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## NOTES

### **I WAS GONNA GET A JOB, BUT THEN I GOT HIGH: AN EXAMINATION OF CANNABIS AND EMPLOYMENT IN THE POST-*BARBUTO* REGIME**

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#### ABSTRACT

*When an individual is fired for her off-duty cannabis consumption in a state where such conduct is otherwise legal, can she recover damages from her employer? Much of the past case law has given a simple answer: no. Recently, however, a few states have recognized employment protections for medical marijuana patients. One case in particular, *Barbuto v. Advantage Sales & Marketing, LLC*, has made waves in the legal community by recognizing a handicap discrimination claim for medical marijuana patients in Massachusetts. Some see this as a win for cannabis advocates, but does *Barbuto* live up to this praise?*

*This Note argues that it does not, and that *Barbuto* is actually an unsurprising decision in the context of other cases that address cannabis and employment. Using the *Barbuto* decision as an anchoring point, this Note examines the existing nationwide precedent to show how any state can recognize employment protections for medical marijuana patients. Further, this Note questions what existing law means for recreational cannabis consumers and their employment, especially as more states legalize cannabis for recreational use. This Note ultimately concludes that current employment practices and statutory schemes do not align with legalization frameworks and are remnants of cannabis prohibition. Instead of targeting cannabis consumption, such schemes need to target on-the-job intoxication. After examining the underlying difficulties with testing for cannabis intoxication, this Note suggests some normative solutions to protect law-abiding cannabis consumers from losing employment, primarily recommending a legislative solution to best protect all cannabis consumers.*

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## INTRODUCTION

In August 2014, Cristina Barbuto accepted an entry-level position with Advantage Sales and Marketing, LLC (“ASM”).<sup>1</sup> When an ASM representative told Barbuto that she had to take a pre-employment drug test, Barbuto disclosed that she was a certified medical marijuana (“MED”)<sup>2</sup> patient who used cannabis to ease the symptoms of her Crohn’s disease, and as a result would test positive for cannabis.<sup>3</sup> The ASM representative told Barbuto that her MED use “should not be a problem.”<sup>4</sup> Barbuto took the drug test and began working the following week, until the test results arrived.<sup>5</sup> During this time, she did not arrive at work intoxicated and did not use cannabis on-site.<sup>6</sup> After work on her second day, Barbuto was called by an ASM Human Resources representative, Joanna Villaruz, who told her that she had tested positive for cannabis and was being terminated.<sup>7</sup> Villaruz told Barbuto that ASM did not care if Barbuto was using cannabis medicinally, because ASM followed federal, not state, law.<sup>8</sup> Barbuto subsequently filed a complaint against Villaruz and ASM in Massachusetts Superior Court.<sup>9</sup>

In July 2017, the Massachusetts Supreme Judicial Court (the “SJC”) ruled that Barbuto met the necessary qualifications to sue for handicap

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<sup>1</sup> See *Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37, 41 (Mass. 2017).

<sup>2</sup> This Note uses the terms “MED” and “medical marijuana” because of how ubiquitous their use already is in the cannabis legal area. However, throughout this Note, the term “cannabis” will be used as much as possible, both because of the racist origins of the term “marijuana” and the more positive connotation that “cannabis” has compared to “marijuana.” See Alex Halperin, *Marijuana: Is It Time to Stop Using a Word with Racist Roots?*, GUARDIAN (Jan. 29, 2018, 5:00 AM), <https://www.theguardian.com/society/2018/jan/29/marijuana-name-cannabis-racism> [<https://perma.cc/DG5W-2FB3>] (discussing racist origins of term “marijuana” and movement towards term “cannabis”).

<sup>3</sup> *Barbuto*, 78 N.E.3d at 41.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (describing Barbuto’s claims of (1) handicap discrimination, (2) invasion of privacy, (3) denial of right or privilege to use cannabis medicinally under Massachusetts MED statute, and (4) wrongful termination in violation of public policy). Per Massachusetts law, Cristina Barbuto first filed a complaint with the Massachusetts Commission Against Discrimination before filing in Superior Court. *Id.*

discrimination.<sup>10</sup> In *Barbuto v. Advantage Sales & Marketing, LLC*,<sup>11</sup> the SJC found a right of action not through the MED statute itself, but through the Massachusetts employment discrimination law.<sup>12</sup> This decision was seen as a win for MED patients and cannabis advocates alike, particularly because it went against the tide of decisions in other states, where similar claims had failed.<sup>13</sup> Though MED patients in Massachusetts can still be terminated based upon their cannabis consumption, *Barbuto* requires an employer to engage in an “interactive process” with the employee and prove that it would cause an undue hardship the employer to attempt to accommodate the employee’s cannabis use.<sup>14</sup> Further, *Barbuto* held that allowing off-duty cannabis consumption is not a per se unreasonable accommodation (that would cause an undue hardship to the employer and allow for termination)—meaning that Massachusetts employers now have to prove that the employee’s off-duty cannabis use unduly burdens the employer in some specific manner or else be liable for handicap discrimination.<sup>15</sup>

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<sup>10</sup> *Id.* at 43-44 (concluding that (1) person with Crohn’s disease is “handicapped person” under Massachusetts General Laws chapter 151B, section 1(19); (2) Barbuto could perform essential functions of position and was therefore “qualified handicapped person” under Massachusetts General Laws chapter 151B, section 1(16); and (3) that Barbuto was therefore entitled to reasonable accommodation from employer for MED use). While the SJC decision only that Barbuto overcame a motion to dismiss, meaning that she still may lose her case on the merits, the relevant holding from the case effectively gives MED patients a right of action for adverse employment action. *Id.* at 43-44, 47.

<sup>11</sup> 78 N.E.3d 37 (Mass. 2017).

