*Lewis* and *Bourgoin*: The Growing Divide Over Reimbursement for Medical Marijuana in the Workers' Compensation System

In 1996, California became the first state to authorize the use of marijuana for medical purposes.[1] So far, thirty-two states have followed California's lead and implemented their own medical marijuana programs.[2] Eleven states (including California) and the District of Columbia have gone further, legalizing the use of recreational marijuana for adults.[3] As marijuana laws across the country have loosened and certain medical benefits of marijuana have been recognized, some states have authorized reimbursement for medical marijuana as a treatment under their workers' compensation systems through administrative and judicial proceedings.

But as this trend of marijuana state law liberalization has proceeded, conflict with federal law has loomed large. One state with a medical marijuana program prohibits coverage in the workers' compensation system through statutory exclusion.[4] Where state law is silent on the issue of workers' compensation reimbursement, administrative and judicial proceedings have filled in gaps left by the legislature.

There is an emerging split among state judiciaries over whether federal law preempts reimbursement for medical marijuana in the workers' compensation system. Leading cases from New Mexico and Maine have taken diverging viewpoints on the question of preemption. New Mexico determined that the federal Controlled Substances Act (CSA)[5] did not conflict with state law, allowing for workers' compensation reimbursement for medical marijuana[6]; Maine found just the opposite—that the CSA preempted reimbursement for medical marijuana.[7]

Part I of this paper looks at federal and state marijuana laws including the ways in which the federal government enforces and chooses not to enforce the CSA. Part II examines the doctrine of federal preemption in general and federal preemption of state marijuana laws in particular. Part III analyzes the leading cases on the interaction of state medical marijuana and workers' compensation laws and how those cases deal with federal preemption. Part IV suggests reasons why state courts should hesitate to find preemption for medical marijuana reimbursement in the workers' compensation system.

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[1] *Gonzalez v. Raich* 545 U.S. 1, 5-6 (2005).
[2] *State Medical Marijuana Laws*, National Conference of State Legislatures, http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last visited Dec. 19, 2019).
[3] *Id.*
[4] See *infra* note 145.
[5] Controlled Substances Act, 21 U.S.C. §§ 801-904 (2018).
[6] *Lewis v. American General Media*, 355 P.3d 850, 858 (N.M. Ct. App. 2015).
[7] *Bourgoin v. Twin Rivers Paper Company, LLC*, 187 A.3d 10, 22 (Me. 2018).

This paper is limited in scope to the three-way intersection between (1) state medical marijuana laws, (2) state workers' compensation laws, and (3) the federal CSA. Medical marijuana programs present a host of issues in the workers' compensation system and the broader employment context. Issues like discrimination against workers using medical marijuana or workers' compensation coverage for individuals using medical marijuana who fail a drug test following a workplace accident are not covered in this paper.

## I. FEDERAL AND STATE MARIJUANA LAWS

"Marijuana" refers to parts of *cannabis sativa*, a plant that contains over 500 chemical substances.[8] The primary chemicals (cannabinoids) derived from marijuana are cannabidiol (CBD) and tetrahydrocannabinol (THC).[9] State and federal laws handle the regulation of these substances in a variety of ways.

### *A. The Federal Controlled Substances Act – Text and Regulations*

The regulation of marijuana has a checkered and problematic history in the United States. The cultivation and consumption of marijuana was legal at the federal and state levels until the 1910s.[10] The early twentieth century was marked by white panic about Black and Hispanic populations, and this panic manifested itself, in part, through state laws criminalizing the use and cultivation of marijuana.[11] The federal government, over the protestations of the American Medical Association, reclassified marijuana in 1937, removing it from a list of medicines approved by the federal government.[12]

The Controlled Substances Act was passed by Congress and signed into law by President Richard Nixon in 1970.[13] The CSA has been characterized as a "comprehensive regime to combat the international and interstate traffic in illicit drugs[,]"[14] although the motivation behind it appears to have been a more nefarious continuation of prior racist drug laws.[15] The CSA makes it a federal crime for "any person to knowingly or intentionally

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[8] *Cannabis (Marijuana) and Cannabinoids: What You Need to Know*, National Institutes of Health, https://nccih.nih.gov/health/marijuana-cannabinoids (Last visited Dec. 8, 2019).
[9] *Id.*
[10] Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 81 (2015) (citing Mark Eddy, Cong. Research Serv., RL 33211, Medical Marijuana: Review and Analysis of Federal and State Policies 45 (2010)).
[11] Chemerinsky et al. *supra* note 10, at 81-82 (citing The National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding 16 (1972)).
[12] Chemerinsky et al., *supra* note 10, at 82 (internal citations omitted).
[13] *Id.*
[14] *Gonzalez*, 545 U.S. at 12.
[15] John Ehrlichman, a "domestic-policy adviser" to President Nixon, characterized the administration's motivation behind its "War on Drugs" policies:

> You want to know what this was really all about? . . . The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what

manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]"[16] As part of the "comprehensive regime" of the CSA, drugs are grouped into "schedules" numbered I-V.[17] Since the CSA passed, marijuana has been classified as a Schedule I drug.[18]

Schedule I is the highest classification for drugs in the CSA scheme. Schedule I drugs are classified as such for having "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use of the drug . . . under medical supervision."[19] Other Schedule I drugs include lysergic acid diethylamide (LSD), heroin, peyote, and psilocybin.[20]

Beyond criminal sanctions, a Schedule I listing can create other problems for a spectrum of interested parties. Scientific research using Schedule I drugs is tightly regulated by the Drug Enforcement Administration (DEA) and has only recently been expanded.[21] Doctors are unable to prescribe marijuana since, under Schedule I classification, there is "no . . . accepted medical use."[22] A doctor that attempts to prescribe marijuana risks "losing their DEA license."[23]

Drugs are classified at levels below Schedule I based upon variances in three factors: potential for abuse, accepted medical uses, and safety/dependence.[24] Where Schedule I drugs have "no currently accepted medical use in treatment in the United States[,]" Schedule II drugs have "a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions."[25] And where Schedule I drugs have "a lack of accepted safety for use of the drug . . . under medical supervision[,]"[26] Schedule II drug "[a]buse . . . may

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> I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

Dan Baum, *Legalize It All*, Harper's Magazine (April 2016), https://harpers.org/archive/2016/04/legalize-it-all/.

[16] 21 U.S.C. § 841(a).

[17] 21 U.S.C. § 812(a). This section of the U.S.C. requires the Schedule classifications to be updated on an annual basis. Current schedules can be found at 21 CFR 1308.

