye* provide the reviewing court strong footing to rule on the side of workers. Part IV also examines a CT Superior Court case and a District of Connecticut case, both finding that the CSA did not preempt PUMA's anti-discrimination employment

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[13] Caye v. Thyssenkrupp Elevator, No. 6296 CRB-1-18-11, 2019 WL 6168483, at *1, *11 (Conn. Workers' Comp. Comm'n Rev. Div. Oct. 29, 2019).

[14] *Medical Marijuana Update:* Caye v. Thyssenkrupp Elevator, HALLORAN SAGE (Dec. 6, 2019), http://halloransage.com/news/medical-marijuana-update-caye-v-thyssenkrupp-elevator/.

[15] *Caye*, 2019 WL 6168483, at *1.

[16] *See* CONN. GEN. STAT. § 31-294d(a)(1) (2019) (describing the employer's obligation to pay for reasonable or necessary medication). The statutory standard is "reasonable *or* necessary," however, many trial commissioners describe this statutory requirement as reasonable *and* necessary, even using both conjunctions within the same opinion. *See, e.g.*, *Petrini*, 2016 WL 6659149, at *1, *3 (stating one issue was "whether the claimant's use of medical marijuana . . . constitutes reasonable *and* necessary medical treatment," and later stating "[t]he trial commissioner noted that '[u]nder our law, reasonable *or* necessary medical care is that which is curative or remedial") (emphasis added). Throughout this Note, I sometimes describe medical cannabis as "reasonable *and* necessary" medication in order to emphasize how medical cannabis is often both, although the treatment need only be reasonable *or* necessary under the law. *See* Lionetti v. Messineo, L.L.C., No. 6207 CRB-7-17-7, 2019 WL 3934753, at *1, *9 (Conn. Workers' Comp. Comm'n Rev. Div. June 7, 2019) (holding that, since the proposed operation was reasonable, it satisfied the requirement of § 31-294d(a)(1)).

[17] *Caye*, 2019 WL 6168483, at *9.

provision,[18] and how the reasoning in these decisions might inform preemption issues in the workers' compensation context. Lastly, Part IV observes how other states have approached the issue of compelling workers' compensation carriers to reimburse medical cannabis and how these opinions may inform how Connecticut should answer this question.

Accordingly, the CT Appellate Court and Supreme Court has vast legal support to affirm the CRB's basic holding that workers' compensation carriers should reimburse claimants for the cost of medical cannabis. In addition to the legal reasoning set forth in this Note, the CT Appellate or Supreme Court should rule on the side of workers as a matter of public interest. Right now, the opioid epidemic is far from over, and, as a result, hundreds of Connecticut residents' lives continue to be cut short.[19] Although increasing workers' compensation coverage for medical cannabis is not a cure-all solution to the epidemic, increasing access to an effective, less deadly alternative is a step in the right direction.

I. THE OPIOID CRISIS AND POSSIBLE SOLUTIONS

Millions of Americans are prescribed opioids to treat moderate-to-severe pain for varying health conditions, such as recent surgery, injury, or chronic pain.[20] Opioid-based medications are also one of the most common treatments for injured workers.[21] As many of us know through personal experience or from observing the news, "the dangers of prescription misuse, opioid use disorder, and overdose have been a growing problem throughout the United States."[22] Since the 1990s, the number of opioids prescriptions has increased and consequently, the number of overdoses and deaths from prescription opioids has also increased.[23] For example, in the United States, "[f]rom 1999 to 2019, more than 247,000 people died . . . from overdoses involving prescription opioids."[24]

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[18] Smith v. Jensen Fabricating Eng'rs, Inc., HHDCV186086419, 2019 WL 1569048, at *1, *4 (Conn. Super. Ct. 2019); Noffsinger v. SSC Niantic Operating Co., 273 F. Supp. 3d 326, 330 (D. Conn. 2017); *see also* CONN. GEN. STAT. § 21a-408p(b)(3) (2012) (stating that "[u]nless required by federal law or required to obtain federal funding . . . [n]o employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient").

[19] *See* Nicole Leonard, *Connecticut Drug Overdose Deaths Up, with Fentanyl Leading Fatalities*, CT MIRROR (Feb. 17, 2020), https://ctmirror.org/2020/02/17/connecticut-drug-overdose-deaths-up-with-fentanyl-leading-fatalities/ (detailing that "[t]he number of people who died in Connecticut from drug overdoses in 2019 was the most the state has recorded in a single year" and, of the 1,200 fatalities,"[o]pioids . . . were involved in 94% of all cases").

[20] *Opioids: Prescription Opioids*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/opioids/basics/prescribed.html (last reviewed Aug. 29, 2017).

[21] Laurie Jirak, *DLI Not Blowing Smoke: Medical Marijuana Valid Workers' Comp Expense*, 25 MINN. EMP. L. LETTER 1, 1 (2015).

[22] *Drug Overdose: Overview*, *supra* note 3.

[23] *Id.*

[24] *Id.*

Thankfully, "[o]pioid misuse has declined in recent years at the same time that cannabis use has been increasing, with many states liberalizing marijuana laws."[25] Although medical cannabis is a divisive issue, people on both sides of the debate agree that studies are needed to address the possible "medical benefits, safety, and dosing of marijuana, so that we can use it for difficult-to-manage diseases, such as opiate addiction and chronic pain."[26] The systematic reviews completed thus far show that cannabis can help reduce pain, at least for some conditions.[27] For example, a systematic review examining cannabinoids in the treatment of chronic non-cancer pain found that cannabinoids are safe and modestly effective in neuropathic pain and found preliminary evidence of efficacy in rheumatoid arthritis.[28] Many injured workers experience neuropathic pain and are diagnosed with rheumatoid arthritis. For example, carpal tunnel syndrome is a common diagnosis among injured workers, most of whom experience neuropathic pain.[29]

The National Academies of Sciences, Engineering, and Medicine released a similar report in 2017 that "found evidence to support that patients who were treated with cannabis or cannabinoids were more likely to experience a significant reduction in pain symptoms."[30] Accordingly, many injured workers who might seek out or are prescribed opioid painkillers to treat their pain could use medical cannabis instead—a drug that has proven to be far less addictive than opioid prescriptions.[31] Several studies have even linked legal cannabis programs to lower rates of opioid overdoses, indicating

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[25] Frakt, *supra* note 5.

[26] Peter Grinspoon, *Access to Medical Marijuana Reduces Opioid Prescriptions*, HARV. HEALTH PUBL'G: HARV. HEALTH BLOG (June 25, 2019, 9:34 AM), https://www.health.harvard.edu/blog/access-to-medical-marijuana-reduces-opioid-prescriptions-2018050914509.

[27] Frakt, *supra* note 5.

[28] Mary E. Lynch & Fiona Campbell, *Cannabinoids for Treatment of Chronic Non-Cancer Pain; A Systematic Review of Randomized Trials*, 72 BRIT. J. CLINICAL PHARMACOLOGY 735, 735, 737 (2011) ("Cannabinoids studied included smoked cannabis . . . . Chronic non-cancer pain conditions included neuropathic pain, fibromyalgia, [and] rheumatoid arthritis . . . . The majority (15 trials) demonstrated a significant analgesic effect for the cannabinoid agent being investigated.").

[29] Keith T. Palmer, *Carpal Tunnel Syndrome: The Role of Occupational Factors*, 25 BEST PRAC. & RSCH. CLINICAL RHEUMATOLOGY 15, 15 (2011). *See also* Matthew Varacallo & Denise K. Knoblauch, *Occupational Injuries and Workers' Compensation Management Strategies*, STATPEARLS ("The upper extremity is the most common location for work-related injuries. Common musculoskeletal injuries that can occur in association with occupational demands include . . . carpal tunnel syndrome. [Carpal tunnel syndrome] is associated with overuse of the hands and wrists and forceful, repetitive gripping requirements.") (last updated July 18, 2021); Justin O. Sevy & Matthew Varacallo, *Carpal Tunnel Syndrome*, STATPEARLS ("Carpal tunnel syndrome (CTS) is an entrapment neuropathy caused by compression of the median nerve as it travels through the wrist's carpal tunnel . . . . Early symptoms . . . include pain . . . .") (last updated Sept. 10, 2021).

[30] *Health Effects of Marijuana and Cannabis-Derived Products Presented in New Report*, NAT'L ACADS. SCIS., ENG'G & MED. (Jan. 12, 2017), https://www.nationalacademies.org/news/2017/01/health-effects-of-marijuana-and-cannabis-derived-products-presented-in-new-report.

[31] The CDC explains that "about 1 in 10 marijuana users will become addicted," while "one in four patients receiving long-term opioid therapy in a primary care setting struggles with opioid addiction." *Marijuana and Public Health: Is It Possible for Someone to Become Addicted to Marijuana?*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/marijuana/faqs/marijuana-addiction.html (last reviewed Mar. 7, 2018); *Opioids: Prescription Opioids*, *supra* note 20.

that access to cannabis can mitigate the opioid epidemic.[32] For example, "[a]ccording to two studies recently published in *JAMA Internal Medicine*, the rate of opiate prescriptions is lower in states where medical marijuana laws have been passed."[33]

Although these systematic reviews and studies have provided hopeful information about the use of medical cannabis in an effort to reduce opioid misuse and overdoses, no studies prove a direct causation. The 2014 JAMA study pointed out that their findings do not prove that medical cannabis liberalization causes lower opioid-related mortality.[34] Further, it is very difficult to know the true effectiveness of medical cannabis because of the research barriers in the United States.[35] Specifically, "regulatory barriers, including the classification of cannabis as a Schedule I substance, impede the advancement of research."[36] Notwithstanding this research barrier, numerous studies have established the effectiveness of medical cannabis for pain control. This fact, taken together with knowledge that medical cannabis is far safer than opioids as it is impossible to overdose on cannabis and it is far less addictive, leads to the sensible conclusion that medical cannabis is an effective alternative to opioids.[37]

II. FEDERAL LAW AND STATE LAW OVERVIEW

A. *The Controlled Substance Act and Executive Enforcement*

The Controlled Substance Act is the main federal statute regulating the possession and use of certain substances, including cannabis.[38] The CSA was signed into law by President Nixon in 1970 and was designed "to conquer drug abuse and to control the legitimate traffic in controlled substances."[39] The CSA places all substances into one of five schedules, which are primarily "based on the substance's potential for abuse, safety, and dependence."[40] Schedule I substances, generally, are substances that "have

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[32] Marijuana Moment, *Marijuana Dispensaries Reduce Local Opioid Overdose Rates, Study Finds*, BOS. GLOBE (Nov. 28, 2018, 2:34 PM), https://www.bostonglobe.com/news/marijuana/2018/11/28/marijuana-dispensaries-reduce-local-opioid-overdose-rates-study-finds/KH1Y1SGfFFFm7ZcyvRuwhM/story.html. *See also* Marcus A. Bachhuber, Brendan Saloner, Chinazo O. Cunningham & Colleen L. Barry, *Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999–2010*, 174 JAMA INTERNAL MED. 1668, 1669–70 (2014) (explaining that states that have implemented medical marijuana laws have about a twenty-five percent lower annual rate of opioid overdose deaths than states without medical marijuana laws).

[33] Grinspoon, *supra* note 26.

[34] Frakt, *supra* note 5.

[35] J. Herbie DiFonzo & Ruth C. Stern, *Divided We Stand: Medical Marijuana and Federalism*, 27 HEALTH L. 17, 17 (2015).

[36] NAT'L ACADS. SCIS., ENG'G & MED., *supra* note 30.

[37] Peter Grinspoon, *Medical Marijuana*, HARV. HEALTH PUBL'G: HARV. HEALTH BLOG (Apr. 10, 2020), https://www.health.harvard.edu/blog/medical-marijuana-2018011513085.

[38] 21 U.S.C. § 801 (2018).

[39] Susan K.H. Conley & Jeffrey M. Markowitz, *Pot for Pain: A Courtroom Conundrum in Workers' Compensation*, 61 DRI FOR DEF. 46, 47 (2019) (citing Gonzales v. Raich, 545 U.S. 1, 12 (2005)).