<sup>12</sup> *Id.* at 40 (“We conclude that the plaintiff may seek a remedy through claims of handicap discrimination in violation of [Massachusetts General Laws chapter 151B] . . .”).

<sup>13</sup> See Nate Raymond, *Massachusetts Court Rules for Woman Fired for Medical Marijuana Use*, REUTERS (July 17, 2017, 1:37 PM), <https://www.reuters.com/article/us-massachusetts-marijuana/massachusetts-court-rules-for-woman-fired-for-medical-marijuana-use-idUSKBN1A21WX> [<https://perma.cc/VW5K-DEE8>] (“Matthew Fogelman, Barbuto’s lawyer, called the ruling a ‘groundbreaking decision.’ ‘This is the highest court in Massachusetts recognizing that the use of medically prescribed marijuana is just as lawful as the use of any prescribed medication,’ he said.”); Michelle Williams, *Marijuana Ruling by Massachusetts High Court ‘First Case of Its Kind in the Country,’* MASSLIVE (July 17, 2017), [http://www.masslive.com/politics/index.ssf/2017/07/marijuana\\_ruling\\_by\\_massachuse.html](http://www.masslive.com/politics/index.ssf/2017/07/marijuana_ruling_by_massachuse.html) [<https://perma.cc/8LWE-HTEA>] (“‘I can’t stress this enough, it’s the first case of its kind in the country,’ said Dale Deitchler, a shareholder at world’s largest labor and employment law firm representing management Littler Mendelson and an expert on marijuana issues in the workplace.”).

<sup>14</sup> *Barbuto*, 78 N.E.3d at 44-45.

<sup>15</sup> *Id.* at 45-46; see also MASS. GEN. LAWS ch. 151B, § 4(16) (2017) (listing factors to consider in determining whether an accommodation would impose undue hardship on employer). Some undue hardships could include the loss of government contracts,

The result in *Barbuto* expanded protections for certified MED patients, but it may end up having negative impacts for those who consume cannabis recreationally. By ruling that the Massachusetts MED statute provides a claim for chapter 151B handicap discrimination *at the expense of other claims*,<sup>16</sup> the SJC set a precedent that affects employees who want to take advantage of Massachusetts's new recreational cannabis ("REC") law. If a Massachusetts REC consumer tests positive for cannabis and is therefore terminated, she cannot claim handicap discrimination and has no other currently recognized remedy. Further, with largely similar language in the MED and REC statutes regarding the rights and privileges of those covered, *Barbuto*'s preclusion of other remedies weighs against a REC consumer having any right of action at all and could leave the Massachusetts REC law nugatory with respect to employment protections.<sup>17</sup> While some advocates point to *Barbuto* as a step forward for the legalization movement, the case illuminates new problems for consumers' employment as Massachusetts and other states begin REC sales, all while tension remains between state and federal policy.<sup>18</sup>

This Note seeks to explore what the *Barbuto* holding means for MED patients and REC consumers in Massachusetts, and moreover seeks to use the holding to examine the future of cannabis and employment protections nationally. This Note proceeds as follows: Part I explores the legal background, including the Controlled Substances Act and federal preemption doctrine. Part II then examines how preemption applies to employment protections under the Controlled Substances Act. Using cases from multiple state courts, Part II shows that holdings against MED employment protections were decided not on preemption grounds, but by interpreting statutory language. Reframing the legal

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impossibility of cannabis use being off-duty (for employers that require overtime or on-call work), and safety concerns.

<sup>16</sup> Because the SJC concluded that *Barbuto* could sue for handicap discrimination, it held that she could not sue for invasion of privacy, for violation of public policy, or under a private right of action, because "where a comparable cause of action already exists under our law prohibiting handicap discrimination," there is no need to find other causes of action. *Barbuto*, 78 N.E.3d at 49.

<sup>17</sup> See *infra* Section IV.A (describing how similar language of Massachusetts's MED and REC laws leads to *Barbuto* having negative impacts for potential future claims for REC consumers).

<sup>18</sup> Massachusetts set July 1, 2018 as the date that recreational dispensaries were allowed to begin selling cannabis to consumers, and moved ahead with that date despite then-U.S. Attorney General Jeff Sessions's revocation of previous federal policies protecting states, businesses, and individuals from federal prosecution for implementing cannabis regulation measures. See Joshua Miller & Jim O'Sullivan, *Mass. Lawmakers Approve Marijuana Delay Bill*, BOS. GLOBE (Dec. 28, 2016), <https://www.bostonglobe.com/metro/2016/12/28/marijuana-shops-may-delayed/StlB04ayOcNl8RksKmMwkJ/story.html>; Bob Salsberg, *State Officials Critical of Shift in Federal Pot Policy*, US NEWS (Jan. 4, 2018, 7:47 PM), <https://www.usnews.com/news/best-states/massachusetts/articles/2018-01-04/pro-pot-group-in-state-blasts-ags-move-on-federal-policy> [<https://perma.cc/F3TL-TCNS>].

issues in this way makes *Barbuto* appear less novel and illuminates statutory language as the crux of employment protections. Part III examines different language within MED statutes and specifically the employment protections within them. This dive into statutory language not only reinforces how *Barbuto* makes sense given Massachusetts's MED statute, but elaborates on how employment protection language can be found in *many* MED statutes. Looking to the future, Part IV questions what the implications of *Barbuto* and similar cases are for REC consumers, reasoning that there remains an underlying problem in cannabis laws after *Barbuto*. It further posits that REC consumers seeking employment protections face a practical obstacle: the difficulty of testing for cannabis impairment on the job makes it nearly impossible for employers to distinguish between regular, off-the-job consumers and employees intoxicated on the job. Part V then suggests solutions to Part IV's posed problems, finally proposing that state legislatures introduce specific employment protections for all cannabis consumers, aimed at distinguishing impaired from sober employees, as is the case for other intoxicants. This Note then concludes.