[18] *Gonzales*, 545 U.S. at 14 (citing 21 U.S.C. § 812(c)). The CSA and some state laws use the archaic spelling "marihuana."

[19] 21 U.S.C. § 812(b)(1)(A)-(C).

[20] 21 U.S.C. § 812(c).

[21] *DEA announces steps necessary to improve access to marijuana research*, Drug Enforcement Agency (Aug. 26, 2019), https://www.dea.gov/press-releases/2019/08/26/dea-announces-steps-necessary-improve-access-marijuana-research.

[22] 21 U.S.C. 812(b)(1)(B).

[23] Chemerinsky et al., *supra* note 10, at 83.

[24] 21 U.S.C. § 812(b)(1)-(5).

[25] 21 U.S.C. § 812(b)(2).

[26] 21 U.S.C. § 812(b)(1)(C).

lead to severe psychological or physical dependence."[27] The rest of Schedules III-V are primarily distinguished on the varying levels of risk of abuse and the dangers of dependency.[28]

The Attorney General is vested with the authority to reschedule or remove a drug from the schedule list "(1) on his own motion, (2) at the request of the Secretary [of Health and Human Services], or (3) on the petition of any interested party."[29] There have been numerous attempts since passage of the CSA to reschedule marijuana. These administrative and judicial attempts have proven unsuccessful.[30]

*B. The Federal Controlled Substances Act – Enforcement*

The text of the CSA often does not align with enforcement of the CSA, at least where marijuana is concerned. While the federal government does still prosecute violations of the CSA's prohibition on marijuana, the vast majority of marijuana criminal arrests are handled by states.[31] In 2012, state arrests for marijuana violations surpassed federal arrests "by a ratio of 109 to 1."[32] The federal government's equivocal statements of policy, both explicit and implicit, from both the executive and legislative branches, have factored into state court decisions deciding preemption of marijuana laws by the CSA.[33]

The executive branch of the federal government has given numerous conflicting signals over the last decade about the continued prosecution of marijuana offenses under the CSA. During his initial presidential run in 2008, Barack Obama "said he supported the 'basic concept of using medical marijuana for the same purposes and with the same controls as other drugs.'"[34] In 2009, the Department of Justice (DOJ) issued what has been called the "infamous Ogden memorandum" named after its author, Deputy Attorney General David Ogden.[35] This memo signaled that the DOJ would not direct federal resources towards the prosecution of "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[36] This memo ("Ogden Memo") was "intended solely as a guide to the exercise of investigative and prosecutorial

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[27] 21 U.S.C. § 812(b)(2)(C).
[28] 21 U.S.C. § 812(b)(3)-(5).
[29] 21 U.S.C. § 811(a).
[30] *Bourgoin*, 187 A.3d at 15-16 (Summary of administrative and judicial proceedings from 1972 to present).
[31] Chemerinsky et al., *supra* note 10, at 84.
[32] *Id.*
[33] *See infra*, Part III.
[34] *Obama's pot promise a pipe dream?*, Politico (Apr. 21, 2012, 7:02 AM), https://www.politico.com/story/2012/04/obamas-pot-promise-a-pipe-dream-075421.
[35] Chemerinsky et al., *supra* note 10, at 86.
[36] *Memorandum for Selected United State Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, Department of Justice (Oct. 19, 2009), https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states.

discretion" and was not meant to undermine federal prosecutions of the CSA, nor provide a legal defense to a violation of the CSA.[37]

The DOJ issued further guidance following the Ogden Memo in a trilogy of memos between 2011 and 2014.[38] The first of these memos ("Cole Memo I") was issued on June 29, 2011 by then-Deputy Attorney General James Cole.[39] Cole Memo I reinforced the DOJ's "commit[ment] to the enforcement of the [CSA] in all States."[40] This new memo purported to reinforce the Ogden Memo but also indicated that the DOJ had "large-scale, privately-operated industrial marijuana cultivation centers[]" in its prosecutorial crosshairs.[41] The DOJ then commenced a crackdown on the marijuana industry that "exceed[ed] [President George W.] Bush's record for medical-marijuana busts."[42]

In November 2012, Colorado and Washington became the first states to pass initiatives to legalize the recreational use of marijuana by adults.[43] Following these legalization successes, the second of the Cole Memos was issued on August 29, 2013, and this memo ("Cole Memo II") provided some of the most significant language guiding interpretation of CSA preemption of medical marijuana laws.[44] Once again, the DOJ reinforced its "commit[ment] to enforcement of the CSA[.]"[45] The DOJ then listed eight federal "enforcement priorities" for marijuana under the CSA.[46] These priorities were "less likely to [be] threat[ened]" in "jurisdictions that have enacted

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[37] *Id.*
[38] Memos I and II are most important for purposes of this preemption discussion. Cole Memo III provides "Guidance Regarding Marijuana Related Financial Crimes," and is of limited relevance to the preemption discussion *infra*. *Guidance Regarding Marijuana Related Financial Crimes*, Department of Justice (Feb. 14, 2014), https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20(2).pdf.
[39] *Guidance Regarding the Ogden memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use*, Department of Justice (June 29, 2011), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf.
[40] *Id.*
[41] *Id.*
[42] Tim Dickinson, *Obama's War on Pot*, Rolling Stone (Feb. 16, 2012, 2:55 PM), https://www.rollingstone.com/politics/politics-news/obamas-war-on-pot-231820/.
[43] Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. Times, Nov. 7, 2012, https://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html.
[44] *Guidance Regarding Marijuana Enforcement*, Department of Justice (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.
[45] *Id.*
[46] Those priorities are (1) "Preventing the distribution of marijuana to minors;" (2) "Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;" (3) "Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;" (4) "Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;" (5) "Preventing violence and the use of firearms in the cultivation and distribution of marijuana;" (6) "Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;" (7) "Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers

laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana[.]"[47] This memo was interpreted to mean that "states that could demonstrate compliance with these [enforcement] priorities would largely be left to their own devices."[48]

The Ogden and Cole Memos, and their limited effects, were short-lived. On January 4, 2018, Attorney General Jeff Sessions officially rescinded the Ogden Memo and the three Cole memoranda.[49] The practical enforcement effect of the rescissions is unclear, although the memos have featured prominently in judicial decisions on the preemption issue.[50]

Further complicating the mixed signals from the executive branch are mixed signals from the legislative branch. Of course, Congress passed the CSA and initially listed marijuana as a Schedule I drug[51] evincing a strong anti-marijuana animus. But Congress sent a sharply contrasting signal against enforcement with the Consolidated Appropriation Act, 2016.[52] While, "the rider is not a model of clarity,"[53] it "effectively prohibit[s] the Department of Justice from prosecuting individuals who engage in conduct permitted by state medical marijuana laws and who full comply with such laws."[54] One Circuit Court of Appeals has held that federal prosecutions under the CSA of individuals in full compliance with their State's medical marijuana statutes violate the Appropriations Clause of the Constitution.[55] But the court in *McIntosh* noted that non-prosecution of CSA violations for those in compliance with medical marijuana state laws is of a "temporal nature."[56] "Congress could appropriate funds for such prosecutions tomorrow."[57]

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pose by marijuana production on public lands; and" (8)" Preventing marijuana possession or use on federal property." *Id.*

[47] *Id.*

[48] Chemerinsky et al., *supra* note 10, at 90 (note omitted).