[40] *Id.*; 21 U.S.C. § 812 (2018).

a high potential for abuse, for which there is no currently accepted medical use" in treatment in the U.S.[41] Moreover, in the federal government's opinion, "[t]here is a lack of accepted safety for use of the [Schedule I] drug or other substance under medical supervision."[42]

Despite the evidence that medical cannabis is an effective option for pain management, the CSA prohibits cannabis as a Schedule I drug, alongside drugs such as heroin and MDMA (ecstasy).[43] Thus, the CSA makes it a crime "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" cannabis knowingly or intentionally.[44] The CSA further criminalizes "knowingly or intentionally . . . possess[ing] a controlled substance."[45] Under the CSA, federal prosecution can be directed against a principal, which is defined as any individual who "commits an offense against the United States or *aids, abets*, counsels, commands, induces or procures its commission."[46]

Unfortunately, the CSA imposes harsh criminal penalties for Schedule I substances, including "prison sentences of ten or even twenty years in extreme cases, in addition to stiff fines."[47] "Of particular concern to employers and workers' compensation insurers, those penalties are not reserved for principal actors."[48] Instead, the CSA extends the same penalties

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[41] 21 U.S.C. § 812 (2018); Conley & Markowitz, *supra* note 39, at 47.

[42] 21 U.S.C. § 812(b)(1)(C) (2018); Conley & Markowitz, *supra* note 39, at 47.

[43] 21 U.S.C. § 812(c) (2018) (describing the schedules of controlled substances and specifically indicating that "marihuana" is classified as Schedule I); Conley & Markowitz, *supra* note 39, at 47. It is important to note, however, that the U.S. Food and Drug Administration (FDA) "recognizes the potential opportunities that cannabis or cannabis-derived compounds may offer" and, in 2018, the FDA approved Epidiolex, which contains a purified form of CBD for limited medical treatment. FDA REGULATION OF CANNABIS AND CANNABIS-DERIVED PRODUCTS, INCLUDING CANNABIDIOL (CBD), U.S. FOOD & DRUG ADMIN. (Jan. 22, 2021), https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd; AGATA DABROWSKA, VICTORIA R. GREEN, RENÉE JOHNSON & LISA N. SACCO, CONG. RSCH. SERV., R46189, FDA REGULATION OF CANNABIDIOL (CBD) CONSUMER PRODUCTS: OVERVIEW AND CONSIDERATIONS FOR CONGRESS 6 (2020). The DEA, in response, issued an order placing FDA-approved drugs that contain CBD and no more than 0.1% THC in Schedule V. Schedules of Controlled Substances: Placement in Schedule V of Certain FDA-Approved Drugs Containing Cannabidiol; Corresponding Change to Permit Requirements, 83 FED. REG. 48,950 (Sept. 28, 2018) (to be codified at 21 C.F.R. pts. 1308, 1312). The Agriculture Improvement Act of 2018, otherwise known as the 2018 Farm Bill, also changed "certain federal authorities relating to the production and marketing of hemp . . . . includ[ing] removing hemp from the CSA, which means that cannabis plants and derivatives that contain no more than 0.3 percent THC . . . are no longer controlled substances under federal law." FDA REGULATION OF CANNABIS AND CANNABIS-DERIVED PRODUCTS, INCLUDING CANNABIDIOL (CBD), *supra*.

[44] 21 U.S.C. § 841(a)(1) (2018); 21 U.S.C. § 841(b) (describing the penalties for distribution of controlled substances).

[45] 21 U.S.C. § 844(a) (2018) (describing the penalties for simple possession of controlled substances).

[46] 18 U.S.C. § 2 (2018) (defining principal) (emphasis added); 21 U.S.C. § 854(a) (2018) (referring to a principal within the meaning of § 2 of Title 18); Conley & Markowitz, *supra* note 39, at 49–50. The CSA also provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846 (2018).

[47] Conley & Markowitz, *supra* note 39, at 50 (citing 21 U.S.C. § 841(b) (2018)).

[48] Sue Conley & Jeff Markowitz, *Workers' Compensation for Medical Marijuana? Not So Fast.*, 77 BENCH & BAR MINN. 27, 28 (2020).

to any person who conspires to commit the offense, and anyone who is found to aid or abet is punishable as a principal.[49] Part IV addresses the implications of the CSA general aiding-and abetting provision, specifically, the possibility of federal prosecution against insurance carriers if they cover the cost for medical cannabis.

Starting with President Obama's administration, however, the U.S. Department of Justice (DOJ) has adopted a "hands-off approach" regarding federal enforcement of the CSA in states that legalized or medicalized cannabis.[50] President Obama's DOJ, per three memoranda, established policy guidelines regarding federal prosecution of medical cannabis, namely by advising prosecutors that resources should be directed elsewhere.[51] The August 2013 Cole Memorandum, in particular, provided that "as long as dispensaries, providers, and individuals comply with state law in the distribution and use of medical marijuana, the federal government will not prosecute."[52] On January 4, 2018, Attorney General (AG) Jeff Sessions rescinded these three memos, permitting individual U.S. attorneys "to decide how aggressively to go after marijuana in their jurisdictions" and stating that "the previous issuance of guidance undermines the rule of law."[53] Thankfully, Sessions' tenure as AG only lasted one year,[54] and his replacement, AG William Barr, accepted the Cole Memorandum.[55] In fact, AG Barr testified in his Senate Confirmation Hearing that "removing the federal government from the situation and allowing states to set their own cannabis policy would be an improvement over the present scenario, which . . . [is] an 'intolerable' conflict between federal and state laws."[56]

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[49] *Id. See* 21 U.S.C. § 846 (2018); 18 U.S.C. § 2 (defining a principal).

[50] Laura Jarrett, *Sessions Nixes Obama-Era Rules Leaving States Alone That Legalize Pot*, CNN (Jan. 4, 2018, 5:44 PM), https://www.cnn.com/2018/01/04/politics/jeff-sessions-cole-memo/index.html.

[51] Memorandum from David W. Ogden, U.S. Deputy Att'y Gen., to Selected U.S. Att'ys (Oct. 19, 2009); Memorandum from James M. Cole, U.S. Deputy Att'y Gen., to U.S. Att'ys (June 29, 2011); Memorandum from James M. Cole, U.S. Deputy Att'y Gen., to all U.S. Att'ys (Aug. 29, 2013); Conley & Markowitz, *supra* note 39, at 46; Sarah N. Lynch, *Trump Administration Drops Obama-Era Easing of Marijuana Prosecutions*, REUTERS (Jan. 4, 2018, 9:39 AM), https://www.reuters.com/article/us-usa-justice-marijuana/trump-administration-drops-obama-era-easing-of-marijuana-prosecutions-idUSKBN1ET1MU.

[52] Conley & Markowitz, *supra* note 39, at 47 (citing Memorandum from James M. Cole (Aug. 29, 2013), *supra* note 51).

[53] Ryan Lucas, *Attorney General Rescinds Obama-Era Marijuana Guidelines*, NPR (Jan. 4, 2018, 12:52 PM), https://www.npr.org/2018/01/04/575679429/attorney-general-rescinds-obama-era-marijuana-guidelines.

[54] *See Attorney General: Jeff Sessions*, U.S. DEP'T OF JUST. (Nov. 8, 2018), https://www.justice.gov/ag/bio/attorney-general-jeff-sessions (explaining that AG Sessions served for one year, from 2017–2018).

[55] Sara Brittany Somerset, *Attorney General Barr Favors a More Lenient Approach to Cannabis Prohibition*, FORBES (Apr. 15, 2019, 5:00 AM), https://www.forbes.com/sites/sarabrittanysomerset/2019/04/15/attorney-general-barr-favors-a-more-lenient-approach-to-cannabis-legalization/#597ca3ecc4c8.

[56] *Id.* AG Bar, however, allegedly directed "the Justice Department's Antitrust Division to carry out investigations into 10 marijuana mergers out of personal animus for the industry." Kyle Jaeger, *Biden AG Stresses that Marijuana Use in Legal States is Not a Justice Department Priority*, MARIJUANA MOMENT (May 4, 2021), https://www.marijuanamoment.net/biden-ag-stresses-that-marijuana-use-in-legal-states-is-not-a-justice-department-priority/.

President Biden's U.S. AG, Merrick Garland, is expected to continue this hands-off approach.[57] For example, AG Garland has "reaffirmed that he does not feel the [DOJ] should be using its limited recourses to go after people using marijuana in compliance with state law."[58] However, "[i]t's not clear if the [DOJ] will issue a new cannabis prosecution guidance memo under Garland."[59] Nonetheless, "[t]he belief is that Garland's confirmation could potentially usher in a more marijuana-friendly Department of Justice than existed in the Trump Administration."[60] For example, unlike his predecessors, AG Garland recognized that "criminalizing the use of marijuana has contributed to mass incarceration and racial disparities in our criminal justice system."[61] Accordingly, although "Garland 'did not explicitly state a position on efforts to make cannabis legal,' the one-time federal judge's other marijuana positions give [industry trade groups] a lot of hope."[62] Additionally, President Biden nominated, and the Senate subsequently confirmed, civil rights advocates Vanita Gupta for Associate AG, and Kristen Clarke for Assistant AG for the Department's Civil Rights Division, both of whom expressed explicit support of cannabis legalization.[63] "Together, the picks could have far-reaching implications for marijuana policy . . . . [and] can be viewed as encouraging from an advocacy standpoint."[64]

Congress is in the real power position to finally end the federal prohibition of medical cannabis. Still, "[a]s Attorney General, Garland would be in a position to unilaterally initiate a petition to reschedule cannabis. As head of the Justice Department, under which DEA is organized, he would also have considerable influence of the agency's scheduling and enforcement policies when it comes to marijuana."[65] Accordingly, it will be important to observe AG Garland's statements and actions regarding cannabis reclassification, including his response to Senator Warren and Senator Booker's letter calling on him to "initiate a descheduling process."[66]

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[57] Jaeger, *supra* note 56.

[58] *Id.*

[59] *Id.*

[60] John Schroyer, *Garland's Confirmation As AG Could Change Feds' Marijuana Views*, MARIJUANA BUS. DAILY (March 23, 2021), https://mjbizdaily.com/garland-confirmation-as-attorney-general-could-change-feds-marijuana-views/.

[61] Jaeger, *supra* note 56.

[62] Schroyer, *supra* note 59.

[63] Kyle Jaeger, *Biden AG Pick Merrick Garland Wants to Defer to DEA on Marijuana Science and Classification*, MARIJUANA MOMENT (Jan. 7, 2021), https://www.marijuanamoment.net/biden-ag-pick-merrick-garland-wants-to-defer-to-dea-on-marijuana-science-and-classification/; Jason Breslow, *Civil Rights Attorney Vanita Gupta Confirmed As Associate Attorney General*, NPR (Apr. 21, 2021, 6:29 PM), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/21/989599055/civil-rights-attorney-vanita-gupta-confirmed-as-associate-attorney-general; Sarah N. Lynch, *U.S. Senate Confirms Kristen Clarke As Top Justice Dept. Civil Rights Lawyer*, REUTERS (May 26, 2021, 5:45 AM), https://www.reuters.com/world/us/us-senate-confirms-kristen-clarke-top-justice-dept-civil-rights-lawyer-2021-05-25/.

[64] Jaeger, *supra* note 63.

[65] *Id.*

[66] Kyle Jaeger, *Senators Push U.S. Attorney General To Decriminalize Marijuana 'Now' As Congress Debates Reform Bills*, MARIJUANA MOMENT (Oct. 8, 2021), https://www.marijuanamoment.