#### I. CANNABIS AND THE LAW

If you asked an average employer whether they could fire an employee for testing positive for cannabis, they would likely answer that they could. Similar to what ASM and Joanna Villaruz thought, a state employer may believe that because cannabis is illegal under federal law, any state law to the contrary is superceded, and the employer may discriminate based on cannabis consumption at will. In reality, the issues surrounding cannabis and its place in the law are complex, and require an examination of federal preemption doctrine as well as some state cases purportedly decided on preemption grounds. Contrary to Villaruz's view that cannabis's federal illegality makes all state laws and regulations inapplicable to private actors, an analysis of the intersection of cannabis and employment in the law reveals that the door was already open to Cristina Barbuto's claim and that the right circumstances needed only to arise.

##### A. *Cannabis and Federal Prohibition*

In 1970, Congress passed the Controlled Substances Act (the "CSA"), authorizing the Department of Justice (the "DOJ") to categorize, or "schedule," substances according to their potential for abuse and accepted value for medical use, thus making unauthorized possession of such scheduled substances unlawful.<sup>19</sup> As the United States' first comprehensive drug control statute, the

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<sup>19</sup> Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1242, 1247, 1263, 1285 (codified at 21 U.S.C. §§ 811, 812, 844 (2012)). The enactment of the CSA "has

CSA was intended “to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.”<sup>20</sup> Under the CSA, cannabis was, and still is, classified as a Schedule I substance, which marks it as having a high potential for abuse and no accepted medical use.<sup>21</sup> However, while the federal government has classified cannabis harshly, it does not have the resources to enforce its prohibition and cannot simply force the states to enforce that prohibition, so it largely relies upon states’ voluntary cooperation to enforce the CSA.<sup>22</sup>

In November 2012, Washington and Colorado citizens voted to legalize cannabis for recreational use. After the vote but before REC storefronts opened, then-Deputy Attorney General James M. Cole issued a memorandum announcing that the DOJ would not prioritize enforcing the CSA against states that legalized recreational cannabis use.<sup>23</sup> Giving further leniency to cannabis

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made a lot of people very angry and been widely regarded as a bad move.” DOUGLAS ADAMS, *THE RESTAURANT AT THE END OF THE UNIVERSE* 9 (1980).

<sup>20</sup> *Gonzales v. Raich*, 545 U.S. 1, 12 (2005).

<sup>21</sup> See 21 U.S.C. § 812(c) (Schedule I)(c)(10), (17); Schedules of Controlled Substances, 21 C.F.R. § 1308.11(d)(23), (31), (58) (2018). For comparison, heroin is also classified as a Schedule I substance, and cocaine and methamphetamine are classified under Schedule II. 21 C.F.R. §§ 1308.11(c)(11), 1308.12(b)(4), (d)(2).

<sup>22</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 923-25 (1997) (holding federal government cannot command state executive officers to enforce federal regulation). Federal arrests make up only a small percentage of overall drug-related arrests. See DRUG ENFORCEMENT AGENCY, DEA DOMESTIC ARRESTS, <https://www.dea.gov/resource-center/statistics.shtml#seizures> [perma.cc/7QLX-L5MN] (last visited Feb. 21, 2019) (reporting that the Drug Enforcement Agency, and therefore in large part the federal government, accounted for only 27,107 domestic drug-related arrests in 2017); FBI, U.S. DOJ, UNIFORM CRIME REPORTING: CRIME IN THE UNITED STATES tbl.18 (2016), <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-18> [https://perma.cc/93KY-ZQTQ] (reporting that over 1.5 million total arrests were made in 2016 for drug violations). While the FBI has concurrent jurisdiction with the DEA over drug offenses under the CSA and has nearly three times the number of officers as the DEA, the DEA focuses exclusively on drug-related offenses whereas the FBI has authority over many other types of offenses. See *Drugs and Crime Facts*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/content/DCF/enforce.cfm#arrests> [https://perma.cc/G82Z-YGF5] (last visited Feb. 21, 2019).

<sup>23</sup> U.S. DOJ, OFFICE OF THE DEPUTY ATT’Y GEN., MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: GUIDANCE REGARDING MARIJUANA ENFORCEMENT 1 (2013). Former Attorney General Jeff Sessions indicated that such guidance documents may no longer be followed as strictly as before and then repealed the Cole Memo. See U.S. DOJ, OFFICE OF THE ATT’Y GEN., MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: MARIJUANA ENFORCEMENT 1 (2018) (repealing Cole Memo and any other documents restricting U.S. attorneys’ ability to prosecute cannabis-related activities); U.S. DOJ, OFFICE OF THE ATT’Y GEN., MEMORANDUM FOR ALL COMPONENTS: PROHIBITION ON IMPROPER GUIDANCE DOCUMENTS 1-3 (2017) (declaring new

businesses and states implementing such laws, Congress has directed the DOJ to refrain from expending funds to deter the implementation of state MED laws.<sup>24</sup> Contrasted with the federal government's stance, support for cannabis legalization has seen drastic growth in recent years among the general public.<sup>25</sup> This trend has come to fruition in the law, for as of November 2018, thirty-three states plus the District of Columbia, Guam, and Puerto Rico allow some form of MED use,<sup>26</sup> and ten states have legalized cannabis for recreational use.<sup>27</sup> With the DOJ somewhat restricted in their actions against the quickly growing movement of cannabis legalization<sup>28</sup> and members of Congress largely unwilling to push back on the states that they represent,<sup>29</sup> cannabis proponents

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standards for guidance documents and indicating that guidance documents will no longer be used in binding manner).