[49] *Marijuana Enforcement*, Department of Justice (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download.

[50] *See infra*, Part III.

[51] 21 U.S.C. § 812(c).

[52] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015).

[53] *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016).

[54] *Appeal of Panaggio*, 205 A.3d 1099, 1104 (N.H. 2019) (citing *McIntosh*, 833 F.3d at 1177).

[55] *McIntosh*, 833 F.3d at 1177.

[56] *Id.* at 1179.

[57] *Id.*

The text of the CSA in combination with its equivocal federal enforcement record has proved important to state decisions about preemption of medical marijuana coverage in the workers' compensation system.[58] But any discussion about federal preemption necessarily requires a discussion of state laws they may preempt.

*C. State Medical Marijuana Laws*

Since California adopted the first medical marijuana program in 1996, state marijuana laws have been in a state of flux. State marijuana laws come, generally, in four varieties: (1) illegal medically and recreationally; (2) legal CBD/low-THC medical products; (3) comprehensive medical marijuana; and (4) recreational marijuana.[59]

Marijuana is still illegal, both medically and recreationally, in four states: Idaho, Kansas, Nebraska, and South Dakota.[60] These states maintain traditional, strict laws prohibiting the use, possession, and distribution of marijuana and marijuana-derived products. Thirteen states have de-criminalized marijuana-derived products,[61] which contain CBD but low amounts of THC, the primary psychoactive component of marijuana.[62] These states that allow CBD products but have not legalized marijuana with higher concentrations of THC do not have "comprehensive medical marijuana programs," and are thus outside the scope of this article.[63]

Because of the CSA, state medical marijuana programs[64] must necessarily function separate and apart from traditional methods used for dispensing drugs.[65] Under a typical medical marijuana program, a doctor first recommends medical marijuana.[66] Statutes usually limit the physician's ability to recommend marijuana by enumerating a list of "medical condition[s]" that qualify a patient for the program.[67] After receiving medical authorization, the patient can then receive a medical marijuana registration card from the State[68] and acquire

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[58] *See infra*, Part III.
[59] *See State Medical Marijuana Laws*, *supra* note 2.
[60] *Id.*
[61] *Id.*
[62] *Id.*; *see also* John G. Sprankling, *Owning Marijuana*, 14 Duke J. Const. L. & Pub. Pol'y 1, 16 n. 76 (2019).
[63] *State Medical Marijuana Laws, supra* note 2.
[64] This section contains a very general overview of a typical marijuana program. State laws contain substantial variations and cataloging them is outside the scope of this paper.
[65] Doctors cannot "prescribe" marijuana and pharmacists cannot "distribute" marijuana. *See* Section I-B *supra*.
[66] *See e.g.*, Me. Stat. tit. 22, § 2423-B (2019) (In Maine, "[a] medical provider may provide a written certification . . . for the medical use of marijuana under this chapter and, after having done so, may otherwise state that in the medical provider's professional opinion a qualifying patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's medical diagnosis.").
[67] *See e.g.,* N.H. Rev. Stat. Ann. § 126-X:1(IX) (New Hampshire's definition of "Qualifying medical condition" includes a list of conditions (like cancer, glaucoma, and HIV), a list of symptoms (like wasting syndrome and constant or severe nausea) and a more general list that includes "[m]oderate to severe chronic pain" and "[m]oderate or severe post-traumatic stress disorder.").
[68] *See e.g.,* N.M. Stat. Ann. § 26-2B-7(B) (In New Mexico, "[t]he department [of health] shall issue registry identification cards to a patient . . . in accordance with the department's rules[.]").

marijuana from a dispensary.[69] In addition to creating a regulated system for the use and distribution of marijuana, state medical marijuana laws also provide exemptions from certain state criminal sanctions.[70]

## II. FEDERAL PREEMPTION

The specific question this paper examines, and the question addressed by the state courts in New Mexico and Maine, is whether the CSA preempts reimbursement of medical marijuana expenses through workers' compensation systems. This is a relatively narrow question. A much broader and consequential question is whether the CSA preempts permissive state marijuana laws that create a regulated system of marijuana use, either medically or recreationally. Before discussing the narrow workers' compensation question, it helps to have a familiarity with current thought on federal preemption generally and by the CSA.

### A. *Federal Preemption Generally*

Preemption doctrine derives from Article VI, cl.2 of the Constitution, the Supremacy Clause.[71] Federal law is "the supreme law of the Land[]" whenever state and federal law are in conflict. There are two guiding principles in determining federal preemption. The first principle: "'the ultimate touchstone in every pre-emption case' is Congress's purpose in enacting the federal law[.]"[72] The second principle is that "in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal [law] unless that was the clear and manifest purpose of Congress."[73]

Using these two principles, courts have determined that federal preemption occurs in four separate ways: "express, field, conflict, and obstacle preemption."[74] Express preemption is the simplest form of preemption and occurs "where Congress expressly states that federal law preempts the state law[.]"[75] Express preemption is thus the easiest form of preemption to resolve since Congress's intent to preempt is made clear and manifest in the statute itself.