Nonetheless, cannabis users, business owners, and, as this Note argues, workers' compensation respondents in states that have medicalized cannabis can take solace in knowing that AG Garland is expected to continue the DOJ's hands-off policy and will respect state cannabis programs.[67]

B. *Pending Federal Legislation*

Congress has introduced numerous cannabis reform bills, including legalization and rescheduling of cannabis. However, most of these bills have either failed or stalled in committee.[68] Recently, the U.S. House of Representatives (House) has re-introduced the Marijuana Opportunity Reinvestment and Expungement Act of 2021 (the MORE Act), which would "remove cannabis from the CSA and expunge cannabis convictions. In addition, this Act would bring in federal tax revenue . . . [and] [t]his tax revenue would fund the federal Opportunity Trust Fund to be used for community reinvestment."[69]

> A similar measure was [recently] introduced in the Senate as the Cannabis Administrative Opportunity Act ('CAOA'). Similar to the MORE Act, CAOA would decriminalize and deschedule marijuana federally. While CAOA recognizes state law as controlling the possession, production and distribution of cannabis, the law would preempt states from interfering with interstate commerce where a lawful cannabis delivery requires transport through the state's borders.[70]

Unfortunately, these two more expansive bills do not have broad bi-partisan support.[71]

A narrower bill, known as the SAFE Banking Act,

> would offer protection to financial institutions that do business with state-licensed marijuana businesses and would otherwise be subject to prosecution for 'aiding or abetting' the violation of federal drug and money laundering laws. . . It has already passed the House five times in various forms . . . with 106 Republicans in support."[72]

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net/senators-push-u-s-attorney-general-to-decriminalize-marijuana-now-as-congress-debates-reform-bills/.

[67] Jaeger, *supra* note 56.

[68] Conley & Markowitz, *supra* note 39, at 47.

[69] Alex Malyshev & Sarah Ganley, *Reading the Tea Leaves: What Might Federal Legalization of Marijuana Look Like?*, REUTERS (Nov. 15, 2021, 10:14 AM), https://www.reuters.com/legal/litigation/reading-tea-leaves-what-might-federal-legalization-marijuana-look-like-2021-11-15/.

[70] *Id.*

[71] *Id.*

[72] Mike DeBonis, *Democratic Divide Puts Congressional Action on Marijuana In Doubt*, WASH. POST (Nov. 18, 2021, 6:00 AM), https://www.washingtonpost.com/politics/marijuana-democrats-legalize/2021/11/17/61dd37b4-47b3-11ec-95dc-5f2a96e00fa3_story.html.

Lawmakers are pushing

> to attach the narrower banking legislation to the must-pass annual defense policy bill, which would ensure ts passage in the coming months. . . . That push has hit a roadblock in the Senate, however, where [certain democratic senators], who are seeking to assemble [the CAOA] . . . . Passing the narrower bill, they argue, would make passing their broader bill more difficult.[73]

Although the broader bills introduced by democratic lawmakers are not receiving as much bipartisan support, republicans have supported efforts to ensure states have control over cannabis legislation.[74]

Recently, "the first federal bill to legalize marijuana from a Republican was introduced. Its conservative roots are expected to give it better prospects in the Senate, unlike the Democratic proposals that preceded it . . . ."[75] As Congresswoman Nancy Mace, who introduced the States Reform Act, makes clear "cannabis is an issue that is truly bipartisan; it's overwhelmingly supported by Republicans and Democrats alike."[76] Congresswoman Mace also explained how she became more open to cannabis based on her own personal experiences, including having "family that have overdosed from hardcore opiates and prescription drugs."[77] Accordingly, the bipartisan support of cannabis decriminalization and President Biden's own support of federal decriminalization[78] provide particular hope that either the States Reform Act or a similar bill will pass sooner rather than later.

C. *Federal Funding*

Ideally, Congress will soon pass cannabis legislation aimed at ending this federal-state conflict so that those complying with their state cannabis laws do not have to fear federal prosecution. In the meantime, "[s]ince December 2014, there has been a provision in the federal budget that, generally stated, denies funds to the U.S. Department of Justice (the DOJ) to prosecute conduct that is in compliance with state medical-marijuana

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[73] *Id.*

[74] Last year, a bill called the STATES Act, which would amend the CSA so that its provisions no longer apply to any person acting in compliance with State or tribal laws, received bi-partisan support, including both Republican and Democratic original co-sponsors. See STATES Act, H.R. 2093, 116th Cong. §§ 1–6 (2019) (the House version had sixty-five cosponsors, including both republican and democratic original cosponsors); Strengthening the Tenth Amendment Through Entrusting States Act, S. 1028, 116th Cong. §§ 1–6 (2019) (the Senate version was introduced by both Republican Senator Cory Gardner and had nine cosponsors). These bills have not been re-introduced in the 117th congressional session.

[75] Tiffany Kary, A Republican Congresswoman's Formative Moment With Marijuana, BLOOMBERG (Nov. 22, 2021, 7:00 AM), https://www.bloomberg.com/news/newsletters/2021-11-22/republican-nancy-mace-came-to-cannabis-after-a-personal-tragedy.

[76] *Id.*

[77] *Id.*

[78] Tim Craig, *Biden, Once a Warrior in the 'War on Drugs,' May Slowly Retreat*, WASH. POST (Jan. 11, 2021, 8:00 AM), https://www.washingtonpost.com/politics/2021/01/11/biden-war-on-drugs/.

law."[79] This rider, known as the Rohrabacher-Farr Amendment, thus prohibits the DOJ from using funds "to interfere with the implementation of state medical marijuana laws."[80] The rider has been renewed in each appropriations bill since 2014, including in the Fiscal Year 2021 spending legislation, which former President Trump signed into law on December 27, 2020.[81]

Thus, through September 30, 2021, medical cannabis users and business owners in the thirty-six states that have medicalized cannabis have some level of protection against DOJ prosecution for conduct that is in compliance with their state laws.[82] Accordingly, even during the Trump presidency and a Republican-controlled Senate, the legislature took steps to ensure that federal resources would not be wasted on prosecuting people and businesses who are in compliance with their states' medical cannabis laws.[83]

D. *State Law and the Preemption Doctrine*

Despite federal law, the majority of states in the U.S. have either legalized medical cannabis or decriminalized cannabis.[84] As of December 2021, thirty-six states, the District of Columbia, Guam, Puerto Rico, and U.S. Virgin Islands passed laws legalizing some form of medicinal cannabis use.[85] An additional twelve states passed laws that allow the "use of 'low-THC, high cannabidiol (CBD)' products for medical reasons in limited

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[79] Zachary S. Roman, *Tenth Circuit Decision Clears the Way for Further Judicial Consideration of Application of Recently Re-Enacted Rohrabacher-Farr Amendment*, REEDSMITH (Dec. 27, 2019), https://www.reedsmith.com/en/perspectives/2019/12/tenth-circuit-decision-clears-the-way-for-further-judicial-consideration.

[80] Conley & Markowitz, *supra* note 39, at 46; Roman, *supra* note 79.

[81] Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 531, 134 Stat. 1182, 1282-83 (2020); Seung Min Kim, Jeff Stein, Mike DeBonis & Josh Dawsey, *Trump Signs Stimulus and Government Spending Bill into Law, Averting Shutdown*, WASH. POST. (Dec. 27, 2020, 9:34 PM), https://www.washingtonpost.com/us-policy/2020/12/27/trump-stimulus-shutdown-congress/; Kyle Jaeger, *Congressional Funding Bill Restores Financial Aid for Students with Drug Convictions, and Has Other Marijuana Provisions*, MARIJUANA MOMENT (Dec. 21, 2020), https://www.marijuanamoment.net/congressional-funding-bill-restores-financial-aid-for-students-with-drug-convictions-and-has-other-marijuana-provisions/ [hereinafter *Congressional Funding*] ("The new appropriations and COVID relief legislation also contains . . . the extension of a longstanding rider protecting legal medical marijuana programs from federal interference . . . .").

[82] Jaeger, *Congressional Funding*, *supra* note 81; Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 531, 134 Stat. 1182, 1282-83 (2020).

[83] President Trump, however, ensured to include in his signing statements for the 2017, 2018, and 2019 appropriation bills that his "[a]dministration will treat [the Rohrabacher-Farr] provision consistent with the President's constitutional responsibility to faithfully execute the laws of the United States." Tom Angell, *Trump Says He Can Ignore Medical Marijuana Protections Passed by Congress*, FORBES (Dec. 21, 2019, 10:40 AM), https://www.forbes.com/sites/tomangell/2019/12/21/trump-says-he-can-ignore-medical-marijuana-protections-passed-by-congress/#d96d7e64256f. Arguably, "[b]y calling out the medical marijuana rider, Trump [was] making clear that his administration . . . [could] broadly enforce federal drug laws against people complying with state medical marijuana laws even though Congress told him not to." *Id.* However, the Trump administration did not carry "out any major enforcement activities against state-legal marijuana businesses [while in] office." *Id.*

[84] *State Medical Marijuana Laws*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last visited Dec. 19, 2021).

[85] *Id.*

situations or as a legal defense."[86] Eighteen states, the District of Columbia, Guam, and Northern Mariana Islands passed legislation that legalizes recreational adult use of cannabis.[87] Consequently, as of December 2021, only two states, Idaho and Nebraska, have not legalized cannabis or low-THC CBD products for medical reasons or as a legal defense.[88] Nebraska, however, partially decriminalized cannabis, allowing first-time offenders arrested for possession of one ounce or less to face no jail time but pay an infraction.[89] An additional twenty-six states, and the District of Columbia, have wholly or partially decriminalized cannabis possession offenses.[90] The CSA, however, *fully criminalizes* cannabis in any amount or form and thus does not recognize the difference between medical and recreational use.[91] Accordingly, forty-nine states, the District of Columbia, and four U.S. territories all passed laws that possibly conflict with the CSA.

This federal-state conflict presents the issue of federal preemption, or more specifically, whether the CSA preempts many of these states' laws regulating cannabis. The preemption doctrine is derived from the Supremacy Clause, which states that, "the laws of the United States . . . shall be the supreme law of the land," giving federal law precedence over state law.[92] The case law that has developed the preemption doctrine instructs that there are two main types of preemption: express and implied.[93] State laws are often challenged on the grounds of implied preemption, and more specifically, a type of implied preemption called conflict preemption.[94] "When the state law is drafted in such a way that it becomes impossible to comply simultaneously with both the state and federal laws, it is recognized

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[86] *Id.* Kansas is the twelfth state to decide that under its medical CBD law, "qualifying patients with a written recommendation from a physician possess only 'an affirmative defense to prosecution' with regard to the possession of qualifying CBD products," which may include CBD products with less than 5% THC. *Kansas Medical CBD Law*, NORML, https://norml.org/laws/kansas-medical-cbd-law (last visited Feb. 3, 2021).

[87] *State Medical Marijuana Laws*, *supra* note 84.

[88] *Id.*; *Kansas Medical CBD Law*, *supra* note 86.

[89] *Nebraska Laws and Penalties*, NORML, https://norml.org/laws/item/nebraska-penalties-2 (last visited Jan. 31, 2021).

[90] *Decriminalization*, NORML, https://norml.org/laws/decriminalization/ (last visited Dec. 19, 2021).

[91] *See* 21 U.S.C. § 812(c), sched. I(c)(10) (2018) (indicating, specifically, that "marihuana" is classified as Schedule I); *Federal Laws and Penalties*, NORML, https://norml.org/laws/federal-penalties-2/ (last visited Jan. 31, 2021) (detailing that possession of "any amount" of cannabis carries a one-year incarceration sentence).

[92] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."); *see* Gonzales v. Raich, 545 U.S. 1, 29 (2005) ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.").

[93] Conley & Markowitz, *supra* note 39, at 47. *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 884 (2000) ("[T]his Court traditionally distinguishes between 'express' and 'implied' pre-emptive intent . . . .").

