A Smoking Gun
Medical Marijuana and Gun Ownership Rights: What Patients Need to Know

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I. A look at the Relevant Laws at issue in Order of Their Supremacy

US Constitution: Amendment II

A well-regulated militia, being necessary to the security of a free state, **the right of the people to keep and bear arms, shall not be infringed.**

United States Department of Justice: Bureau of Alcohol, Tobacco, and Firearms (ATF)

Memorandum from administrative agency which is a part of the Executive branch of government providing guidance to federal firearms licensees (who sell firearms). References 18 U.S.C. § 922(g)(3) in support of the proposition that a LAWFUL medicinal marijuana card holder in a state for which marijuana use has been legalized is nonetheless, considered to be illegally using according to the language of the above-referenced federal statute.

Missouri Constitution: Bill of Rights

Section 23. **Right to keep and bear arms, ammunition, and certain accessories—exception—rights to be unalienable.**—That **the right of every citizen to keep and bear arms**, ammunition, and accessories typical to the normal function of such arms, **in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable.** Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.

Amendment XIV

Section 1. Right to access medical marijuana.—1. Purposes. This section is intended to permit state-licensed physicians to recommend marijuana for medical purposes to patients with serious illnesses and medical conditions. The section allows patients with qualifying medical conditions the right to discuss freely with their physicians the possible benefits of medical marijuana use, the right of their physicians to provide professional advice concerning the same, **and the right to use medical marijuana for treatment under the supervision of a physician**. This section is intended to make only those changes to Missouri laws that are necessary to protect patients, their primary caregivers, and their physicians from civil and criminal penalties, and to allow for the limited legal production, distribution, sale and purchase of marijuana for medical use. This section is not intended to change current civil and criminal laws governing the use of marijuana

for nonmedical purposes. The section does not allow for the public use of marijuana and driving under the influence of marijuana.

II. Fundamental Rights – Under State and Federal Law

What does it mean to have a fundamental right? Well, the Supreme Court has held that a fundamental right is explicitly or implicitly expressed in the U.S. Constitution under the Bill of Rights or has been conferred under the Due Process Clause as involving either life, liberty, or property.[1] For example, the right to bear arms is a fundamental right under both the federal constitution and also most, if not all state constitutions. An example of a fundamental right arising out of the Due Process Clause under the classification of life, liberty, or property may be welfare benefits. Once a person has established a right to welfare benefits under the law, they cannot be deprived of them by the government without first having an opportunity to be heard as to why they should continue to be eligible for them (due process of law).[2] Keeping this in mind, in conjunction with the U.S. Constitution which has provided a fundamental right to bear arms, the state of Missouri has also made the right to bear arms as evidenced by the language of Section 23 above, a fundamental right. And, they have recently added language making the right to possess and use medicinal cannabis, a fundamental right, as evidenced by Amendment XIV above.

So, what we find is we have essentially the Bill of Rights to our Federal Constitution guaranteeing the right of its citizens to bear arms. This is of course subject to all limitations which by way of any Supreme Court decisions would have carved out exceptions to that right – such as limitations on a felon's right to purchase and possess firearms. We also have the Bill of Rights to the Missouri Constitution which also guarantees/gives the citizens of the state of Missouri an inalienable right to keep and bear arms, and we have a competing right in the state of Missouri to possess medicinal cannabis[3], but which at the current time is so new to have not yet been ratified as part of the Missouri Constitution's Bill of Rights. Although in time the belief is it too will be added.

On the other hand, federal law has not come around to legalizing cannabis and in fact, has classified the plant as a Schedule I drug – meaning that it has absolutely no medicinal value whatsoever. Whether or not you agree with the logic that this plant medicine is more of a danger and threat to society than narcotic pain killers, this is the situation we find ourselves in. Oddly enough, the federal government holds a patent on synthetic cannabinoid drugs derived from marijuana.[4] Which begs the question of how they can manage to make simultaneous claims that

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[1] *McDonald v. City of Chicago, Ill,* 130 S. Ct. 3020, 3029-30, 561 U.S. 742 (2010)

[2] *Goldberg v. Kelly,* 397 U.S. 254 (1970)

[3] For these purposes, you will see reference to both cannabis and marijuana. Most state laws refer to the substance as marijuana. While both terms are generally known and are used synonymously, the word marijuana has discriminatory underpinnings and is linked to prohibition and temperance in that a certain disdain arose during this time for immigrants who would drink after work and African Americans who utilized cannabis during the Jazz movement and racial integration. Unfortunately, some things never change. Redmon, Aubrey, Cannabis 101: The Who, What, When, Where, Whys, and Hows of Amendment 2's Impact on Medical Marijuana in Missouri, 2019.