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[69] *See e.g.,* N.H. Rev. Stat. Ann. § 126-X:1(I) (In New Hampshire, what are colloquially known as "dispensaries" are called "[a]lternative treatment center[s]. New Hampshire defines an "[a]lternative treatment center" as an "entity . . . that acquires, possesses, cultivates, manufactures, delivers, transfers, transports, sells, supplies, and dispenses cannabis, and related supplies and educational materials, to qualifying patients and alternative treatments centers.")
[70] *See e.g.,* 35 Pa. Stat. and Cons. Stat. Ann. § 10231.304 (West 2019) (In Pennsylvania, "[e]xcept as provided . . . the use of medical marijuana is unlawful and shall, in addition to any other penalty provided by law, be deemed a violation of . . . The [Pennsylvania] Controlled Substance, Drug, Device and Cosmetic Act.").
[71] Chemerinsky et al., *supra* note 10, at 102.
[72] *Bourgoin*, 187 A.3d at 14 (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).
[73] *Id.*
[74] Chemerinsky et al., *supra* note 10, at 104.
[75] *Bourgoin*, 187 A.3d at 14 (citing *Hillsborough Cty. V. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

The other three forms of preemption are forms of implied preemption. Field preemption requires "state laws [to] yield to a congressional act when 'Congress intends federal law to occupy the field.'"[76] Field preemption can be "inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'"[77]

The final two types of preemption, conflict and obstacle, are related and are sometimes discussed as a singular type of implied preemption.[78] Conflict preemption occurs "where compliance with both federal and state [law] is physically impossible."[79] Obstacle preemption "occurs where 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[80]

B. *Federal Preemption and the CSA*

The CSA does not preempt state law expressly or through implied field preemption. There is no express declaration of Congress's intent to preempt state law, and 21 U.S.C. § 903 addresses the interaction of the CSA with state law:

> 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.[81]

Thus, Congress explicitly stated that it did not intend to preempt state law through field preemption.

This avoidance of field preemption makes sense for the federal government since "states have far greater law enforcement capacity than does the federal government."[82] Recall that state marijuana arrests dwarf federal arrests 109 to 1.[83] Field preemption would gut supplementary state drug laws and require an incredible expansion of the federal government in order to enforce the CSA as the only drug law in America.[84]

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[76] Chemerinsky et al., *supra* note 10, at 105 (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (internal citation omitted)).
[77] *Arizona v. United States*, 567 U.S. 387, 399 (2012) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).
[78] *See e.g.*, *Arizona v. United States*, 567 U.S. at 399-400.
[79] *Bourgoin*, 187 A.3d at 14 (citing *Hillsborough Cty.*, 471 U.S. at 713).
[80] *Id.*
[81] 21 U.S.C. § 903.
[82] Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. Health Care L. & Pol'y 5, 12 (2013).
[83] *See supra*, note 32.
[84] Mikos, *supra* note 82, at 12.

When requiring "positive conflict" between state and federal laws in order to create preemption, Congress thus brought the CSA into the realm of conflict preemption (either traditional conflict or obstacle preemption).[85] Unfortunately, what types of "positive conflicts" Congress envisioned to preempt is unclear since "there is very little known legislative history concerning the meaning of Section 903."[86]

If implied preemption by the CSA arises, it must arise under obstacle preemption. It cannot arise under traditional conflict preemption because state marijuana laws do not make it "physically impossible" to comply with both state and federal laws. As discussed *supra*, state medical and recreational marijuana laws decriminalize possession, use, and cultivation in certain circumstances. Conflict preemption only arises when a state law requires a person to violate a federal law.[87] Medical and recreational marijuana laws do not require citizens to manufacture, distribute, dispense, or possess marijuana, and thus there is no conflict with the CSA in this regard.[88]

Obstacle preemption "encourages courts to disregard text in favor of extratextual notions of Congress's 'true' purpose[,]" so it is no surprise that it is a doctrine controversial to textualists.[89] Divining Congress's "true" purpose is difficult, and "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them."[90] Obstacle preemption is limited by the Tenth Amendment anticommandeering doctrine. Under this doctrine, the federal government "may not force the states to 'enact or administer a federal regulatory program.'"[91]

Commentators generally agree that the CSA does not preempt state marijuana laws that are more permissive than federal law and create a regulated system for marijuana use.[92] But whether the CSA preempts reimbursement for medical marijuana under the workers' compensation system requires a more focused and nuanced discussion of federal criminal law.

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[85] 21 U.S.C. § 903.
[86] Mikos, *supra* note 82, at 13 ("The few statements on the record simply reiterate the language that became Section 903. See H.R. Rep. No. 91-1444, pt. 1, at 29, 60 (1970)")
[87] Chemerinsky et al., *supra* note 10, at 105-06.
[88] *Id.* at 106.
[89] Note, *Preemption as Purposivism's Last Refuge*, 126 Harv. L. Rev. 1056, 1065 (2013).
[90] Chemerinsky et al., *supra* note 10, at 109 (citing *Wyeth*, 555 U.S. at 575).
[91] Mikos, *supra* note 82, at 16 (citing *New York v. United States*, 505 U.S. 144, 188 (1992)).
[92] *See* Mikos, *supra* note 82, at 36 ("[O]nly a few state marijuana reforms pose a direct conflict with the CSA."); Chemerinsky et al., *supra* note 10, at 112 ("[States] may remove some or even all criminal penalties and impose a state system to regulate marijuana activity[.]"); Lea Brilmayer, *A General Theory of Preemption: With Comments on State Decriminalization of Marijuana*, 58 B.C. L. Rev. 895, 924 (2017) ("The case is weak for federal/state preemption because there is sufficient basis for assuming Congressional tolerance for state inaction.").

## III. WORKERS' COMPENSATION COVERAGE FOR MEDICAL MARIJUANA

The issue of preemption for reimbursement of medical marijuana under the workers' compensation system has reached appellate courts in three states: New Mexico[93], Maine[94], and New Hampshire.[95] The two leading opinions on this issue are those from New Mexico and Maine.[96]

### A. *The New Mexico Cases:* Vialpando *and* Lewis

The issue of preemption of coverage for medical marijuana in the workers' compensation system reached the Court of Appeals of New Mexico twice. The first case was *Vialpando v. Ben's Automotive Services*.[97] *Vialpando* is primarily a case of statutory interpretation and whether medical marijuana can be reimbursed as "reasonable and necessary health care services from a health care provider."[98] The issue of preemption of coverage by the CSA is addressed briefly at the end of the court's opinion. The Employer argued that "because marijuana remains a controlled substance under federal law, the order to reimburse Worker for money spent purchasing a course of medical marijuana 'essentially requires' Employer to commit a federal crime."[99] This case is similar to *Panaggio*[100] in that, beyond generally citing to the illegality of marijuana under the CSA, the Employer did "not cite to any federal statute it would be forced to violate[.]"[101] The court declared that it "will not search for such a statute[]" and affirmed the order of the WCJ authorizing reimbursement.[102]