[94] Conley & Markowitz, *supra* note 39, at 47; *see Geier*, 529 U.S. at 884 ("[T]his Court traditionally . . . treats 'conflict' pre-emption as an instance of [implied pre-emptive intent].").

as 'conflict preemption.'"[95] In other words, the Supremacy Clause, and by extension the preemption doctrine, dictates that when federal law conflicts with state law, federal law prevails.[96]

The CSA dictates that state laws are preempted if there is a "positive conflict."[97] Similarly, multiple state courts have held that the state law is preempted when the two laws cannot consistently stand together.[98] State courts, however, are divided when interpreting this provision in cases involving cannabis.[99] For example, courts in Colorado, New Mexico, Maine, and Oregon have held that their state provisions were preempted by the CSA.[100] Specifically, the Supreme Court of Oregon found that the state provision legalizing possession of cannabis presented an obstacle to enforcement of the CSA, thereby creating a conflict.[101] On the other hand, Arizona, California, and Michigan "courts have held that the laws decriminalizing medical marijuana did not pose an obstacle to the federal enforcement of federal law," and, thus, state law was not preempted by the CSA.[102]

In 2005, the U.S. Supreme Court took up the issue of federal preemption as it relates to state cannabis law in *Gonzales v. Raich*.[103] Angel Raich and Diane Monson were prescribed cannabis for numerous ailments, including for relief from severe, chronic pain.[104] Although Raich and Monson's use of the medical cannabis was legal under California's Compassionate Care Act,

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[95] Conley & Markowitz, *supra* note 39, at 47.

[96] *Id.*

[97] 21 U.S.C. § 903 (2018) ("No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, *unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together*.") (emphasis added).

[98] Conley & Markowitz, *supra* note 39, at 48; *see* Kevin D. Caton, Annotation, *Preemption of State Regulation of Controlled Substances by Federal Controlled Substances Act*, 60 A.L.R.6th 175 § 2 (2010) ("This annotation collects and analyzes the cases regarding whether there is preemption of state regulation of controlled substances by the Federal Controlled Substances Act.").

[99] Conley & Markowitz, *supra* note 39, at 48; Caton, *supra* note 98, at § 2.

[100] *See* Caton, *supra* note 98, at § 3 (discussing and analyzing cases in Colorado, New Mexico, and Maine that held the state laws were preempted by the CSA); People v. Crouse, 388 P.3d 39, 43 (Colo. 2017) (holding that the medical marijuana amendment was preempted by the CSA and rendered void); Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225, 1225 (D.N.M. 2016) (holding that the "Controlled Substances Act . . . preempted interpretation [of the] CUA [the state cannabis law] . . . as requiring [the] employer to accommodate [the] employee's use of medical marijuana"); Bourgoin v. Twin Rivers Paper Co., 187 A.3d 10, 10 (2018) (holding "that the federal . . . [CSA] precluded, due to conflict preemption, application of the Maine Medical Use of Marijuana Act (MMUMA) as a predicate for compelling [the] employer to reimburse [the] claimant for medical marijuana"); Emerald Steel Fabricators v. Bureau of Lab. & Indus., 230 P.3d 518, 518 (Or. 2010) (holding that the "provision of Oregon Medical Marijuana Act affirmatively authorizing the use of medical marijuana was preempted by Federal [CSA], which explicitly prohibited marijuana use with regard to medicinal purpose").

[101] Caton, *supra* note 98, at § 3; *Emerald Steel Fabricators*, 230 P.3d at 528–29.

[102] Conley & Markowitz, *supra* note 39, at 48; Reed-Kaliher v. Hoggatt, 332 P.3d 587, 591–92 (Ariz. Ct. App. 2014), *aff'd*, 347 P.3d 136 (Ariz. 2015); Qualified Patients Ass'n v. City of Anaheim, 187 Cal. App. 4th 734 (Cal. Ct. App. 2010); Ter Beek v. City of Wyoming, 846 N.W.2d 531, 537–41 (Mich. 2014).

[103] Gonzales v. Raich, 545 U.S. 1, 29 (2005); DiFonzo & Stern, *supra* note 35, at 19.

[104] *Raich*, 545 U.S. at 6–7; DiFonzo & Stern, *supra* note 35, at 19.

their actions were illegal under federal law.[105] Thus, they "sued the federal government seeking declaratory and injunctive relief to prevent the federal government from interfering with [their] [prescription for cannabis] and prosecuting [them] under the CSA."[106] The U.S. Supreme Court upheld the CSA as constitutionally permissible under the Commerce Clause power, finding that California and eight other similar state laws legalizing Monson and "Raich's conduct had no impact . . . on federal law enforcement."[107] However, the Court also found that the CSA did not invalidate the contrary California state law.[108]

At the appellate level, the Eighth Circuit recently upheld the Minnesota District Court's finding that a criminal defendant's "use of marijuana—even for medical purposes—contravenes federal law" under the CSA.[109] The court stated, "[a]lthough some medical marijuana is legal in Minnesota as a matter of state law, the state's law conflicts with federal law."[110] Consequently, the court concluded that "the district court had no discretion to allow [the defendant] to use medical marijuana while on supervised release," even though the defendant's "physician prescribed him medical marijuana for chronic pain."[111]

Today, the Justice Department generally declines to enforce the CSA "when a person or company buys or sells marijuana in accordance with state law."[112] "Congress reinforce[s] this arrangement" through its reenactment of the Rohrabacher-Farr Amendment each year.[113] The Ninth Circuit provided that, at a minimum, the Rohrabacher-Farr 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."[114] However, the Ninth Circuit also cautioned that Congress could restore funding next year, and the Rohrabacher-Farr Amendment "does not provide immunity from prosecution for federal marijuana offenses."[115] This is the current status of

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[105] *Raich*, 545 U.S. at 7; DiFonzo & Stern, *supra* note 35, at 19.
[106] DiFonzo & Stern, *supra* note 35, at 19; *Raich*, 545 U.S. at 1.
[107] DiFonzo & Stern, *supra* note 35, at 19.
[108] *Id.*
[109] United States v. Schostag, 895 F.3d 1025, 1028 (8th Cir. 2018).
[110] *Id.*
[111] *Id.* at 1027–28.
[112] Green Sol. Retail, Inc. v. United States, 855 F.3d 1111, 1114 (10th Cir. 2017).
[113] *Id. See also* Emily Kopp, *States Turn to Unenforced Federal Law to Slow Medical Marijuana Legalization*, ROLL CALL (Mar. 4, 2020, 5:30 AM), *https://www.rollcall.com/2020/03/04/states-turn-to-unenforced-federal-law-to-slow-medical-marijuana-legalization/* ("Since 2014, Congress has protected patients and cannabis programs from federal marijuana prosecutions in states that allow it for medical use.").
[114] United States v. McIntosh, 833 F.3d 1163, 1177 (9th Cir. 2016); Roman, *supra* note 79. *See also* United States v. Gilmore, 886 F.3d 1288, 1290 (9th Cir. 2018) ("Section 538 does not limit the government's ability to enforce federal drug laws on federal land. Rather, as we noted in *McIntosh*, the provision applies narrowly, to those specific rules of state law that 'authorize the use, distribution, possession or cultivation of medical marijuana.'") (citation omitted).
[115] *McIntosh*, 833 F.3d at 1179 n.5; Roman, *supra* note 79.

cannabis law in the United States today, "with the federal government continuing to bury its head in the sand and failing to enact bills to legalize [cannabis]."[116] The lack of stability on this issue complicates workers' compensation coverage for medical cannabis as respondents argue that reimbursing the cost of cannabis would break federal law.[117] Nonetheless, right now there is no indication that Congress will stop passing "stopgap legal protections" for medical cannabis programs.[118] Accordingly, as this Note will develop further below, this speculative risk should not outweigh a claimant's present need for an effective, less deadly pain relief treatment.[119]

III. CONNECTICUT LAW

This Note argues how the CT Appellate Court or Supreme Court should rule regarding workers' compensation coverage for medical cannabis. Accordingly, it is important to first outline the Connecticut's Palliative Use of Marijuana Act and the Connecticut's Workers' Compensation Act. Thereafter, Part III will introduce the two Connecticut Compensation Review Board (CRB) holdings that currently dictate Connecticut's law on workers' compensation coverage for medical cannabis.

A. *PUMA and Connecticut's Workers' Compensation Statute*

Connecticut arguably decided to break federal law by enacting the Palliative Use of Marijuana Act (PUMA) in 2012.[120] "The law permits a qualified patient to purchase and use a limited amount of medical marijuana to manage the symptoms of a debilitating medical condition as enumerated in [the General Statutes of Connecticut section] 21a-408(3)."[121] The CSA illegalizes cannabis in any form and therefore does not recognize the difference between medical and recreational use.[122] Thus, PUMA conflicts with the CSA's prohibition on allowing the possession and distribution of cannabis and arguably conflicts with CSA's prohibition on doctors prescribing cannabis.[123] Lastly, PUMA provides that health insurance

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[116] Conley & Markowitz, *supra* note 39, at 47.

[117] Caye v. Thyssenkrupp Elevator, No. 6296 CRB-1-18-11, 2019 WL 6168483, at *4 (Conn. Workers' Comp. Comm'n Rev. Div. Oct. 29, 2019).

[118] *Id.* at *10.

[119] *Id.*

[120] CONN. GEN. STAT. §§ 21a-408–408v (2020); *Connecticut: Medicinal Marijuana Legalization Measure Signed into Law*, NORML (June 7, 2012), https://norml.org/news/2012/06/07/connecticut-medicinal-marijuana-legalization-measure-signed-into-law.

[121] Abbott, *supra* note 12, at 6; CONN. GEN. STAT. § 21a-408a (2020); *id.* § 21a-408(3). *See Qualification Requirements*, CONN. STATE DEP'T CONSUMER PROT., https://portal.ct.gov/DCP/Medical-Marijuana-Program/Qualification-Requirements (last visited Jan. 31, 2021).

[122] 21 U.S.C. § 812 (2018); Conley & Markowitz, *supra* note 39, at 47.

[123] 21 U.S.C. § 829 (2018) (listing "Prescriptions" as Schedule II, III, IV, and V substances, but not as Schedule I substances); United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001); CONN. GEN. STAT. § 21a-408a(a)(1) (2020). Technically, PUMA allows physicians to issue a written certification to qualifying patients for the palliative use of cannabis "after the physician . . . has prescribed, or determined it is not in the best interest of the patient to prescribe, prescription drugs to

carriers are not required to provide coverage for medical use.[124] However, as discussed in Part IV, the CRB in *Petrini* did not believe that this provision excluded workers' compensation coverage.[125]

The Connecticut's Workers' Compensation Act generally provides that in the event an employee is injured due to a work-related incident, the employer must "provide[] medical care for the compensable condition and limited wage-loss benefits."[126] Often, the question presented is whether "a particular incident or exposure in the course of employment cause[d] the condition at issue, or cause[d] the need for medical treatment at issue."[127] If the answer to this question is yes, then the injury is compensable, and the employer is mandated to provide medical care.[128] Specifically, Connecticut General Statute § 31-294d(a)(1) mandates the employer's obligation to provide medical care for workplace injuries found to be compensable.[129] Section 31-294d(a)(1) further states that the employer is responsible for paying the cost for "prescription drugs, as the physician, or . . . surgeon deems reasonable or necessary."[130] Moreover, § 31-294d(a)(1) provides that "[t]he employer, [or] any insurer acting on behalf of the employer . . . shall be responsible for paying the cost of such prescription drugs directly to the provider."[131] However, claimants have the choice to either "pay prescription expenses themselves and then seek reimbursement, or obtain a prescription card from the adjuster, which will allow the charges to be billed directly to the carrier."[132]

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address the symptoms or effects for which the certification is being issued." *Id.* Thus, the provision seems to indicate that there is a difference between a physician prescribing and certifying medication; however, in practice, there is a strong argument that this certification still conflicts with CSA's prescription prohibition of Schedule I drugs.

[124] CONN. GEN. STAT. § 21a-408o (2020).

[125] Petrini v. Marcus Dairy, Inc., No. 6021 CRB-7-15-7, 2016 WL 6659149, at *5 (Conn. Workers' Comp. Comm'n Rev. Div. May 12, 2016).

[126] 19 ROBERT F. CARTER, DONNA CIVITELLO, JASON M. DODGE, JAMES POMERANZ & LUCAS D. STRUNK, CONNECTICUT PRACTICE SERIES, WORKERS' COMPENSATION § 1:2, Westlaw (database updated Dec. 2020).

[127] *Id.* § 1:11.

[128] *Id.* § 8:2; CONN. GEN. STAT. § 31-294d(a)(1) (2020) ("The employer . . . shall provide a competent physician[] [or] surgeon . . . to attend the injured employee and, in addition, shall furnish any medical and surgical aid . . . including . . . prescription drugs, as the physician, or . . . surgeon deems reasonable or necessary. The employer[] [or] any insurer acting on behalf of the employer . . . shall be responsible for paying . . . .").