<sup>24</sup> See Rohrabacher-Farr Amendment, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2015) (codified in scattered sections of 2 U.S.C. and 48 U.S.C.). This appropriations rider has been interpreted by the Ninth Circuit Court of Appeals to restrict the DOJ from expending any funds to prosecute any individual for conduct that complies with applicable state MED law. *United States v. McIntosh*, 833 F.3d 1163, 1169-70, 1177 (9th Cir. 2016).

<sup>25</sup> See Justin McCarthy, *Record-High Support for Legalizing Marijuana Use in U.S.*, GALLUP (Oct. 25, 2017), <http://news.gallup.com/poll/221018/record-high-support-legalizing-marijuana.aspx> [<https://perma.cc/HY9Z-79NR>] (showing that sixty-four percent of Americans support cannabis legalization, as opposed to only around forty percent in 2008, near twenty-five percent in 1996, and only twelve percent in 1969); see also Justin McCarthy, *Two in Three Americans Now Support Legalizing Marijuana*, GALLUP (Oct. 22, 2018), <https://news.gallup.com/poll/243908/two-three-americans-support-legalizing-marijuana.aspx> [<https://perma.cc/86FF-B2PX>] (referencing recent Gallup poll showing sixty-six percent of Americans now support cannabis legalization).

<sup>26</sup> See *State Medical Marijuana Laws*, NAT'L CONF. ST. LEGISLATURES (Nov. 8, 2018), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/V3YQ-8UD8>].

<sup>27</sup> *State Marijuana Laws in 2018 Map*, GOVERNING (Nov. 7, 2018), <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> [<https://perma.cc/L55J-4GWD>].

<sup>28</sup> The DOJ faces both legal obstacles and political pushback in attempting to crack down on legal cannabis. See James Higdon, *Did Jeff Sessions Just Increase the Odds Congress Will Make Marijuana Legal?*, POLITICO MAGAZINE (Jan. 6, 2018), <https://www.politico.com/magazine/story/2018/01/06/jeff-sessions-marijuana-legalization-congress-216251> [<https://perma.cc/F2BT-KV75>] (describing pushback from U.S. politicians on repeal of Cole Memo and industry stalwartness in resisting DOJ crackdown); Christopher Ingraham, *Jeff Sessions Faces a Steep Uphill Battle in His War on Pot*, WASH. POST (Jan. 4, 2018), [https://www.washingtonpost.com/news/wonk/wp/2018/01/04/jeff-sessions-faces-a-steep-uphill-battle-in-his-war-on-pot/?utm\\_term=.518b59871909](https://www.washingtonpost.com/news/wonk/wp/2018/01/04/jeff-sessions-faces-a-steep-uphill-battle-in-his-war-on-pot/?utm_term=.518b59871909) (detailing multiple legal and political pressures DOJ faces in cracking down on legal cannabis, including public support, support among national politicians, and economic proliferation of cannabis industry).

<sup>29</sup> For example, the somewhat conservative delegation from Colorado has taken a strong stance against any attempt to damage or deter that state's cannabis programs. See Higdon,



have found that some of the most stalwart opposition is coming not from the federal government, but from private actors.<sup>30</sup>

Since the first state cannabis regulations passed, private actors have sought to use cannabis's illegal federal status against cannabis consumers in litigation.<sup>31</sup> People commonly believe that because cannabis is federally illegal, federal law preempts state cannabis regulations and parties cannot rely on state cannabis regulations in court to justify cannabis consumption. In some ways, this intuition is correct, as cannabis consumers cannot use state cannabis law to shield their conduct when trying to invoke federal statutes in court.<sup>32</sup> However, as cases across the country have illustrated, understanding federal preemption of cannabis requires one to go a bit further into the weeds.<sup>33</sup>

#### B. *Federal Preemption and Cannabis*

The U.S. Constitution's Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."<sup>34</sup> Pursuant to this provision, Congress may preempt state law by way of a federal statute where (1) Congress expressly indicates its intent to preempt within a statute ("express preemption"); (2) Congress intended to occupy an entire regulatory field, leaving no room for the states to supplement it ("field preemption"); (3) state law directly conflicts with federal law such that it is impossible to comply with both simultaneously ("direct conflict preemption"); or (4) state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ("obstacle conflict preemption").<sup>35</sup> In the context of the CSA and state cannabis laws, almost all preemption questions have hinged on theories of direct or obstacle conflict preemption.<sup>36</sup>

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*supra* note 28 (detailing conservative U.S. senator from Colorado Cory Gardner's vehement response to repeal of Cole Memo).

<sup>30</sup> See, e.g., *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 202 (Cal. 2008) (describing adverse employment action by employer against MED patient employee).

<sup>31</sup> See *id.* at 203 (describing adverse employment action occurring against MED patient four years after MED was legalized in California).

<sup>32</sup> See Erwin Chemirinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 103 (2015) ("[N]o state can erect a legal shield protecting its citizens from the reach of the CSA.").

<sup>33</sup> See *infra* Section II.A (analyzing state cases considering preemption challenges to cannabis employment protections).

<sup>34</sup> U.S. CONST. art. VI, cl. 2.

<sup>35</sup> Robert Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 9-10 (2013) (describing four types of preemption).

<sup>36</sup> See *id.* at 14.