[4] The federal government, by classifying marijuana as a Schedule I drug, has taken the position that all parts of the plant are deemed unsafe for consumption; yet, the US government holds a patent on synthetic cannabinoid drugs derived from marijuana, which are then being approved by the FDA. See Patent 6,630,507B1, *available at:*

cannabis has no medicinal value, yet patent a pharmaceutical version of the same substance that the government claims has no medicinal benefits. These two positions are squarely in conflict with one another and yet they are both positions of the federal government. In following the reading of this memorandum, which is not law, but guidance from an administrative body, as the letter so states, the DOJ has taken it upon themselves to analyze the language of 18 U.S.C. § 922(g)(3) and determine what should be determined by a court of competent jurisdiction. They conclude that because the Controlled Substances Act (CSA - federal law) still makes cannabis possession unlawful under federal law, this forecloses the issue and every use and possession of cannabis for any reason violates federal law. So, if the right to bear arms is a fundamental right (both at the federal and state level) and the right to possess and use medicinal cannabis is too a fundamental right (at the state level), then how can it be justified that one of your fundamental rights must give way to the exercise of the other? If both rights are unequivocally inalienable, then to take one in place of another is presumably a violation of one of those rights. In other words, a violation of due process of law. Essentially, what I am arguing is the exercise of one right cannot be hinged upon the other.

A. Analysis: Do State Cannabis Laws Contravene the Controlled Substances Act?

However, courts that have actually looked at the issue of whether state cannabis laws violate the plain language of the CSA, depending on the rights provided by state law, courts have stated rather unequivocally that state cannabis laws which have made possession of cannabis legal, whether for medicinal or recreational purposes, do not violate the Controlled Substances Act because none of the states who have legalized cannabis have made trafficking of cannabis legal (meaning none of the states have made it legal to carry or take cannabis across state lines). They have opined in those various decisions that the true intent and purpose of the Controlled Substances Act was in curbing or preventing the trafficking of illegal substances, and since no state cannabis laws up to this point allow this kind of activity, they are not in contravention of or in conflict with the Controlled Substances Act.[5]

In fact, the Court in *Reed-Kaliher v. Hoggatt,* 347 P.3d 136 at 141 further explains that states are not mandated to enact or enforce federal law. As background, *Reed-Kaliher,* a qualified patient under the Arizona Medical Marijuana Act (AMMA), was on probation after serving time in jail for a conviction for possession and sale of marijuana. Once out, his probation officer imposed as a condition of his probation that he be prohibited from using medical cannabis despite his status as a qualified patient. The Court found that unlike California, whose cannabis law merely exempted medical use from criminal liability[6], Arizona's law contemplated immunity for users from prosecution from being "subject to arrest, prosecution, and penalty in any manner, or denial of any right or privilege" so long as a patient's use complies with the AMMA. This is an

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https://patents.google.com/patent/US6630507B1/en, which specifically claims that, "No signs of toxicity or serious side effects have been observed following chronic administration of cannabidiol to healthy volunteers (Cunha et al., Pharmacology 21:175-185, 1980), even in large acute doses of 700 mg/day (Consroe et al., Pharmacol. Biochem. Behav. 40:701-708, 1991)."