While the court in *Vialpando* did not rule on the merits of the preemption issue, the court did signal that it was inclined not to find preemption. Specifically, the court cites to Cole Memo II and the DOJ's "equivocal

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[93] *Lewis v. American General Media*, 355 P.3d 850 (N.M. Ct. App. 2015).
[94] *Bourgoin v. Twin Rivers Paper Company, LLC*, 187 A.3d 10 (Me. 2018).
[95] *Appeal of Panaggio*, 205 A.3d 1099 (N.H. 2019).
[96] In *Panaggio*, the Supreme Court of New Hampshire briefly discussed the issue of preemption but did not substantively decide the issue. The New Hampshire Compensation Appeals Board "upheld the carrier's refusal to reimburse Panaggio, concluding that 'the carrier is not able to provide medical marijuana' because such reimbursement is 'not legal under state or federal law.'" *Id.* at 1100. Beyond this explanation, however, the Appeals board "did not cite any legal authority for its conclusion[.]" *Id.* at 1104. The court remanded to the Board for legal determinations so that a "meaningful review" could be conducted. *Id.* at 1105. A subsequent opinion has not been issued.
[97] *Vialpando v. Ben's Automotive Services*, 331 P.3d 975 (2014).
[98] *Id.* at 977. The court concluded that medical marijuana can be reimbursed under the statute's language. "Products" are included in the statute's definition of "health care services," and "products" includes "non-prescription drugs and other products." *Id.* at 978. "The only prerequisite is that the service be 'reasonable and necessary' for the worker's treatment." *Id.* (citing N.M. Code R. §11.4.7.7(U) (2011)).
[99] *Id.* at 980.
[100] See *supra*, note 96. In *Panaggio*, it was the Compensation Appeals Board that did not fully explain its preemption theory.
[101] *Vialpando*, 331 P.3d at 980.
[102] *Id.*

statements about state laws allowing marijuana use for medical and even recreational purposes."[103] This seeming deference from the DOJ combined with the New Mexico legislature's "clear" statement of public policy "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments[]" led the court to leave the issue for another day.[104]

The court did not have to wait long before the preemption issue was raised once again. *Lewis v. American General Media* was decided in June 2015[105] and is currently the leading case in which a state appellate court has found that the CSA does not preempt authorization for reimbursement of medical marijuana in the workers' compensation system.

The Employer in *Lewis* argued conflict with federal law in two ways. First, the Employer argued "that the Workers' Compensation Act and the Compassionate Use Act do not meet the standard set forth" in Cole Memo II.[106] The Employer attempted to build upon the court's citation (in *Vialpando*) to the "enforcement guidelines" in this memo, but this argument failed. The argument was too vague: "It is not clear the manner in which any deficiency in this system is an issue in this case, and Employer's arguments in this regard are not specific."[107]

Unlike the Employer in *Vialpando*, the Employer here specifically cited to the CSA provision which allegedly preempts the reimbursement of medical marijuana. The Employer cited to 21 U.S.C. § 841(a) which makes it "unlawful for any person knowing or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . ."; 21 U.S.C. § 846, the CSA's attempt and conspiracy provision; and 18 U.S.C. § 2(a), "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

The Court of Appeals did not thoroughly engage in the substance of the preemption argument, unfortunately. The court did not even discuss the various preemption doctrines nor how the New Mexico

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[103] *Id.*
[104] *Id.* (citing N.M. Stat. Ann. §26-2B-2).
[105] 355 P.3d 850 (2015). In between these two cases, the Court of Appeals of New Mexico addressed reimbursement for medical marijuana in the workers' compensation system again in *Maez v. Riley Industrial*, 347 P.3d 732 (2015). The issue of preemption was not addressed in *Maez*. *Maez* once again concerned the "reasonable and necessary" requirement, this time in the face of contradictory statements from a doctor authorizing medical marijuana treatments. *Maez*, 347 P.3d at 737.
[106] *Lewis*, 355 P.3d at 857.
[107] *Id.*

Compassionate Use and Workers' Compensation Acts might fit into that doctrinal scheme. The court discarded this preemption argument in a single, brief paragraph.[108]

As in *Vialpando*, the court cited to the DOJ's equivocal statements in Cole Memo II and to "the clear New Mexico policy as expressed in the Compassionate Use Act[.]"[109] By this point, Congress had passed the Consolidated Appropriation Act, 2016 which prevented federal prosecutions of those in compliance with state medical marijuana laws.[110] The court "reach[ed] the same conclusion [as] in *Vialpando*[,]" albeit slightly bolstered because of Congress's rescission of funds for medical marijuana prosecutions.[111]

What is troubling about the opinion in *Lewis* is its vulnerability to collapse. Cole Memo II has been rescinded by the Trump administration and, as noted in *McIntosh*, "Congress could appropriate funds for [medical marijuana] prosecutions tomorrow."[112] If Congress does decide to once again fund DOJ prosecutions for medical marijuana users who are in full compliance with state laws, the *Lewis* opinion's reasoning is immediately undermined, and the Court of Appeals of New Mexico could face the issue of CSA preemption once again. A substantive engagement with the Employer's preemption argument could have settled this issue (at the intermediate appellate level, at least).

B. Bourgoin*: Preemption in Maine*

The Supreme Judicial Court of Maine, divided 5-2, found that the CSA preempted reimbursement for medical marijuana under the workers' compensation system.[113] The majority opinion and justice Jabar's dissenting opinion both engage in substantive discussions of preemption doctrine and the effect of the CSA on reimbursement.[114]

i. *Preemption Based on Accomplice Liability*

The majority opinion first discusses the four different ways that federal law can preempt state law.[115] As in *Lewis*, the Employer argues that the CSA preempts reimbursement through 21 U.S.C. § 841(a) and 18 U.S.C. § 2(a). Of particular importance to the majority is accomplice liability under 18 U.S.C. § 2(a) which holds criminally liable an aider and abettor as a principal in the commission of a federal crime. "[W]ere Twin Rivers to comply with the

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[108] *Id.* at 858.
[109] *Id.*
[110] *Id. See also* Section I-B; *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016).
[111] *Lewis*, 355 P.3d at 858.
[112] 833 F.3d at 1179.
[113] *Bourgoin v. Twin Rivers Paper Company, LLC.*, 187 A.3d 10 (2018).
[114] A second dissenting opinion, filed by Justice Alexander, is discussed in Part IV, *infra*.
[115] *Bourgoin*, 187 A.3d at 14-15. The majority discusses "three ways" that federal preemption occurs, including obstacle preemption as a sub-type of conflict preemption.

administrative order by subsidizing Bourgoin's use of medical marijuana, it would be engaging in conduct that meets all of the elements of criminal aiding and abetting as defined in section 2(a)."[116] But as discussed below, not *all* of the elements of aiding and abetting could be proved. The court's discussion of mens rea is problematic.