[129] § 31-294d(a)(1); CARTER ET AL., *supra* note 126, § 8:2 (citing Vargas v. King-Conn Enters., No. 3333 CRB-4-96-4, 1997 WL 662363, at *2 (Conn. Workers' Comp. Comm'n Rev. Div. Oct. 24, 1997) and § 31-294d(a)(1)).

[130] § 31-294d(a)(1). *See also* CARTER ET AL., *supra* note 126, § 8:5 (discussing the requirement that the employer be liable for all reasonable or necessary treatment ordered by an authorized treating physician).

[131] § 31-294d(a)(1); CARTER ET AL., *supra* note 126, § 8:19.

[132] CARTER ET AL., *supra* note 126, § 8:19 (detailing that there are often challenges in obtaining and using prescription cards, such as limitations on the types of medications that they can be used for and/or the adjuster failing to update the card to reflect changes in medications).

The employer can contest its liability to pay for a particular medical treatment by filing a "Form 43" with the commission.[133] In the event that the "parties dispute whether particular medical treatment is reasonable or necessary, the commissioner is the arbiter."[134] A commissioner, applying the *Bowen* standard,[135] decides what is reasonable or necessary medical care by determining that which is "curative or remedial. Curative or remedial care is that which seeks to repair the damage to health care caused by the job even if not enough health is restored to enable the employee to return to work."[136]

B. *Relevant Case Law: Introducing* Petrini *and* Caye

The CRB case, *Petrini v. Marcus Dairy, Inc.*, was the first case in Connecticut addressing whether the Connecticut Workers' Compensation Commission can order a respondent to pay for medical cannabis.[137] The claimant, Mr. Petrini, was "totally disabled following a failed back surgery."[138] Mr. Petrini took a large number of narcotic and non-narcotic medications for six years, without significant pain relief and with a number of unhealthy side effects.[139] Mr. Petrini asked his authorizing treating physician about medical cannabis, but when that doctor resisted, Mr. Petrini went on his own to one of the three physicians in Connecticut licensed at the time to prescribe medical cannabis.[140] This doctor prescribed Mr. Petrini medical cannabis and, thankfully, he "obtained so much relief that he was able to stop using six of his medications, and rarely used any narcotics."[141]

The treating physician, after observing the results, wrote that "there should be no question of the medical necessity in substituting medical marijuana for opiate medications."[142] The claimant testified "that his functional level and his mood had significantly improved as a result of the medical [cannabis] treatment."[143] The trial commissioner found, based on all available evidence, that the use of medical cannabis "'significantly increased his function, and is remedial in nature.' . . . '[U]nder our law, reasonable or necessary medical care is that which is curative or remedial.'"[144] The trial

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[133] *Id.* § 8:2 ("Where the right to any or a particular medical treatment recommended by the treating physician is contested by the employer, the commissioner may order a commissioner's examination with a medical provider of his or her choice. The commissioner, however, is not obligated to order such an exam to resolve disputed questions of medical treatment.").

[134] *Id.* § 8:5.

[135] *Id.* § 8:15 (citing Bowen v. Stanadyne, No. 232 CRD-1-83, 1984 WL 20298, at *3 (Conn. Workers' Comp. Comm'n Rev. Div. June 19, 1984)).

[136] Petrini v. Marcus Dairy, Inc., No. 6021 CRB-7-15-7, 2016 WL 6659149, at *3 (Conn. Workers' Comp. Comm'n Rev. Div. May 12, 2016).

[137] CARTER ET AL., *supra* note 126, § 8:3; *Petrini*, 2016 WL 6659149, at *1, *5.

[138] CARTER ET AL., *supra* note 126, § 8:3; *Petrini*, 2016 WL 6659149, at *1.

[139] CARTER ET AL., *supra* note 126, § 8:3; *Petrini*, 2016 WL 6659149, at *1.

[140] CARTER ET AL., *supra* note 126, § 8:3; *Petrini*, 2016 WL 6659149, at *2.

[141] CARTER ET AL., *supra* note 126, § 8:3; *Petrini*, 2016 WL 6659149, at *2.

[142] *Petrini*, 2016 WL 6659149, at *2; CARTER ET AL., *supra* note 126, § 8:3.

[143] CARTER ET AL., *supra* note 126, § 8:3; *Petrini*, 2016 WL 6659149, at *3.

[144] *Petrini*, 2016 WL 6659149, at *3.

commissioner also ordered the respondents to pay the cost of the medical cannabis going forward and to reimburse the claimant for his out-of-pocket medical cannabis expenses.[145]

The CRB upheld the trial commissioner's finding that medical cannabis was a reasonable and necessary medical treatment.[146] Thus, "[t]he CRB held . . . that medical marijuana prescribed in accordance with the medical marijuana enabling act will be treated by the Commission like any other prescription medication under the Workers' Compensation Act."[147] The CRB rejected all of respondents' arguments on appeal, including respondents' assertion of "general negative policy implications," which included the public policy argument that cannabis is still classified as a Schedule I substance and is illegal under federal law.[148] The Respondents appealed again to the CT Appellate Court but withdrew the appeal before a decision was rendered.[149]

In *Petrini*, the CRB affirmed the trial commissioner's decision "that the claimant's use of medical marijuana as a substitute for opioids for chronic pain constituted reasonable and necessary medical treatment under" the Workers' Compensation Act.[150] Thus, *Petrini* was arguably a landmark case in Connecticut for injured workers who seek access to medical cannabis as alternative pain relief—at least, it should have been. Some employers and their workers' compensation insurance carriers, however, still resisted paying for medical cannabis because *Petrini* failed to answer the federal preemption issue.[151] Namely, the CRB did not squarely address whether employers or insurance carriers can be mandated to pay or reimburse claimants for medical cannabis because cannabis is illegal under federal law.[152]

Enter *Caye v. Thyssenkrupp Elevator*, where the CRB squarely addressed the question "[d]oes the federal Controlled Substances Act . . . proscribe a state agency from ordering an insurance carrier to pay or reimburse for marijuana prescriptions?"[153] In this case, the insurer appealed from the trial commissioner's order for it to pay for the claimant's medical cannabis prescription and reimburse his expenses for medical cannabis.[154] The respondents argued that the CSA preempts PUMA, and, because the CSA criminalizes aiding and abetting the procurement of cannabis, insurers cannot be ordered by a state court or administrative agency to violate the federal

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[145] *Id.* at *4.
[146] CARTER ET AL. , *supra* note 126, § 8:3; *Petrini*, 2016 WL 6659149, at *4, *11.
[147] CARTER ET AL., *supra* note 126, § 8:3.
[148] *Petrini*, 2016 WL 6659149, at *4, *9.
[149] *Medical Marijuana Update:* Caye v. Thyssenkrupp Elevator, *supra* note 14.
[150] Abbott, *supra* note 12, at 6.
[151] *Id.* at 7.
[152] *Id.*
[153] Caye v. Thyssenkrupp Elevator, 6296 CRB-1-18-11, 2019 WL 6168483, at *1 (Conn. Workers' Comp. Comm'n Rev. Dev. Oct. 29, 2019) (citations omitted).
[154] *Id.*

statute, since doing so would put the insurer at risk of being prosecuted.[155] The claimant, on the other hand, argued that PUMA and the CSA "are not inherently incompatible and that recent federal legislative activity evinces a clear public policy against enforcing the CSA against state medical marijuana programs."[156] The claimant additionally argued that "[c]onsequently, it is implausible for the respondents to assert a credible concern as to being prosecuted should they comply with the commissioner's finding."[157]

The CRB held that the insurer must reimburse the claimant's expenditures for medical cannabis but vacated the order requiring the insurer to pay directly for the medical cannabis.[158] Thus, the CRB differentiated between mandating the respondent to reimburse out-of-pocket expenses and direct payment for the medical cannabis. As the dissent explained, the CRB vacated the trial court's order requiring respondent to make direct payment to the dispensary because "[t]he respondent simply cannot comply with such an order without violating federal law."[159] "The respondent would not only be aiding and abetting the illegal transaction, it could be argued to have induced or procured [the cannabis's] commission."[160] Nonetheless, the CRB affirmed the finding that the insurer should reimburse the claimant for the out-of-pocket expenses partly because the CRB "determine[d] [that] the respondents would not face a material risk of federal prosecution for after-the-fact reimbursement of the claimant's medical marijuana expense."[161]

IV. SUPPORTING CASE LAW FOR REIMBURSEMENT

As of December 2021, the CRB holding in *Caye* is the precedent-setting opinion in Connecticut as to whether respondents are required to pay for a claimant's out of pocket costs for medical cannabis.[162] This Note argues that when the issue of workers' compensation coverage for medical cannabis is inevitably appealed to the CT Appellate or Supreme Court, the reviewing court should find that a workers' compensation respondent should be required to reimburse the cost of medical cannabis. The CT Appellate or Supreme Court could easily rely on the reasoning established in both *Petrini* and *Caye* in order to make this finding. The reviewing court can also find support to side with workers in the holdings of CT Superior Court case,

[155] *Id.* at *4 (arguing "that the CSA makes it illegal to finance a marijuana transaction and, were they to do so, they could be prosecuted under that statute as well as the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. (RICO)").

[156] *Id.* at *1.

[157] *Id.*

[158] *Id.* at *10–11; CARTER ET AL., *supra* note 126, § 8:3.

[159] *Caye*, 2019 WL 6168483, at *13 (Schoolcraft, Comm'r, dissenting).

[160] *Id.*

[161] *Id.* at *1 (majority opinion).

[162] Assuming, of course, the prescription was found reasonable or necessary.

Smith v. Jensen Fabricating Engineers;[163] CT District Court case, *Noffsinger v. SSC Niantic Operating Co.*;[164] as well as out-of-state cases.

Before outlining the various court holdings below, however, it is necessary to establish the standard that the CT Appellate Court uses to review CRB decisions. First, "any party 'aggrieved' by the CRB decision may take an appeal to the [CT] Appellate Court."[165] Accordingly, "[i]n any workers' compensation claim in Connecticut, there is an appeal of right to the Appellate Court; [however] there is no appeal of right . . . from a decision of the Appellate Court to the Supreme Court."[166] Nonetheless, the CT Supreme Court may still review the CRB's decision due to its "power to review petitions for certification to the Supreme Court."[167]

The Appellate Court reviews CRB decisions under a somewhat deferential standard.[168] Specifically, the standard of review by the Appellate Court of the CRB is limited and the role of the court is to "determine whether the review [board's] decision results from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn."[169] In other words, when a trial commissioner and the reviewing CRB sided with the claimant in *Caye*, Connecticut workers who seek medical cannabis won a significant battle. Still, because this issue would be one of first impression, and would be a "pure question[] of law," the CT Appellate Court would "invoke a broader standard of review than is ordinarily involved."[170] Thus, it is important that the Appellate Court have strong legal reasoning to uphold *Caye*'s basic holding.[171]

A. Caye v. Thyssenkrupp Elevator*: Responding to* Bourgoin v. Twin Rivers Paper Co.

The CT Appellate or Supreme Court can and should rely on much of the legal reasoning set forth by the CRB in the *Caye* decision. First, the CRB majority opinion makes a compelling argument that in the event the CT Workers' Compensation Commission orders a respondent to reimburse a claimant for medical cannabis and the respondent fails to do so, the respondent could be subject to monetary sanctions pursuant to Connecticut

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[163] Smith v. Jensen Fabricating Eng'rs, Inc., No. HHDCV186086419, 2019 WL 1569048 (Conn. Super. Ct. Mar. 4, 2019).

[164] Noffsinger v. SSC Niantic Operating Co., 273 F. Supp. 3d 326 (D. Conn. 2017).

[165] CARTER ET AL. , *supra* note 126, § 23:1 (citing CONN. GEN. STAT. § 31–301b (2020)).

[166] *Id.* § 23:11.

[167] *Id.*

[168] *Id.* § 23:1 ("On appeal the standard of review by the Appellate and Supreme Court of decisions of the Compensation Review Board is . . . 'limited' . . . ." (citation omitted)).