[5] *Reed Kaliher v. Hoggatt,* 347 P.3d 136, 141-42, 237 Ariz. 119, 347 (2015); *Ter Beek v. City of Wyoming,* 495 Mich. 1, 846 N.W.2d 531, 537-38 (2014); and

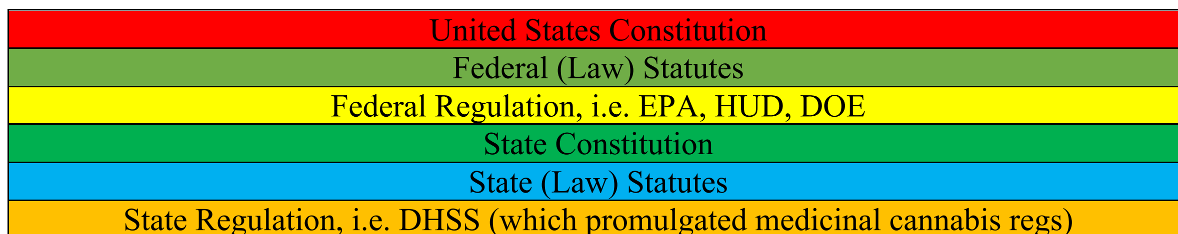
[6] *Ross v. RagingWire Telecommunications,* 174 P.3d 200 (2008)

important distinction as the law in Missouri provides similar protection to that of the AMMA. Keeping in mind the proper context, the Court stated,

> Although a court may require compliance with federal law as a condition of probation, federal law does not require the court to do so[7]….("Congress cannot compel the states to enact or enforce a federal regulatory program.")…Federal law does not *require* our courts to enforce federal law, and Arizona law does not *permit* them to do so in contravention of the AMMA….Thus, while the court can impose a condition that probationers not violate federal laws generally, it must not include terms requiring compliance with federal laws that prohibit cannabis use pursuant to AMMA.

B. The Supremacy Clause of the U.S. Constitution

You may ask, well, why do we keep hearing this same argument that the Controlled Substances Act (CSA) makes any use of cannabis illegal? It does sound like a compelling argument given the Supremacy Clause of the U.S. Constitution puts federal law ahead of state law. I have included a simple graph below to illustrate this concept:



In short, what this means is that the U.S. Constitution preempts all other bodies of law, federal statutes/laws preempt state statutes, with administrative law either state or federal generally having the force and effect of law. In explaining what administrative law is, think along the lines of regulations, for instance by the EPA, which protect the environment, or ICE.

C. Are State Marijuana Law Preempted by the CSA?

This brings us to preemption. Using the graph above for reference, a state law is preempted by federal law where: 1) the federal law contains a provision which expressly preempts state law; 2) Congress has determined the law was intended to exclusively govern the field; or 3) federal and state law conflict so that compliance with both is an impossibility. [8] Once again, the Court in *Reed-Kaliher* dispelled the myth that the CSA preempts all state marijuana laws, they state,

> In preemption analysis, courts should assume the historic police powers of the States' are not superceded, 'unless that was the clear and manifest purpose of

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[7] (citing to *Printz v. United States,* 522 U.S. 898, 935, 117 S. Ct. 2365, 138 L.Ed.2d 914 (1997)

[8] *Reed Kaliher v. Hoggatt,* 347 P.3d 136 at 141

> congress' [in enacting a law]….Congress itself has specified that the CSA does not expressly preempt or exclusively govern the field.

The CSA states in pertinent part,

> **No provision of [the subchapter on control and enforcement of United States drug laws] shall be construed as indicating an intent on the part of Congress to occupy the field**…to the exclusion of any state law on the same subject matter which would otherwise be within the authority of the State, **unless there was a positive conflict between that provision…and that State law, so that the two cannot consistently stand together.** (emphasis added).

20 U.S.C. § 903. The same conclusion was reached by the Michigan Supreme Court in *Ter Beek v. City of Wyoming,* 495 Mich. 1, 846 N.W.2d 531, 536-41 (2014) which stated,

> [T]he statute 'does not purport to prohibit federal criminalization of or punishment for' use permitted by state law….The manifest purpose of the CSA was 'to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.'[citing to the Supreme Court case of *Gonzales v. Raich,* 545 U.S. 1, 12, 125 S. Ct. 2195, 162 L.Ed.2d. 1 (2005)]…A state law stands as an obstacle to federal law '[I]f the purpose of the [federal law] cannot otherwise be accomplished'…The state law immunity the AMMA provides does not frustrate the CSA's goals of conquering drug abuse or controlling drug traffic.