There is no provision in the CSA that expresses preemption of state laws, so express preemption is not relevant to federal preemption of state cannabis regulations. Moreover, § 903 of the CSA specifically states that it does not intend to occupy the field of drug regulation:

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.<sup>37</sup>

In § 903, Congress expressly disavows field preemption, and by specifying “positive conflict,” the statute could be read to imply that only direct conflicts are intended to be preempted.<sup>38</sup> However, because direct conflict preemption is “vanishingly narrow” in its scope, courts rarely invoke it.<sup>39</sup>

Direct conflict preemption is a particularly poor way to analyze cannabis laws, because unless a state requires individuals to possess or sell cannabis, individuals may comply with both state and federal law simultaneously. Imagine that when Massachusetts legalized cannabis, it also *required* every resident over the age of twenty-one to possess at least one gram of usable cannabis flower at all times. If Jane, a Massachusetts resident, were to comply with Massachusetts law and possess two grams of cannabis, then she would be in violation of federal law. If Jane were to comply with federal law and possess no cannabis, then she would be in violation of Massachusetts law. There is no way that Jane could comply with *both* federal and state law simultaneously, and therefore there is a direct conflict. Thus, the CSA would preempt the Massachusetts law. However, because no state requires individuals to possess cannabis or otherwise violate the CSA, federal preemption of state cannabis laws can only be effectively analyzed under obstacle conflict preemption.<sup>40</sup>

Looking through the lens of obstacle conflict preemption, the preemption issue still is not clear; many state cannabis regulations can be understood to

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<sup>37</sup> Controlled Substances Act of 1970, 21 U.S.C. § 903 (2012).

<sup>38</sup> Mikos, *supra* note 35, at 15 (“[T]he CSA should be interpreted . . . to preempt only direct conflicts with the statute.”).

<sup>39</sup> Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 & n.15 (2000) (“[E]ven when state and federal law contradict each other, it is physically possible to comply with both unless federal law *requires* what state law *prohibits* (or vice versa).”).

<sup>40</sup> There are, however, some cannabis regulations that could be seen as directly conflicting with the CSA, but not as obviously as the example given here. *See* *People v. Crouse*, 2017 CO 5, ¶ 8, 388 P.3d 39, 41 (holding that statute requiring officers to return unlawfully seized cannabis mandates distribution of controlled substances, and therefore conflicts with CSA).

comply with the purposes of the CSA. Some state cannabis regulations, such as age and amount restrictions, limit access to cannabis, thereby furthering the CSA's intended purposes "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances," without outright prohibition.<sup>41</sup> However, state regulations that are interpreted to promote cannabis possession and consumption may indeed stand as an obstacle to congressional intent.<sup>42</sup> If a Colorado regulation required that cannabis only be sold to anyone twenty-one years old and older, the regulation would restrict access to cannabis, and would therefore be in line with Congressional intent. However, a different Colorado regulation stipulating that all adults over the age of sixty-five receive a state-subsidized fifty percent discount at any licensed establishment would likely encourage *greater* cannabis consumption and therefore run afoul of the CSA's purpose. Perhaps this distinction is why courts upholding cannabis regulations have characterized them as removing criminal penalties, while others have characterized these regulations as affirmatively authorizing cannabis use.<sup>43</sup> Further, if a state's cannabis legalization measure is characterized as removing criminal penalties, any challenge to it could violate the Tenth Amendment's anti-commandeering principle.<sup>44</sup> It is between these two pillars of anti-

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<sup>41</sup> *Gonzales v. Raich*, 545 U.S. 1, 12 (2005); *see also* Mikos, *supra* note 35, at 18 (explaining that restricting access to cannabis with minimum age requirements and high taxes actually *discourages* cannabis use, in line with congressional intent). As a side note, while *Raich* is often cited as evidence that the CSA preempts state law, the case only dealt with Commerce Clause questions. Indeed, preemption is only mentioned once in the entire opinion, and as a tangent at that. *See Raich*, 545 U.S. at 41 ("The Court has repeatedly recognized that, if authorized by the commerce power, Congress may regulate private endeavors 'even when [that regulation] may pre-empt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress.'" (citation omitted)).

<sup>42</sup> Mikos, *supra* note 35, at 17 ("Congress likely wanted to preempt only those state regulations that *promote* rather than *restrict* marijuana-related activities . . . [including] cash subsidies for the purchase of marijuana and bans on private discrimination against marijuana users.").

<sup>43</sup> *Compare* *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 540 (Mich. 2014) (characterizing issue as "whether the CSA preempts § 4(a)'s limited state-law immunity from penalty for certain medical marijuana use" and ruling against federal preemption), *with* *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 529 (Or. 2010) (characterizing provision as "[a]ffirmatively authorizing a use that federal law prohibits [which] stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act" and ruling that provision at issue was preempted).

<sup>44</sup> *See* *Printz v. United States*, 521 U.S. 898, 914 (1997) ("The preemption power is constrained by the Supreme Court's anti-commandeering rule."); *New York v. United States*, 505 U.S. 144, 162 (1992) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."). The anti-commandeering doctrine was recently enforced in a case that gives greater merit to

commandeering and obstacle conflict preemption that the lion's share of the cannabis preemption arguments takes place.<sup>45</sup> Therefore, the way that a court characterizes a cannabis provision is often determinative of, or determined by, whether the court holds that provision preempted.<sup>46</sup> Prior to *Barbuto*, only one court had upheld employment protections for MED patients and only at the trial court level.<sup>47</sup> In order to understand the national precedent for cannabis employment protections and *Barbuto*'s place in that framework, it is necessary to take a deep dive into those cases and determine whether there is a consistent framework that runs through all of them. The next Part argues that there is: all of these cases denying the right to a reasonable accommodation for MED patients were decided on statutory interpretation, and not preemption, grounds.