[169] *Id.* (citing Wiblyi v. McDonald's Corp., 144 A.3d 1075, 1081 (Conn. App. Ct. 2016)).

[170] *Wiblyi*, 144 A.3d at 1080 ("We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny . . . ." (alterations in original) (citation omitted)).

[171] *See* Caye v. Thyssenkrupp Elevator, No. 6296 CRB-1-18-11, 2019 WL 6168483, at *1 (Conn. Workers' Comp. Comm'n Rev. Div. Oct. 29, 2019) (holding that the insurer must reimburse the claimant's expenditures for medical cannabis).

General Statute § 31-288(a) (Chapter 568).[172] Thus, the penalties associated with the failure to reimburse

> would negate the *mens rea* of willfulness necessary to sustain a criminal prosecution for "aiding or abetting" a criminal act pursuant to the CSA . . . because an employer or insurer reimbursing a claimant for medical marijuana prescriptions clearly would not be acting volitionally, but under an order from a state agency exercising its statutory police powers and empowered to sanction noncompliance.[173]

This argument set forth by the CRB is in direct response to the Maine Supreme Court's finding in *Bourgoin v. Twin Rivers Paper Co.* regarding the crime of aiding and abetting.[174] The Maine Supreme Court majority and dissenting judges both agreed that the crime of aiding and abetting is a specific intent crime.[175] However, the *Bourgoin* majority reasoned that "'for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission,' and, on that basis, is criminally liable."[176] Therefore, the majority found that the employer would be "aiding and abetting [the claimant]—in his purchase, possession, and use of marijuana—by acting with *knowledge* that it was subsidizing [the claimant's] purchase of marijuana."[177]

The dissenting judge in *Bourgoin*, however, found that "the government would not be able to prove that the employer would be acting with the specific intent necessary to establish the requisite mens rea element of the offense of aiding and abetting."[178] The dissenting judge cited to Judge Learned Hand, who established

> a definition of the necessary mens rea for all aiding and abetting offenses, stating that in order to be guilty . . . , it is necessary that the alleged aider or abettor "participate in [the venture] as in something that he *wishes* to bring about, that he seek by his actions to make it succeed."[179]

Thus, as the *Caye* majority argued, the respondent would not be reimbursing the claimant wishing to subsidize the medical cannabis. Instead, the respondent-employer would be reimbursing the cost associated with the medical cannabis after the fact because of a workers' compensation

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[172] *Id.* at *9; CONN. GEN. STAT. § 31-288(a) (2020).
[173] *Caye*, 2019 WL 6168483, at *9.
[174] Bourgoin v. Twin Rivers Paper Co., 187 A.3d 10, 17 (Me. 2018).
[175] *Id.* at 17; *id.* at 26 (Jabar, J., dissenting).
[176] *Id.* at 17 (majority opinion) (citing Rosemond v. United States, 572 U.S. 65, 77 (2014)) (emphasis omitted).
[177] *Id.* at 19 (emphasis added).
[178] *Id.* at 25 (Jabar, J., dissenting).
[179] *Id.* (citing United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)).

commissioner's order to do so and under the loom of monetary sanction if they do not comply with the order.[180]

Second, the CT Appellate or Supreme Court can and should rely on the CRB's reasoning in *Caye* regarding preemption. The CRB found that the issue presented was one of conflict preemption.[181] The CRB ruling, alongside the dissent in the Maine Supreme Court's holding in *Bourgoin*, found that nothing in the order to reimburse the cost of medical cannabis required the appellant to physically possess or distribute cannabis, "which would run afoul" of the CSA.[182] The CRB reasoned that the employer's reimbursement of medical cannabis does not fall into any category of defined or proscribed activity under the CSA and "[b]ecause the employer is not required to physically engage in activity that the CSA proscribes, there is no positive conflict in this case."[183] The CRB, again, mimicking *Bourgoin*'s dissent:

> found that reimbursement of expenses for marijuana, in contrast to physical possession of marijuana, were materially distinct types of transactions relative to liability under the CSA. . . . [and] retrospectively making a claimant whole does not constitute the level of involvement which would place the respondent within the ambit of physically conducting a proscribed transaction under the CSA.[184]

The CRB further argued that the respondent's fear of federal prosecution for compliance with a lawful order of the commission is particularly theoretical "in a circumstance in which the respondent never violates the CSA by actually possessing marijuana or engaging prospectively in a marijuana transaction."[185] The CRB stated that, "[i]nstead, . . . the respondent would be solely acting under their obligations . . . to make the claimant whole."[186]

Third, the uncertain but still persuasive argument that the CRB made in *Caye* was the larger finding that the appellant's fear of federal prosecution

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[180] Caye v. Thyssenkrupp Elevator, No. 6296 CRB-1-18-11, 2019 WL 6168483, at *9 (Conn. Workers' Comp. Comm'n Rev. Div. Oct. 29, 2019). *See Bourgoin*, 187 A.3d at 27 (Jabar, J., dissenting) ("Contrary to the Court's conclusion, I do not agree that mere knowledge constitutes active participation in the commission of a crime, the effective accomplishment of which the accomplice himself or herself must *wish* or *desire* to bring about in order to establish the requisite specific intent that the offense of aiding and abetting demands.").

[181] *Caye*, 2019 WL 6168483, at *5.

[182] *Id.* at *7; 21 U.S.C. § 841(a) (2018). *See Bourgoin*, 187 A.3d at 24 ("[R]eimbursement does not require the employer to *physically* manufacture, distribute, dispense, or possess marijuana, and, as a result, no physical impossibility exists between the federal law and the [Workers' Compensation Board] order in this case.").

[183] *Caye*, 2019 WL 6168483, at *7 (citing *Bourgoin*, 187 A.3d at 25).

[184] *Id.* at *9.

[185] *Id.*

[186] *Id.*

was "speculative at best."[187] The CRB noted that for several years, Congress has "pass[ed] legislative measures such as the Rohrabacher-Blumenauer Amendment on an annual basis."[188] The CRB reasoned that there is no indication that Congress is likely to stop passing such legislative measures and "while there was some speculation that former Attorney General Jeff Sessions might institute litigation or prosecutions . . . , to date this has not occurred, and there has been no indication that the DOJ under [AG] William Barr will do so."[189] This argument is uncertain because, as the *Caye* majority recognized, Congress could stop passing stopgap legal protections, and the current or future AG could direct the DOJ to commence prosecutions.[190]

The CRB majority deals with this uncertainty by relying on the precedent set out in *Gill v. Brescome Barton, Inc.*, finding that "respondents can present evidence of changed legal circumstances since the issuance of the commissioner's findings and seek modification of the finding pursuant to General Statutes § 31-315."[191] As the dissenting Commissioner in *Caye* noted, however, there are flaws with this argument. Namely, "criminal prosecutions are invariably brought for offenses that have already occurred. If the actions we force the respondent to take today are currently illegal, the fact they were committed before the government decided to resume prosecuting such offenses will be no defense."[192] Still, the CRB majority weighs the future concerns of respondents against the claimant's current situation, arguing that:

> as of today, [the claimant] requires pain medication, and all the medical experts on the record concur that the use of marijuana for this purpose is reasonable and necessary. On the other hand, the respondents . . . face only a speculative threat of legal liability and, as we held [previously], we cannot offer relief today in regards to a speculative, unripe dispute which may occur in the future.[193]

The CT Appellate or Supreme Court should similarly weigh these competing concerns and find that the current need for an injured worker to use prescribed, reasonable, and necessary medication outweighs the respondent's theoretical concern of future prosecution.

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[187] *Id.*

[188] *Id.* at *10. *See* Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong. § 531 (2020) (showing how the Rohrabacher-Farr Amendment was again reenacted).

[189] *Caye*, 2019 WL 6168483, at *10.

[190] *Id.*

[191] *Id.* (citing Gill v. Brescome Barton, Inc., 5659 CRB-8-11-6 (June 1, 2012), *aff'd*, 68 A.3d 88 (Conn. App. Ct. 2013), *aff'd*, 114 A.3d 1210 (Conn. 2015)).

[192] *Id.* at *15 (Schoolcraft, Comm'r, dissenting) (discussing another flaw, namely that "the respondent would need the permission of a commissioner to stop paying. The notion that the respondent should have to petition a commissioner for permission to stop doing something for which it is facing criminal prosecution is, I have to believe, unprecedented.").

[193] *Id.* at *10 (majority opinion) (citing Meloni v. Raymark Indus., Inc., No. 5838 CRB-4-13-5, 2017 WL 2664894, at *1 (Conn. Workers' Comp. Comm'n Rev. Div. June 1, 2017)).

B. Petrini v. Marcus Dairy, Inc.*: Medical Cannabis is Medically Reasonable and Necessary*

The CT Appellate or Supreme Court should also look to the CRB's opinion in *Petrini* for three reasons. First, *Petrini* was the first case to establish that medical cannabis is a reasonable and necessary medication.[194] Although this seems like an irrelevant holding, especially since the parties in *Caye* stipulated to this fact,[195] the CT Appellate Court has not yet addressed this issue. Accordingly, the CT Appellate or Supreme Court will still likely rely on the *Petrini* opinion regarding the preliminary question of whether medical cannabis is a reasonable or necessary medication. The respondent-employer could argue that the CT Appellate or Supreme Court should not follow the CRB's holding in *Petrini*, and instead should find that medical cannabis is not a necessary treatment since there are federally legal alternatives. In response, the claimant may be able to demonstrate that medical cannabis treatment is both reasonable and necessary, however, the statutory standard laid out in Connecticut General Statute § 31-294d(a)(1), requires only that the claimant show that the treatment is reasonable *or* necessary.[196] The claimant will most likely have no problem demonstrating that medical cannabis is reasonable, especially given the evidence that cannabis is far less addictive and deadly than opioids.[197]

In resolving this possible dispute, the reviewing court should look to the CRB's holding in *Lionetti v. Messineo*, finding that § 31-294d(a)(1) only requires the recommended treatment to be reasonable *or* necessary.[198] In *Lionetti*, the CRB reversed the trial commissioner's decision denying authorization for a surgery on the basis that the surgery was reasonable but not necessary.[199] The CRB acknowledged that there were numerous prior cases where the CRB used

> the phrase "reasonable and necessary" . . . interchangeably with the phrase "reasonable or necessary," and the findings of the commissioner on the issue of medical care in those cases were ultimately upheld. However, ... [the CRB was] not aware of[] any prior cases in which th[e] board sustained either a denial of or authorization for surgery which was deemed reasonable but not necessary, or vice versa.[200]

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[194] Petrini v. Marcus Dairy, Inc., No. 6021 CRB-7-15-7, 2016 WL 6659149, at *1, *4, *5 (Conn. Workers' Comp. Comm'n Rev. Div. May 12, 2016).

[195] *Caye*, 2019 WL 6168483, at *12 (Schoolcraft, Comm'r, dissenting).

[196] CONN. GEN. STAT. § 31-294d(a)(1) (2020).

[197] Boehnke et al., *supra* note 9, at 739.

[198] Lionetti v. Paul G. Messineo, L.L.C., No. 6207 CRB-7-17-7, 2019 WL 3934753, at *9 (Conn. Workers' Comp. Comm'n Rev. Div. June 7, 2019).

[199] *Id.* ("Given that the commissioner specifically concluded that [the recommended operation] was reasonable, and therefore satisfied the requirements of § 31-294d(a)(1), we are unable to sustain the commissioner's decision to deny the surgery.").