D. Where Fundamental Rights are at Issue – Strict Scrutiny Applies

Should a case arise with the issues at play here in this article, the first thing the court will determine is whether a right is at issue, explicitly or implicitly guaranteed by the Constitution. *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 34 (1973). For our purposes, this has already been established that the two rights at issue have either been explicitly or implicitly guaranteed by Missouri's state constitution and in the case of the guns, the U.S. Constitution as well. In most cases, not involving fundamental rights or suspects classifications of persons[9], legislation must only be rationally related to a legitimate state interest. *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 440 (1985). In this context, the court would ask, is the prohibition of guns for persons who utilize medicinal cannabis, rationally related to a legitimate state interest? And let me let you in on a little secret, almost anything passes constitutional muster under "rational basis review" but, the same does not hold true for strict scrutiny. In constitutional terms, strict scrutiny analysis is utilized when a fundamental right or suspect classification is at issue. *San Antonio Independence School Dist.,* 411 U.S. at 17. The case of *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) explains the strict scrutiny as applied in that case where the state of Oklahoma sought to enforce a law which required sterilization of repeat criminal offenders, the court explained,

[9] Suspect classification of persons refers to persons who the court admits are at heightened risk of or vulnerable to discriminatory treatment but are not necessarily considered a protected category of persons. An example would include indigent persons.

> We are dealing here with legislation that deals with one of the basic civil rights of man. Marriage and procreation are **fundamental** to the very existence and survival of the race…[T]here is no redemption for the individual whom the law touches…[**H]e is forever deprived of a basic liberty.** We mention these matters not to reexamine the scope of the police power of the States. We advert them merely in emphasis of our view that **strict scrutiny of the classification which a State makes in a sterilization law is essential**, lest unwittingly, or otherwise, invidious discrimination is made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.

In short, the Court is recognizing that a fundamental right is at issue in this case, and therefore, strict scrutiny analysis was warranted in determining the constitutionality of a law that sought to strip repeat criminals of the right to procreate through sterilization.

In the current situation we have determined that the Second Amendment (the right to bear arms) is fundamental in our society, it is neatly packaged in the Constitution of these United States as second in line of importance in our Bill of Rights, therefore strict scrutiny must apply in determining whether or not the government has a compelling interest in limiting a person's right to possess guns where they utilize medicinal cannabis. In strict scrutiny analysis the court would consider the same question above, but it would be framed like this – Is the prohibition of guns for persons who utilize medicinal cannabis narrowly tailored to achieve a compelling government interest? In order to answer that question then, we must first answer, what the government's compelling interest is in depriving its citizens of the right to bear arms where they access medicinal cannabis? I simply cannot answer this question because the government thus far, has not made that known; we can however, look to that "guidance" letter from the DOJ for help. The letter itself provides no guidance apart from saying that federal law prohibits "any person who is an unlawful user or addicted to any controlled substance…from shipping, transporting, receiving or possessing firearms or ammunition". In short, the government, in any case arising from this current set of facts will have to delineate the compelling interest behind the federal government's purported violation of this right. This was a much simpler proposition for the government prior to the several states' enactment of medicinal cannabis laws, as now there is scientific study of the plant's benefits and the economic benefit to society where there was once none by design.

In conclusion, there are competing rights at issue: the right to bear arms v. the right to possess and use medicinal cannabis. If both are fundamental, (one at the both the federal and state level and one at the state level) then one should not give way to the other. We must hold our government to account – as our rights and freedoms here in this great country are what separates us from other nations. The Controlled Substances Act on its face does not conflict with state medicinal cannabis laws, or otherwise frustrate the manifest purpose of the law, which is to curb drug abuse and the legitimate and illegitimate traffic of controlled substances, therefore it cannot be said to preempt state medicinal cannabis laws. Furthermore, the Federal government cannot mandate states to enact Federal law. This leads to the conclusion that there is much support for the proposition that states which follow the mandate of the DOJ in its "guidance letter" are violating the rights of their citizens. It's time for Civil Rights attorneys in states with legalized medicinal cannabis to armour up and head into battle to protect those rights.