Mens rea is a crucial element of liability as an aider and abettor under § 2(a). Any "trivial" act can suffice to fulfill the actus reus requirement of a criminal statute, but "the mens rea half of the equation can pose a more difficult hurdle."[117] The majority relied exclusively on *Rosemond v. United States*[118] for its explanation of the mens rea requirement under § 2(a). But a further exploration of mens rea for accomplice liability is necessary since, as Justice Alito's partial concurrence notes, the *Rosemond* majority, in discussing different levels of mens rea, "'refer[red] interchangeably' to both purpose and knowledge[.]"[119]

The majority in *Bourgoin* also seems to refer interchangeably to purpose and knowledge. The court states that a person is criminally liable for aiding and abetting a criminal scheme when that person "*knowing* its extent and character *intends* that scheme's commission."[120] The court rests its analysis of accomplice liability on the mens rea level of "knowing" and does not further engage with any discussion of specific intent.

Justice Jabar's dissent more deeply explored the mens rea required for accomplice liability. This dissent asserts 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."[121] The definition of the mens rea required for aiding and abetting was set forth by Judge Learned Hand in *United States v. Peoni*.[122] To be criminally liable as an aider and abettor, "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 action to make it succeed.'"[123] This definition of the mens rea required for accomplice liability was affirmed by the Supreme Court in *Nye & Nissen v. United States*.[124] Aiding and abetting is thus a specific intent crime, and "[t]o be proved guilty of aiding and abetting, [it] must be established [] that the defendant desired the illegal activity to succeed."[125]

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[116] *Id.* at 17.
[117] Kit Kinports, *Rosemond, Mens Rea, and the Elements of Complicity*, 52 San Diego L. Rev. 133, 136 (2015).
[118] *Rosemond v. United States*, 572 U.S. 65 (2014).
[119] Kinports, *supra* note 117, at 141 (citing *Rosemond*, 572 U.S. at 1253 (Alito, J., concurring in part)).
[120] *Bourgoin*, 187 A.3d at 17 (citing *Rosemond*, 572 U.S. at 1249) (emphasis in *Bourgoin*).
[121] *Id.* at 25 (Jabar, J., dissenting).
[122] *Bourgoin*, 187 A.3d at 25 (Jabar, J., dissenting) (citing *United States v. Peoni*, 100 F.2d 401, 402 (2d. Cir. 1938)).
[123] *Id.* (emphasis in *Bourgoin*)
[124] *Bourgoin*, 187 A.3d at 25 (Jabar, J., dissenting) (citing *Nye & Nissen v. United States*, 336 U.S. 613, 618-19 (1949)).
[125] *Bourgoin*, 187 A.3d at 26 (citing *United States v. Zafiro*, 945 F.2d 881, 887 (7th Cir. 1991) (Posner, J.)).

As stated above, the majority's main theory of preemption is the premise that an administrative order for reimbursement of medical marijuana would require an employer to "engag[e] in conduct *that meets all of the elements* of criminal aiding and abetting as defined in section 2(a)."[126] But as Justice Jabar points out, if a prosecutor attempted to try the employer with an aiding and abetting violation of the CSA, the prosecutor could not prove the specific intent element of § 2(a) because the employer did not wish to participate in the venture and did so only by administrative order.[127] The majority, relying on *Rosemond*, conflated "purpose" and "knowledge" mens rea levels, and it appears upon close scrutiny that the majority's primary theory of preemption collapses.

ii. *Alternate Theories of Preemption*

The majority does set forth alternate theories of preemption, pulling from other judicial decisions about medical marijuana. The court found these cases analogous since "a party . . . was confronted with a mandate to engage in conduct that would be violative of the CSA."[128] One alternate theory the majority sets forth is based on *People v. Crouse*.[129] When Colorado passed an amendment to its constitution legalizing the medical use of marijuana, it included a provision that "require[d] law enforcement officers to return medical marijuana seized from an individual later acquitted of a state drug charge."[130] The Supreme Court of Colorado found that this "return provision" of the Colorado Constitution was preempted by the CSA since it required law enforcement officers to return, or "distribute," marijuana in direct violation of § 841(a) of the CSA.[131]

The majority again relies on "aiding and abetting" accomplice liability in its reliance on *Crouse*, which is inapt since *Crouse* is not premised on 18 U.S.C. § 2(a).[132] Justice Jabar's dissent correctly notes that *Crouse* is also inapt because the return provision "required police officers to *physically distribute* seized medical marijuana to individuals[.]"[133] Since the officers were required to *physically distribute* marijuana, compliance with both federal and state law was *physically impossible*.[134] There is thus a difference between the situation in *Crouse* and an order requiring reimbursement for medical marijuana "in both nature and degree."[135]

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[126] *Bourgoin*, 187 A.3d at 17 (emphasis added).
[127] *Bourgoin*, 187 A.3d at 25 (Jabar, J., dissenting).
[128] *Bourgoin*, 187 A.3d at 19.
[129] *People v. Crouse*, 388 P.3d 39 (Colo. 2017).
[130] *Crouse*, 388 P.3d at 40 (citing Colo. Const. art. XVIII, § 14(2)(e)).
[131] *Crouse*, 388 P.3d at 42.
[132] *Bourgoin*, 187 A.3d at 20.
[133] *Bourgoin*, 187 A.3d at 24 (Jabar, J., dissenting).
[134] *Id.*
[135] *Id.* at 24-25 (Jabar, J., dissenting).

Two of the cases, *Garcia v. Tractor Supply Co.*[136] and *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*[137], held that employers are not required "to treat an employee's medical use of marijuana as a reasonable workplace accommodation."[138] In these cases, an employee or potential employee was required to take a drug test. They notified their supervisors of their medical marijuana use in compliance with state law and were subsequently terminated/not hired.[139] The employees claimed the employers violated anti-discrimination statutes by firing them because of a disability.[140] The courts held that the CSA preempted in this situation.[141]

The majority in *Bourgoin* states that these cases show that "a person's right to use medical marijuana cannot be converted into a sword that would require another party . . . to engage in conduct that would violate the CSA."[142] This alternate theory thus requires the analysis to circle back to "the conduct that would violate the CSA" (reimbursement), accomplice liability, and conflict preemption. This alternate theory is not analyzed significantly in *Bourgoin* but instead serves primarily to underline the court's primary argument of preemption because of accomplice liability. It remains to be seen whether other courts deciding worker's compensation medical marijuana cases will import this line of reasoning from anti-discrimination litigation.

iii. *Preemption Conclusion*

As discussed *supra*, the CSA generally does not preempt state laws where states have created a regulated system for the medical or recreational use of marijuana. The New Mexico opinion in *Lewis* did not find preemption but also did not do a thorough analysis of the issue. The majority opinion in *Bourgoin* did find preemption based upon accomplice liability, but the court confused the "purpose" and "knowledge" mens rea requirements of that specific intent crime.