[200] *Id.*

Second, the CRB in *Petrini* also stated that, although PUMA specifically excluded health insurance coverage for medical cannabis, the statute was silent with respect to workers' compensation insurance.[201] The CRB emphasized that a workers' compensation insurance exclusion was absent from PUMA at the outset of its analysis, but the purpose of doing so was to establish subject matter jurisdiction.[202] Nonetheless, the CT Appellate or Supreme Court should similarly call attention to PUMA's language as the CRB did in *Petrini*. As this Note will argue below, the reviewing court should, as other state courts have, weigh the absence of a workers' compensation exemption from PUMA in its analysis of whether workers' compensation insurers can be ordered to pay the out of pocket expenses for medical cannabis.[203]

Lastly, the CT Appellate or Supreme Court should further consider that many injured workers seek medical cannabis as an alternative to opioid prescriptions, as demonstrated by the fact-pattern in *Petrini.*[204] As detailed above, Mr. Petrini took a large number of narcotic medications for six years without significant pain relief and developed a number of unhealthy side effects.[205] Thankfully, Connecticut's medical cannabis law allowed Mr. Petrini to locate a physician to prescribe him medical cannabis, after which he obtained so much relief that he rarely used any narcotics.[206] Again, after observing the results, his treating physician for his work-related injury stated that "there should be no question of the medical necessity in substituting medical marijuana for opiate medications."[207] Accordingly, the courts should weigh the speculative chance of future prosecution against the public interest in increasing access to a less deadly pain relief medication for injured workers like Mr. Petrini.

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[201] Petrini v. Marcus Dairy, Inc., No. 6021 CRB-7-15-7, 2016 WL 6659149, at *5 (Conn. Workers' Comp. Comm'n Rev. Div. May 12, 2016); CONN. GEN. STAT. § 21a-408o (2020).

[202] *Petrini*, 2016 WL 6659149, at *5 ("We also note that while the legislation specifically excludes health insurance coverage . . . , the statute is silent with respect to workers' compensation insurance. Thus, although neither of the parties . . . challenged the subject matter jurisdiction of this Commission, we deem it worthy of mention that the enabling legislation does not appear to deprive this agency of the jurisdiction to hear the matter.") (citation omitted).

[203] *Id. But see* Caye v. Thyssenkrupp Elevator, No. 6296 CRB-1-18-11, 2019 WL 6168483, at *17 (Conn. Workers' Comp. Comm'n Rev. Div. Oct. 29, 2019) (Schoolcraft, Comm'r, dissenting) (arguing that the "legislature expressly provided that health insurance companies cannot be forced to pay for marijuana products;" that "there is no logical distinction to be drawn between a health insurer and a workers' compensation insurer;" and that "the majority's position that the fact the legislature only referred to health insurers in this caveat was an invitation for [the CRB] to order workers' compensation insurers to pay for marijuana").

[204] *See Petrini*, 2016 WL 6659149, at *1–2 (detailing the claimant's medication history and showing that the claimant rarely used any of his narcotic medication after he started taking medical cannabis).

[205] *Id.* at *1.

[206] *Id.* at *2.

[207] *Id.* (internal quotations marks and citation omitted).

C. Noffsinger & Jensen*: PUMA's Anti-Discrimination Provision and Preemption*

The CT Appellate or Supreme Court can further rely on the CT federal district court case, *Noffsinger v. SSC Niantic Operating Co.*[208] The plaintiff in this case brought an employment discrimination suit against her prospective employer alleging denial of employment based on a positive cannabis pre-employment screening test in violation of PUMA's anti-discrimination provision.[209] In response, the defendant argued that PUMA is preempted by the CSA.[210] The U.S. Connecticut District Court held that "as a matter of first impression, CSA does not preempt" PUMA's anti-discrimination provision.[211]

The district court reasoned that "[g]iven that the CSA nowhere prohibits employers from hiring applicants who may be engaged in illegal drug use, defendant has not established the sort of 'positive conflict' . . . that is required for preemption under the very terms of the CSA."[212] The district court did note that unlike most cases "dealing with the CSA's preemption of state medical marijuana statutes," PUMA contained a specific anti-discrimination provision.[213] Nonetheless, in the workers' compensation context, the reviewing court could similarly find that nowhere in the CSA does it explicitly prohibit workers' compensation respondents from reimbursing claimants for the cost of an illegal drug.

Additionally, a reviewing court can also look to the Connecticut Superior Court's holding in *Smith v. Jensen Fabricating Engineers, Inc.*[214] Although this is an unpublished opinion, the CRB in *Caye* noted this recent superior court case, which also addressed PUMA's anti-discrimination provision.[215] The superior court, like the district court in *Noffsinger*, found the employer failed to establish the required "direct and positive conflict" between PUMA and the CSA because the CSA does not criminalize the employment of cannabis users and because the employer "is not required to engage in any activity that [is] prohibited by the CSA."[216] The *Jensen* court also reasoned that "[t]he mere fact of 'tension' between federal and state law

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[208] Noffsinger v. SSC Niantic Operating Co., 273 F. Supp. 3d 326 (D. Conn. 2017). *See also* Noffsinger v. SSC Niantic Operating Co., 338 F. Supp. 3d 78, 79 (D. Conn. 2018) (further holding that the "employer was not exempt from [the] PUMA anti-discrimination provision based on the federal Drug Free Workplace Act").

[209] *Noffsinger*, 273 F. Supp. 3d at 331–32; CONN. GEN. STAT. § 21a-408p(b)(3) (2020) ("No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient . . . .").

[210] *Noffsinger*, 273 F. Supp. 3d at 333.

[211] *Id.* at 326.

[212] *Id.* at 336.

[213] *Id.* at 335.

[214] Smith v. Jensen Fabricating Eng'rs, Inc., No. HHDCV186086419, 2019 WL 1569048 (Conn. Super. Ct. Mar. 4, 2019).

[215] Caye v. Thyssenkrupp Elevator, No. 6296 CRB-1-18-11, 2019 WL 6168483, at *8 (Conn. Workers' Comp. Comm'n Rev. Div. Oct. 29, 2019) (citing *Jensen*, 2019 WL 1569048, at *1).

[216] *Jensen*, 2019 WL 1569048, at *4.

is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power."[217] The CT Appellate or Supreme Court, in reviewing the preemption issue in the workers' compensation context, could take into consideration *Jensen*'s point regarding traditional police powers, and by extension, the CT Appellate or Supreme Court could reason, like in *Caye*, that

> unless it is clear that the federal government has preempted a state's police powers, the state retains the ability to make its own decisions as to how to best protect its own citizens . . . . [I]n these circumstances, the federal government has essentially decided to tolerate a certain level of tension between the CSA and . . . state-authorized medical marijuana programs.[218]

Further, the court in *Jensen* noted that "federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law . . . and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them."[219] Accordingly, the CT Appellate or Supreme Court can also reason that the annual legislative action by Congress proscribing the use of federal funds to prosecute anyone in compliance with state medical cannabis programs provides evidence that Congress is aware of the operation of these medical cannabis laws.

D. *Out-of-State Case Law*

As demonstrated above, the CT Appellate and Supreme Court has vast legal standing within Connecticut jurisprudence to side with Connecticut workers' compensation claimants. Nonetheless, several state courts have found that their cannabis laws were not preempted by the CSA,[220] and in addition to Connecticut's CRB, at least four other state tribunals have found that respondents were required to reimburse claimants for medical cannabis.[221]

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[217] *Id.* at *3 (quoting Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 241 (2d Cir. 2006)).

[218] *Caye*, 2019 WL 6168483, at *6.

[219] *Jensen*, 2019 WL 1569048, at *3 (alterations in original) (citation omitted). *See Caye*, 2019 WL 6168483, at *8 ("Judge Budzik, [in *Jensen*], found that the CSA did not criminalize the employment of marijuana users. He also noted that Congress was aware of state medical marijuana programs and had acted to allow them to continue. Since the employer was not required to engage in any conduct that was prohibited under the CSA, there was no obstacle preemption present.").

[220] *See* Conley & Markowitz, *supra* note 39, at 48 (discussing Arizona, California, and Michigan court cases holding that "the laws decriminalizing medical marijuana did not pose an obstacle to the federal enforcement of federal law," and, thus, state law was not preempted by the CSA).

[221] *See Caye*, 2019 WL 6168483, at *10–11 (ordering the respondent to reimburse the claimant's cost associated with his medical cannabis prescription); Vialpando v. Ben's Auto. Servs., 331 P.3d 975, 980 (N.M. Ct. App. 2014) (holding that the New Mexico Workers' Compensation Administration can require employers and insurers to reimburse claimants for medical cannabis); Appeal of Panaggio, N.H. Comp. Appeals Bd., 260 A.3d 825, 833 (N.H. 2021) (holding that "there is no direct conflict between the CSA and a Board order to reimburse Panaggio for his medical marijuana purchase"); Hager v. M&K Const., 225 A.3d 137, 140 (N.J. 2020) (holding that there is "no conflict between the CSA and MMA

First, in *Vialpando v. Ben's Automotive Services*, the New Mexico Court of Appeals "held that the workers' compensation act, properly interpreted, permits reimbursement of medical cannabis to treat workplace injuries."[222] The court read the New Mexico's Workers' Compensation Act as consistent with New Mexico's "medical cannabis act to find that cannabis could be a 'service' for which reimbursement is provided under the program."[223] "The court upheld the clear public policy favoring medical cannabis under state law and declined 'to reverse the order on the basis of federal law or public policy.'"[224] A year later, in *Lewis v. American General Media*, the Court of Appeals of New Mexico reaffirmed its commitment to medical cannabis.[225] The appellate court reasoned that respondent's fear of federal liability is only speculative in view of "existing Department of Justice and federal policy," referencing the Cole Memorandum and the Rohrabacher-Farr Amendment.[226]

The Supreme Court of New Hampshire in the *Appeal of Panaggio* held that under both "impossibility preemption" and "conflict preemption," "there is no direct conflict between the CSA and a Board order to reimburse Panaggio for his medical marijuana purchase."[227] Under the "impossibility preemption" doctrine, the court reasoned that "[t]he CSA does not criminalize the act of insurance reimbursement for an employee's purchase of medical marijuana.[228]

The insurer argued that "requiring it to reimburse Panaggio for the purchase of medical marijuana 'would invoke conduct that violates federal law' because it constitutes aiding and abetting his criminal activity."[229] The plaintiff, in response, argued that "[b]ecause New Hampshire law unambiguously requires the insurer to pay for the claimant's medically related treatment,' an insurer that reimburses a claimant for the purchase of medical marijuana acts without the volition required by the federal aiding and abetting statute."[230] The court sided with the plaintiff and "agree[d] with the reasoning of the dissenting justices in *Bourgoin* and with the New Jersey Superior Court Appellate Division in *Hager* and conclude[d] that the insurer

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[New Jersey's medical marijuana law] [and] M&K's [the respondent's] compliance with the order [to reimburse the claimant for medical cannabis] does not establish the specific intent element of an aiding and abetting offense under federal law"); Matter of Quigley v. Village of E. Aurora, 193 A.D.3d 207, 212 (N.Y. App. Div. 2021) ("[A]s the carrier can comply with the state's statutory scheme without running afoul of federal law, we do not find any conflict between the Controlled Substances Act and either the Compassionate Care Act or Workers' Compensation Law § 13 (a) with regard to the carrier's obligation to reimburse claimant for his medical marihuana expenses. . . .").

[222] Francis J. Mootz III & Jason Horst, *Cannabis and Insurance*, 23 LEWIS & CLARK L. REV. 893, 914 (2019); *Vialpando*, 331 P.3d at 976.

[223] Mootz III & Horst, *supra* note 222; *Vialpando*, 331 P.3d at 978–79.

[224] Mootz III & Horst, *supra* note 222 (quoting *Vialpando*, 331 P.3d at 980).

[225] Lewis v. Am. Gen. Media, 355 P.3d 850, 858 (N.M. Ct. App. 2015).

[226] *Id.*

[227] Appeal of Panaggio, N.H. Comp. Appeals Bd., 260 A.3d 825, 833 (N.H. 2021).