## II. THE RIGHT TO A REASONABLE ACCOMMODATION

When *Barbuto* was decided, many viewed it as a landmark case, a departure from accepted precedent, that offered extended protections for MED patients instead of denying them.<sup>48</sup> Under *Barbuto*, Massachusetts MED patients are considered handicapped persons and therefore are entitled to reasonable accommodations from their employers.<sup>49</sup> As previously mentioned, this means that if a Massachusetts MED patient tests positive for cannabis, her employer is required to work with her to consider alternative treatment possibilities and, if there are none, accommodate her off-site cannabis consumption, unless the employer can prove that such accommodation causes an undue hardship.<sup>50</sup> This right to reasonable accommodation is a common fixture of handicap

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an eventual cannabis preemption challenge. See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1468 (2018) (holding state allowance of sports betting not preempted by federal law barring it, and further holding federal law violated anti-commandeering doctrine, which could have drastic implications for similar case regarding state cannabis laws); Vince Sliwoski, *U.S. Supreme Court Sets a Great Precedent for Cannabis*, CANNA LAW BLOG (May 16, 2018), <https://www.cannalawblog.com/u-s-supreme-court-sets-a-great-precedent-for-cannabis/> [<https://perma.cc/U9PU-JEDE>] (describing impact of *Murphy* on cannabis laws).

<sup>45</sup> Chemirinsky et al., *supra* note 32, at 103.

<sup>46</sup> See cases cited *supra* note 43.

<sup>47</sup> See *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 WL 2321181, at \*15 (R.I. Super. Ct. May 23, 2017) (recognizing employment protections and remedy for MED patients through private right of action within Rhode Island MED statute).

<sup>48</sup> See, e.g., Williams, *supra* note 13 (“‘Massachusetts is not a state where such protections are written in the law so this is really significant’ . . .”).

<sup>49</sup> *Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37, 45 (Mass. 2017).

<sup>50</sup> *Id.*

discrimination prohibitions,<sup>51</sup> but is not widely available to MED patients.<sup>52</sup> Why is this right to a reasonable accommodation available to MED patients in a few states, but not in others? This Part argues that state courts<sup>53</sup> have not applied preemption doctrine in inconsistent manners, but that (for the most part)<sup>54</sup> they have come to different holdings by interpreting different language in their respective state statutes. While the defendant in *Barbuto* waived its preemption arguments,<sup>55</sup> this waiver does not make *Barbuto* distinct from other similar cases, but simply elucidates the statutory interpretation at play.

A. *Preemption and State-Imposed Duty to Accommodate*

When a state imposes an affirmative duty to accommodate MED patients' cannabis consumption or, as some have characterized it, "affirmatively authorizes"<sup>56</sup> cannabis use, it is intuitive that such a regulation promotes cannabis use and stands as an obstacle to the CSA's purpose, and therefore may be federally preempted. When such state-imposed duties to accommodate are challenged in court, it seems obvious that preemption would be the dispositive issue. However, the actual cases are a bit muddled, and while they throw around preemption language, state courts largely avoid employing preemption doctrine if at all possible.

Where a state cannabis law requires what federal law forbids, preemption is appropriate and can be necessary. This principle is best illustrated in *People v. Crouse*,<sup>57</sup> where a state provision required law enforcement officers to return cannabis that was wrongfully seized.<sup>58</sup> Colorado claimed that returning

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<sup>51</sup> See, e.g., MASS. GEN. LAWS ch. 151B, § 4(16) (2017) (requiring that any qualified handicapped person who requests reasonable accommodation be granted it if it does not present undue hardship to employer); N.Y. EXEC. LAW § 296 (McKinney 2017) (same).

<sup>52</sup> See *infra* Part III (detailing statutory employment protections for MED patients).

<sup>53</sup> Most cases analyzed in this Note are from state courts, but one prominent case comes from the federal district court of Connecticut. See *Noffsinger v. SSC Niantic Operating Co.*, 273 F. Supp. 3d 326, 330 (D. Conn. 2017).

<sup>54</sup> While this consistency mostly holds true for *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*, 230 P.3d 518 (Or. 2010), it partially rested on an interpretation that the Oregon MED statute had "affirmatively authorize[d]" cannabis use, standing as an obstacle to the intent behind the CSA. See *id.* at 529.

<sup>55</sup> *Barbuto*, 78 N.E.3d at 47 n.9 ("The defendants in this case have waived the argument that Federal preemption requires the conclusion that an employee's use of medical marijuana is facially unreasonable as an accommodation.").

<sup>56</sup> *Emerald Steel*, 230 P.3d at 529 (noting that Oregon "state law affirmatively authorized the very conduct that federal law prohibited").

<sup>57</sup> 2017 CO 5, 388 P.3d 39.

<sup>58</sup> *Id.* ¶ 8, 388 P.3d at 41 (holding provision requiring return of unlawfully seized cannabis to be preempted because it constituted active distribution of cannabis). *Crouse* was mostly a case about statutory interpretation, because it hinged on whether an officer who returned

unlawfully seized cannabis to its original owners constituted cannabis distribution, and the Supreme Court of Colorado agreed.<sup>59</sup> Similar to the hypothetical state law *requiring* an individual to purchase cannabis, the return provision required officers to do something that federal law forbade—distribute a controlled substance—which generated enough of a “positive conflict” to preempt the provision.<sup>60</sup> *Crouse* is a clear example of direct-conflict preemption, despite the majority’s ambiguity on the matter.<sup>61</sup> When there is no specific provision of the CSA on point, as in the case of employment law, direct-conflict preemption is not available, and so preemption issues are analyzed more complexly.

In the landmark case *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*,<sup>62</sup> the Supreme Court of Oregon interpreted the Oregon MED provision that set forth the requirements for MED licensing to “affirmatively authorize[] the use of medical marijuana,” and based on that interpretation held such authorization preempted.<sup>63</sup> The upshot from *Emerald Steel* is that where a state cannabis statute uses authorizing language, it constitutes a positive promotion of cannabis, and therefore the CSA preempts it. *Emerald Steel* is often cited for its preemption content and is commonly held out for the proposition that employment protections for MED patients are preempted by federal law.<sup>64</sup> However, there are reasons to think that *Emerald Steel* is not an example of federal preemption, and further that the Supreme Court of Oregon does not think so either.