The most well-reasoned opinion on this issue is Justice Jabar's dissent in *Bourgoin*. Justice Jabar carefully distinguished between the mens rea levels for accomplice liability and distinguished between the situation in *Crouse* against workers' compensation reimbursement for medical marijuana. While Jabar did not completely refute the

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[136] *Garcia v. Tractor Supply Co.*, 154 F.Supp.3d 1225 (D.N.M. 2016).
[137] *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010).
[138] *Bourgoin* 187 A.3d at 19-20 (citing *Garcia*, 154 F.Supp.3d at 1230; *Emerald Steel Fabricators, Inc.*, 230 P.3d at 536).
[139] *Garcia*, 154 F.Supp.3d at 1226-27; *Emerald Steel Fabricators*, 230 P.3d at 520-21. Neither of these cases involve an employee using marijuana at work. Both cases involved marijuana used only off-premises and off-the-clock.
[140] *Garcia*, 154 F.Supp.3d at 1227; *Emerald Steel Fabricators*, 230 P.3d at 521.
[141] *Garcia*, 154 F.Supp.3d at 1230; *Emerald Steel Fabricators*, 230 P.3d at 536.
[142] *Bourgoin* 187 A.3d at 20.

alternate theories of CSA preemption, his opinion is the clearest that has been authored by any member of a state appellate court on this controversial issue.

Justice Jabar is likely correct that the CSA does not preempt reimbursement for medical marijuana in the workers' compensation system. As discussed *supra*, the CSA preempts state law only where a "positive conflict" exists.[143] Without an express preemption provision, there is a presumption that the state law is valid.[144] Congress's intent is the guiding principle in implied preemption cases, and Congress's intent is anything but clear in this case. Congress did pass the CSA and has resisted rescheduling marijuana as anything lower than Schedule I, but Congress has equivocally refused to fund DOJ prosecutions for those in compliance with state medical marijuana laws. While Congress could change that and fund DOJ prosecutions once again, it still remains speculative whether an employer or insurer could be held criminally liable as an accomplice for aiding and abetting a violation of the CSA.

## IV. SUGGESTIONS

If judicial efficiency and legislative clarity were the only concerns when deciding whether workers' compensation systems can/should reimburse for medical marijuana, then states should follow the lead of Florida. Florida's legislature precluded coverage of marijuana in the workers' compensation through a clear and specific statutory provision.[145] Some other states have medical marijuana statutes that contain language that limit reimbursement from insurers or "government medical assistance program[s,]" but state courts are split on whether these terms include the workers' compensation system.[146]

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[143] *Supra*, Section II-B.

[144] Chemerinsky et al., *supra* note 10, at 104 (citing *Pharm. Research and Mfrs. Of Am. v. Walsh*, 538 U.S. 644, 661-62 (2003).

[145] Fla. Stat. Ann. § 381.986(15)(f) ("Marijuana as defined in this section, is not reimbursable under [the Florida Workers' Compensation Law]"); *see also Jones v. Grace Healthcare Center*, 2019 WL 1594488 at *6, n. 11 (FL.Off.Judge Comp.Cl. Apr. 9, 2019) (Despite claimant counsel's "bizarre argument," the exclusionary language is not "a myth, like Bigfoot.").

[146] *Compare Todor v. Northland Farms, LLC*, 2011 WL 4674784 at *7 (Mich.Comp.App.Com. Sept. 28, 2011) (Section 333.26427(c)(1), which states that "[n]othing in this act shall be construed to require . . . [a] government medical assistance program or commercial or non-profit health insurer to reimburse a person for costs associated with the medical use of marihuana[]" "forbids the use of the [medical marihuana statute] to force a[] [worker's compensation] insurer to pay for the costs associated with the use of medical marijuana." *with Appeal of Panaggio* 205 A.3d at 1102-03 (N.H. Rev. Stat. Ann. § 126-X:3(III)(A), which states that "[n]othing in this [the medical marijuana statute] shall be construed to require [a]ny health insurance provider, health care plan, or medical assistance program to be liable for any claim for reimbursement for the therapeutic use of cannabis[,]" cannot be read to prevent workers' compensation reimbursement as that "would deny [the] right to medical care deemed reasonable under the Workers' Compensation Law.")

But as Justice Alexander noted in his dissenting opinion in *Bourgoin*, "[W]e must not lose sight of the injured worker[.]"[147] The claimants in both *Lewis*[148] and *Bourgoin*[149] sought reimbursement for medical marijuana for chronic, severe back pain that resulted from workplace injuries. In *Lewis*, the worker experienced post-laminectomy syndrome as a result of the surgeries that followed her injury.[150] Before applying for reimbursement for marijuana, she had "taken numerous drugs as part of her pain management, including Oxycontin, oxycodone,[151] . . . Percocet, [and] fentanyl[.]"[152] While no detailed prescription list was given in the *Bourgoin* opinion, the court did state that the claimant "consulted with a number of pain management specialists and attempted a variety of treatments, including opioid medications" but discontinued use "[d]ue to adverse side effects."[153]

It is unsurprising that the claimants in *Lewis* and *Bourgoin* sought alternative treatments to the opioid courses they had been prescribed. America is experiencing a "public health crisis" as the result of the proliferation of opioids and their misuse.[154] When a prescription for an opioid is given, the patient has an 8-12% chance of "develop[ing] an opioid use disorder."[155] There is also an extraordinary danger associated with the use of opioids, with over 47,000 people in the United States dying as a result of opioid overdose in 2017 alone.[156] Yet despite the opioid crisis and the danger of addiction and fatal overdose, OxyContin, oxycodone, fentanyl, and Percocet are listed as Schedule II drugs under the CSA.[157] In contrast, a fatal overdose from marijuana is "unlikely,"[158] and perhaps nearly impossible for an adult.[159]