[228] *Id.*

[229] *Id.*

[230] *Id.*

in this case, if ordered to reimburse Panaggio's purchase of medical marijuana, would not be guilty of aiding and abetting Panaggio's violation of the CSA because the insurer would not be an active participant with the *mens rea* required by *Rosemond*."[231]

The court also concluded, "[f]or similar reasons . . . that . . . the insurer would not be guilty of conspiring with Panaggio to commit an offense under the CSA. . . . Conspiracy, similar to aiding and abetting, requires voluntary participation. . . . As discussed, the insurer's compliance with a court or Board order to reimburse Panaggio for his medical marijuana purchase does not constitute voluntary participation."[232] Moreover, the court determined that the "high threshold' for obstacle preemption is not met here," reasoning that "a Board order to reimburse Panaggio does not interfere with the federal government's ability to enforce the CSA."[233] Finally, the court further reasoned that "the CSA does not make it illegal for an insurer to reimburse an employee for his or her purchase of medical marijuana [and it] does not purport to regulate insurance practices in any manner."[234]

A New York appellate court similarly was unpersuaded "by the employer and the carrier's claim that compelling the carrier to 'fund' claimant's use of medical marihuana under the [state medical cannabis statute] exposes it to civil and criminal liability under the auspices of 'conspiracy or aiding or abetting.' Importantly, '[t]he existence of a hypothetical or potential conflict is insufficient to warrant the preemption of [a] state statute' . . . ." [235] The court further reasoned that even if the claimant's procurement and possession of medical cannabis under the NY medical cannabis statute is illegal under the CSA, "any such criminal transaction in this regard is necessarily completed prior to any request being made for reimbursement from the carrier; thus, as 'one cannot aid and abet a completed crime,' under such circumstances, the carrier cannot be said to be aiding and abetting a crime and/or engaging in a conspiracy to commit same . . . ." [236]

Other states, in determining questions of workers' compensation coverage for medical cannabis, relied on whether their medical cannabis statutes explicitly mention insurance coverage.[237] For example, in *Hall v.*

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[231] *Id.* at 835.

[232] *Id.*

[233] *Id.* at 837.

[234] *Id.*

[235] Matter of Quigley v. Village of E. Aurora, 193 A.D.3d 207, 212 (N.Y. App. Div. 2021)

[236] *Id.*

[237] *See, e.g.*, Appeal of Panaggio, 205 A.3d 1099, 1102–03 (N.H., 2019) (decision reached on appeal by Appeal of Panaggio N.H. Comp. Appeals Bd., 260 A.3d 825 (N.H. 2021) (court found that "[a]lthough the statute does not create a right to reimbursement for the cost of medical marijuana . . . neither does it bar any of those entities from providing reimbursement." Instead, the Court provided that "a qualifying patient shall not be . . . denied any right or privilege for the therapeutic use of cannabis," and thus, barring reimbursement would ignore this language. The Court reasoned that "statues in other jurisdictions expressly prohibit workers' compensation insurance carriers from reimbursing claimants for the cost of medical marijuana . . . [and therefore], [h]ad the legislature intended to bar patients in the therapeutic cannabis program from receiving reimbursement . . . it easily could have done so . . . ."); Caye v.

Safelite Group, Inc., a Vermont court reasoned that the workers' compensation commission could not order the respondent to reimburse for medical cannabis by distinguishing *Petrini* and Connecticut's medical cannabis statute.[238] Unlike PUMA, Vermont's medical cannabis statute explicitly states that workers' compensation insurers are not responsible for coverage.[239] Thus, the CT Appellate or Supreme Court should similarly consider the statutory language set forth in PUMA, noting the absence of a workers' compensation exemption despite its explicit exemption of health insurance. Further, the reviewing Connecticut court should take into consideration that several other states' statutes expressly mention workers' compensation insurers, where some states do not obligate workers' compensation carriers to reimburse claimants and other's explicitly do not permit workers' compensation carriers to reimburse claimants.[240] The Connecticut legislature, on the other hand, did not explicitly include workers' compensation carriers when drafting PUMA in 2012, nor has it elected to amend PUMA in the past nearly ten years in order to include this exemption. Accordingly, despite the dissenting Commissioner's opposite conclusion in *Caye*, "the fact the legislature only referred to health insurers in this caveat was an invitation for [the Workers' Compensation Commission] to order . . . insurers to pay for [cannabis]."[241]

CONCLUSION

There is an unwritten rule among baseball fans that "the tie goes to the runner," even though a Major League Baseball umpire will tell you that there

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Thyssenkrupp Elevator, No. 6296 CRB-1-18-11, 2019 WL 6168483, at *17 (Conn. Workers' Comp. Comm'n Rev. Div. Oct. 29, 2019) (Schoolcraft, Comm'r, dissenting) (explaining and disagreeing with "the majority's position that the fact the legislature only referred to health insurers in this caveat was an invitation for us to order workers' compensation insurers to pay for marijuana"); Hall v. Safelite Grp., Inc., No. 06-18WC, 2018 WL 1802814, at *11 (Vt. Dep't Lab. & Indus. Mar. 28, 2018) (describing medical cannabis statutes that have adopted provisions purporting to exempt private health insurers from any obligation to pay for their use "as acknowledging the inconsistency between state and federal law" (internal quotation marks and citation omitted)); Jones v. Grace Healthcare Ctr., No. 03-025539MAM, 2019 WL 1594488, at *6 (Fla. Off. Judges Comp. Claims Apr. 9, 2019) (holding that, "based on the plain language of [Florida's medical cannabis statute], . . . a Florida workers' compensation employer or carrier cannot be required to pay for medical marijuana for an injured worker").

[238] *Hall*, 2018 WL 1802814, at *12.

[239] *Id.*

[240] *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2814(A)(1) (2020) ("Nothing in this chapter requires . . . a workers' compensation carrier or self-insured employer [from] providing workers' compensation benefits to reimburse a person for costs associated with the medical use of marijuana."); FLA. STAT. § 381.986(15)(f) (2020) (stating that "[m]arijuana . . . is not reimbursable under chapter 440," Florida's workers' compensation statute); MICH. COMP. LAWS § 418.315a (2020) (describing that "an employer is not required to reimburse or cause to be reimbursed charges for medical marihuana treatment"). *See also* John Howard, Steven Wurzelbacher, Jamie Osborne, Jennifer Wolf, John Ruser, and Raji Chadarevian, *Review of Cannabis Reimbursement by Workers' Compensation Insurance in the U.S. and Canada*, 1-13 AM. J. IND. MED. 1, 3–4 (2021) (reviewing state statutes that expressly prohibit workers' compensation carriers to reimburse medical cannabis and state statutes that make clear that workers' compensation insurers are not obligated to reimburse the costs of medical cannabis).

[241] *Caye*, 2019 WL 6168483, at *17 (Schoolcraft, Comm'r, dissenting).

is no such thing as a "tie" in baseball.[242] The status of cannabis in the United States is not so different—people purchase and business owners distribute cannabis under this unwritten assumption that they will not face federal prosecution under the CSA. Of course, as this Note has detailed, the federal government has indicated through DOJ guidance memoranda and especially through the passage of the Rohrabacher-Farr Amendment that the federal government will not prosecute people and businesses who are complying with their state's cannabis laws. Nonetheless, there is no statute nor regulation that explicitly states that if you follow your state's cannabis laws, you will not face prosecution for breaking federal law. Still, just like fans continue to yell "the tie goes to the runner" despite knowing there is no written rule that says so, cannabis users and business owners continue to possess and distribute cannabis.

Across the United States, state courts and state administrative tribunals have reached competing conclusions regarding reimbursement for medical cannabis. Massachusetts, Maine, and Minnesota courts have concluded that federal law preempts workers' compensation courts from compelling reimbursement for medical cannabis.[243] Connecticut, New Hampshire, New York, New Mexico, and New Jersey tribunals have reached the opposite conclusion, compelling reimbursement.[244] In other words, it is clear that

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[242] Mark Dewdney, *"COME ON, BLUE: TIE GOES TO THE RUNNER!" No, It Does Not.*, BLEACHER REP. (July 27, 2009), https://bleacherreport.com/articles/225160-come-on-blue-tie-goes-to-the-runner-no-it-does-not.

[243] *See* Wright v. Pioneer Valley, No. 04387-15, 2019 WL 3323160, at *8 (Mass. Dep't Indus. Accidents Feb. 14, 2019) (holding that "until marijuana is removed from Schedule I of the CSA . . . a workers' compensation insurer that is ordered to pay for an employee's medical marijuana . . . would risk prosecution for violating the CSA and the cited federal aiding and abetting law"); Bourgoin v. Twin Rivers Paper Co., LLC, 187 A.3d 10, 17 (Me. 2018) (finding that an employer's act of reimbursing an employee's acquisition of medical cannabis meets the elements of aiding and abetting as defined in federal law); Musta v. Mendota Heights Dental Ctr., 965 N.W.2d 312, 316 (Minn. 2021) (concluding "that the CSA preempts an order made under Minn. Stat. § 176.135, subd. 1, that obligates an employer to reimburse an employee for the cost of medical cannabis because compliance with that order would expose the employer to criminal liability under federal law for aiding and abetting Musta's unlawful possession of cannabis"). Florida and North Dakota, by statute, have expressly prohibited the reimbursement of medical cannabis. Howard et al., *supra* note 240, at 3. Ohio and Washington state administrative rules dictate that medical cannabis is ineligible for reimbursement for workers' compensation claimants because cannabis is not a FDA approved drug. *Id.* Other state statutes do not require reimbursement, however, they do not expressly prohibit reimbursement. *See id.* at 3–4.

[244] *See* cases cited *supra* note 221 (detailing case law in Connecticut, New Hampshire, New Mexico, New Jersey, and New York where courts or workers' compensation tribunals compelled respondents to reimburse the cost of medical cannabis). In Delaware "[r]eimbursement for the cost of medical cannabis for a workers' compensation claim is not required and reimbursement depends on whether medical cannabis treatment is 'reasonable and necessary' based on an 'individualized inquiry.'" Howard, et al., *supra* note 240, at 4. Accordingly, based on this individualized inquiry, Delaware courts have differed on their holdings regarding reimbursement. *Compare* Giles & Ransome v. Kalix, No. N17A-10-001 CEB, 2018 WL 4922911, at *4–5 (Del. Super. Ct. June 22, 2018) (affirming an award to an employee requiring the insurer to reimburse the employer for the cost of medical cannabis treatment); *with* Nobles-Roark v. Back Burner, No. N19A-11-001 ALR, 2020 Del. Super. LEXIS 386, at *1 (Del. Super. Ct. July 28, 2020) (affirming the workers' compensation review board's decision denying claimant's petition for reimbursement for cannabis treatment because the review board was not precluded from finding that claimant's use of medical cannabis was not "reasonable or necessary").

legal minds can differ on the question of whether the CSA proscribes a state agency from ordering an insurance carrier to reimburse for cannabis prescriptions. Even within the *Caye* and *Bourgoin* opinions, the majority and dissenting opinions presented extremely persuasive opposing arguments, proving that among colleagues reviewing and discussing the same case, this legal question is difficult to definitively answer.

Despite the legal haziness this question presents, or, more accurately, that the CSA creates, the CT Appellate or Supreme Court should compel respondents and their insurance carriers to reimburse the cost of medical cannabis. In addition to the legal reasoning set forth in this Note, the public interest of increasing access to alternative pain medication requires consideration as well. Connecticut courts should pave the way for injured workers to access medical cannabis given the available evidence that medical cannabis is an effective and less addictive method of pain management than opioids.[245] Hopefully, employers and their workers' compensation insurance carriers can help reduce the number of injured workers who become addicted to opioids due to workplace injuries by allowing injured workers to access a reasonable and necessary medication—medical cannabis. When the issue presented in *Caye* is litigated in a future case and reviewed by the CT Appellate or Supreme Court, Connecticut workers deserve for this legal tie to go to the worker.

[245] It is important to note that reimbursement for medical cannabis still prevents many workers from accessing medical cannabis. Reimbursement requires workers to have the financial ability to pay for the high cost of medical cannabis first and thereafter wait for reimbursement, which could take weeks or months, especially if the respondent contests reimbursement. Accordingly, reimbursement as a solution still limits workers, and in particular low-income workers, from accessing medical cannabis. Direct payment for medical cannabis would solve this issue, however, as the *Caye* majority indicated, direct payment may cause workers' compensation respondents to engage in activity that is prohibited by the CSA. *See Caye*, 2019 WL 6168483, at *10–11. This is why federal legislation allowing the use of medical cannabis is crucial to ensuring better access to medical cannabis for all workers.