*Emerald Steel* is a messy case with several moving parts, discussed in more depth below.<sup>65</sup> Important for this Section is that the *Emerald Steel* majority interpreted the word “authorized” to be a positive promotion, such that in its

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wrongfully seized cannabis to the owner was operating “lawfully” under an immunity provision. *Id.* Once this statutory interpretation issue was resolved, *Crouse* explicitly proclaimed the return provision preempted. *Id.*

<sup>59</sup> *Id.* ¶¶ 5, 14, 388 P.3d at 41-42.

<sup>60</sup> *Id.* ¶ 14, 388 P.3d at 42.

<sup>61</sup> The *Crouse* majority does not reference obstacle-conflict preemption in its opinion, and only states that the return provision resulted in a “positive conflict” with the CSA, using the language of § 903. *Id.*

<sup>62</sup> 230 P.3d 518 (Or. 2010).

<sup>63</sup> *Id.* at 529. *Emerald Steel* turned on both this preemption point and statutory interpretation of an Oregon antidiscrimination law. *Id.* at 536. This Note addresses the statutory interpretation issue in Section II.B, *infra*.

<sup>64</sup> See ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY 672 (Rachel E. Barkow et al. eds., 2017) (using *Emerald Steel* to answer question posed by section heading, which reads “Is a State-Imposed Duty to Accommodate Marijuana Use Preempted by Federal Law?”).

<sup>65</sup> See *infra* Section II.B.1 (discussing *Emerald Steel*’s analysis of affirmative authorization).

MED statute Oregon was “affirmatively authorizing” cannabis possession and so the statute therefore stood as an obstacle to the CSA and was preempted.<sup>66</sup> However, to the extent that *Emerald Steel* is referenced as a precedent for preemption of state cannabis laws, it is a narrow holding that falls short. Few, if any, other courts have followed *Emerald Steel*’s authorization/exception distinction when considering MED licensing.<sup>67</sup> The *Emerald Steel* court itself only considered a preemption argument in order to decide a statutory interpretation issue,<sup>68</sup> and the Supreme Court of Oregon has since tried to cabin its holding to the facts in that one case.<sup>69</sup> Further, the way in which the *Emerald Steel* court even arrived at the preemption issue is a matter of some controversy, and is admittedly a bit contrived.<sup>70</sup> While *Emerald Steel* is sometimes considered persuasive precedent for the preemption of cannabis employment provisions, there are myriad reasons why it should not be cited as such.

To contextualize *Emerald Steel*, other state cases that have considered federal preemption arguments in regard to state MED statutes have come to vastly different conclusions. In *Ter Beek v. City of Wyoming*,<sup>71</sup> the Supreme Court of Michigan held that the CSA did not preempt Michigan’s MED law because the CSA cannot preempt the “limited state-law immunity” from criminal liability that the statute provided.<sup>72</sup> Unlike the *Emerald Steel* court, the *Ter Beek* court

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<sup>66</sup> *Emerald Steel*, 230 P.3d at 529.

<sup>67</sup> See, e.g., *White Mountain Health Ctr., Inc. v. Cty. of Maricopa*, No. 2012-053585, 2012 WL 6656902, at \*8 (Ariz. Super. Ct. Dec. 3, 2012) (“[T]he *Emerald* Court majority stands virtually alone when it suggested that almost any State statute that affirmatively authorizes federally conflicting conduct is preempted.”).

<sup>68</sup> See *Noffsinger v. SSC Niantic Operating Co.*, 273 F. Supp. 3d 326, 335 n.3 (D. Conn. 2017) (“The decision in *Emerald Steel* turned on whether the plaintiff’s use of medical marijuana constituted ‘the use of illegal drugs,’ and therefore it turned on whether the use of medical marijuana was ‘lawful.’”).

<sup>69</sup> See *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 540 n.6 (Mich. 2014) (“[T]he Oregon Supreme Court has since moderated [the affirmative authorization] aspect of its analysis, clarifying that ‘*Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as ‘affirmatively authorizing’ what federal law prohibits is preempted.’” (quoting *Willis v. Winters*, 253 P.3d 1058, 1064 n.6 (Or. 2011))).

<sup>70</sup> See *White Mountain Health Ctr., Inc. v. Maricopa Cty.*, 386 P.3d 416, 430 (Ariz. Ct. App. 2016) (“The authorization/decriminalization distinction itself seems to be primarily semantic and ultimately results in a circular analysis.”); *Emerald Steel*, 230 P.3d at 538-40 (Walters, J., dissenting) (claiming that authorizing words in Oregon’s MED statute are only there to effectuate exceptions and exemptions in law, and that majority’s distinction between authorizing and allowing is arbitrary).

<sup>71</sup> 846 N.W.2d 531 (Mich. 2014).

<sup>72</sup> *Id.* at 539; see also *supra* Section I.B (detailing obstacle-conflict preemption and anti-commandeering doctrine). For additional analysis on the characterization of state cannabis laws as decriminalizing measures rather than authorizations, see *White Mountain Health*, 386 P.3d at 428-31. *White Mountain Health* specifically presents a good commentary on *Emerald*

analyzed its MED provision at-large instead of as related to another statute, a distinction that the *Ter Beek* court actively recognized.<sup>73</sup> More importantly, the *Ter Beek* court based its preemption analysis on a long-held principle that the *Emerald Steel* court failed to properly consider: the presumption against preemption, which applies particularly in realms that states have traditionally occupied.<sup>74</sup> This presumption puts the burden on the party alleging preemption to prove direct or obstacle conflict between the state and federal laws and urges courts to only apply preemption to the degree necessary to dispose with the conflict.<sup>75</sup>