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[147] *Bourgoin*, 187 A.3d at 32 (Alexander, J., dissenting).
[148] *Lewis*, 355 P.3d at 852.
[149] *Bourgoin*, 187 A.3d at 13.
[150] *Lewis*, 355 P.3d at 852.
[151] OxyContin is a brand name for a reformulation of oxycodone. *See* Harriet Ryan, et al. *'You Want a Description of Hell?' OxyContin's 12-Hour Problem*, Los Angeles Times (May 5, 2016), https://www.latimes.com/projects/oxycontin-part1/.
[152] *Lewis*, 355 P.3d at 852.
[153] *Bourgoin*, 187 A.3d at 13.
[154] *Opioid Overdose Crisis*, National Institute on Drug Abuse (January 2019), https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis#one.
[155] *Id.* (internal citation omitted)
[156] *Id.*
[157] *Controlled Substance Schedules*, Department of Justice Diversion Control Division, https://www.deadiversion.usdoj.gov/schedules/ (last visited Dec. 19, 2019).
[158] *Is it possible to "overdose" or have a "bad reaction" to marijuana?*, Centers for Disease Control and Prevention, https://www.cdc.gov/marijuana/faqs/overdose-bad-reaction.html (last visited Dec. 19, 2019).
[159] Marion Renault, *Can you overdose on weed?* (June 21, 2019), https://www.popsci.com/overdose-on-weed-marijuana/.

Beyond being safer than opioids, marijuana is also proven to be effective at treating chronic pain.[160] Further evidence shows that in Michigan, a state with a comprehensive medical marijuana program, opioid users are dropping opioids for marijuana at a rate of 64%.[161] Marijuana, like every drug, does have detrimental effects (especially when used by adolescents),[162] and the full scope of the detrimental effects of marijuana is unclear. But any concern about the scientific uncertainty around marijuana should be weighed against the imminent, potentially fatal danger posed by opioid use.

Marijuana is an effective and much safer treatment for chronic pain than opioids. Medical marijuana is a particularly popular initiative among the American public, with over 90% of Americans in favor legalizing its medical use.[163] Contrasting this widespread public support, Congress and the executive branch have given conflicting signals about the status of the legality of medical marijuana programs. Without a clear Congressional mandate, courts should hesitate before finding that the CSA preempts state medical marijuana laws. In workers' compensation particularly, courts should avoid finding preemption because the current theories on preemption are based upon an incomplete understanding of accomplice liability and medical marijuana is a viable, reasonable and necessary treatment for chronic pain.

## Afterword

The initial draft of this article was submitted to the College of Workers' Compensation Lawyers on January 15, 2020. Two days prior, after substantive research and writing was complete, the Superior Court of New Jersey, Appellate Division issued its opinion in *Hager v. M & K Construction*.[164] New Jersey joined New Mexico in finding that reimbursement for medical marijuana treatments in the workers' compensation system is not preempted by the CSA.[165]

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[160] National Academies of Sciences, Engineering, and Medicine, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, 90 (2017).
[161] *Id.* at 87.
[162] Nora D. Volkow, M.D. et al., *Adverse Health Effects of Marijuana Use*, National Institutes of Health (Apr. 11, 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4827335/.
[163] Andrew Daniller, *Two-thirds of Americans support marijuana legalization* (Nov. 14, 2019), https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/ (Fifty-nine percent of Americans support medical and recreational use while 32% support medical use only. This combines to 91% support for medical marijuana.)
[164] *Hager v. M & K Construction*, No. A-0102-18T3, 2020 WL 218390 (N.J. Super. Ct. App. Div., Jan. 13, 2020).
[165] *Id.* at *9.

The court in *Hager* adopted the view espoused in Justice Jabar's dissenting opinion in *Bourgoin* that the Employer could not be found liable under an aiding and abetting theory because it lacks "the requisite intent and active participation necessary for an aiding and abetting charge."[166] Citing *United States v. Ledezma*,[167] the court in *Hager* "further note[d] that 'one cannot aid and abet a completed crime[,]'"[168] and reimbursement does not require an employer to aid in a CSA violation before the federal crime is committed.[169] This argument concerning the temporal limitations of aiding and abetting liability is novel and not covered in either *Lewis* or the dissents in *Bourgoin*.

*Ledezma* is a case involving, in part, a criminal conviction for aiding and abetting a violation of the CSA. One appellant, Zajac, had an aiding and abetting conviction overturned based on the fact that the crime of possession of narcotics had already been completed by the principals before he was involved in any capacity.[170] Cocaine had already been transported, possessed, and confiscated before Zajac paid the transporters for delivery.[171] The court found that "Zajac did nothing to assist his coconspirators in the substantive offense . . . because his coconspirators had already completed the crime."[172] This temporal distinction does have limits, however, and the court distinguished Zajac's offense from cases in which participation is "part of an on-going crime"[173] or is "a recurring contribution to a continuing crime."[174] The court in *Hager* did not discuss either of these limitations nor their potential effect on the reimbursement preemption issue. It is unclear if assurance of reimbursement which induces a worker to purchase medical marijuana would fulfill this temporal requirement for aiding and abetting liability.

Despite some flaws in the New Jersey opinion[175], it contains the most thorough discussion of preemption on this narrow issue from any appellate court ruling in the worker's favor.

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[166] *Id.* at *8.
[167] *United States v. Ledezma*, 26 F.3d 636 (6th Cir. 1994).
[168] *Id.* (citing *United States v. Ledezma*, 26 F.3d 636, 642 (6th Cir. 1994) (internal citation omitted)).
[169] *Id.*
[170] *Ledezma*, 26 F.3d at 643.
[171] *Id.* at 642.
[172] *Id.* at 642-43.
[173] *Id.* at 643 (citing *United States v. Coady*, 809 F.2d 119, 124 (1st Cir. 1987) (Aiding and abetting liability attached because defendant's statements about drug quality of previously delivered drugs were made to ensure payment)).
[174] *Ledezma*, 26 F.3d at 643 (citing *United States v. Orozca-Prada*, 732 F.2d 1076, 1080 (2d Cir. 1984) (Aiding and abetting liability attached when defendant laundered money from drug sales, furthering distribution)).
[175] The Court confused preemption by the CSA generally and preemption by the CSA on this narrow workers' compensation issue. The Court cited *Lewis* and *Bourgoin* as opinions that decided whether the CSA preempted the respective state medical marijuana statutes generally, something that neither of those opinions purported to do. *Hager*, 2020 WL 218390, at *7.