Cases like *Ter Beek* illustrate that state cannabis statutes are on stronger ground against federal preemption than they may first appear and that preemption of cannabis statutes has only really been used in its direct-conflict strain. Without affirmative state conduct that borders on direct conflict with the CSA, as in *Crouse*, federal preemption of state cannabis laws should not present a major concern to cannabis proponents. However, as numerous other holdings demonstrate, employment protections for MED patients are not widespread.<sup>76</sup>

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*Steel* and *Ter Beek*, discussing at length the differences between the two holdings and addressing conflict preemption at great length. *Id.*

<sup>73</sup> *Ter Beek*, 846 N.W.2d at 540 (“*Emerald Steel* addresses a substantively different question than the one presently before us—whether the CSA preempts § 4(a)’s limited state-law immunity from penalty for certain medical marijuana use—and we see nothing in its answer that would alter our own.”). The *Ter Beek* court was somewhat derisive of *Emerald Steel*, likely because the *Emerald Steel* court based much of its decision on a Supreme Court case interpreting a Michigan statute. *See id.* at 540 n.6 (“Furthermore, we have misgivings, mildly put, about *Emerald Steel*’s reasoning.”); *Emerald Steel*, 230 P.3d at 528-29 (relying on *Mich. Canners & Freezers Ass’n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461 (1984), to justify authorization/exception distinction).

<sup>74</sup> *Ter Beek*, 846 N.W.2d at 536 (“Furthermore, ‘[i]n 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 Act . . . .’” (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009))).

<sup>75</sup> *See Noffsinger v. SSC Niantic Operating Co.*, 273 F. Supp. 3d 326, 334 (D. Conn. 2017) (“[I]n preemption cases, ‘state law is displaced only to the extent that it actually conflicts with federal law,’ and ‘a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.’” (quoting *Dalton v. Little Rock Planning Servs.*, 516 U.S. 474, 476 (1996) (per curiam))).

<sup>76</sup> *See, e.g., Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 431 (6th Cir. 2012) (denying employment protections to Michigan MED patients); *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 202 (Cal. 2008) (denying employment protections for California MED patients). This Note does not discuss *Casias* because it was expressly decided on statutory interpretation grounds, and while it thus fits within the overall scheme this Note identifies, it does not lead to the type of preemption confusion that this Part seeks to address. *See Casias*, 695 F.3d at 437 n.1 (“We need not address the issue of whether federal law preempts the



How should we understand this? The next Section argues that much of the existing precedent has been misconstrued and that different state courts, while reaching different conclusions, have been operating under a largely consistent model of statutory interpretation but have simply been interpreting different statutory language.

B. *Statutory Interpretation and State-Imposed Duty to Accommodate*

Within the context of cannabis and employment protections, state courts have decided cases through statutory interpretation, not preemption, such that any of the courts discussed below could have held as the SJC did in *Barbuto* had they been asked to interpret Massachusetts statutes. While not at issue in *Barbuto*, when a MED patient's claim has hinged on a provision's use of "lawful" or "legal," courts have invariably interpreted the term against the patient, holding "legal" and "lawful" to mean legal under both state *and* federal law.<sup>77</sup> This trend of statutory interpretation has been used in two ways disadvantageous to MED patients: (1) to create a conflict between state and federal law, segueing into preemption, and (2) to prevent cannabis proponents from using other state laws that offer legal protections, but are conditioned on legal conduct. As discussed above, courts have not, for the most part, held state cannabis laws flat-out preempted; rather, preemption is only utilized by state courts within the context of statutory interpretation. This Section will build on the last by showing how the most significant cases regarding MED laws were decided not on broad preemption grounds, but rather on narrow statutory interpretation. This Section concludes that decisions on MED patient employment protections are dependent on the specific statutory language at play, rather than court precedent or federal law, such that any given state can protect MED patients given certain statutory language.

1. *Statutory Interpretation of Antidiscrimination Statutes*

State employment discrimination laws provide a right to reasonable accommodations for handicapped persons and a remedy against employers who do not provide such accommodations.<sup>78</sup> Like other disabled persons, MED

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[Michigan MED statute] based on our finding that [it] does not regulate private employment.").

<sup>77</sup> See, e.g., *People v. Crouse*, 2017 CO 5, ¶ 18, 388 P.3d 39, 43 ("Consistent with [precedent], we again find that conduct is 'lawful' only if it complies with both federal and state law.").

<sup>78</sup> See, e.g., MASS. GEN. LAWS ch. 151B, § 4(16) (2017) (requiring that any qualified handicapped person that requests reasonable accommodation be granted it if it does not present undue hardship to employer). In the context of MED use, a reasonable accommodation entitles a MED patient to an interactive dialogue with her employer to determine that MED is properly prescribed and is necessary to the patient's treatment. See *Barbuto v. Advantage*

patients can claim their medical conditions create a legal obligation for an employer to permit MED use as a reasonable accommodation.<sup>79</sup> On the merits, a MED patient may have a good case for employment discrimination based on her medical diagnosis, and yet she still may lose her case on the basis that her MED treatment precludes her from claiming a right to reasonable accommodation.

In *Emerald Steel*, an employee suffered from extreme anxiety, panic attacks, and physical symptoms that he was not able to alleviate with standard prescribed medication, but he was able to effectively treat his symptoms with MED.<sup>80</sup> He registered under Oregon's MED statute,<sup>81</sup> began medicating with MED, and later obtained a temporary position with the defendant/employer.<sup>82</sup> When it seemed that the employee would be offered a permanent position, he informed his employer that he was a registered MED patient, but his employer did not initiate any interactive process in response,<sup>83</sup> and terminated the employee one week later.<sup>84</sup> The employee later filed a complaint with the Oregon Bureau of Labor and Industries ("BoLI"), alleging employment discrimination.<sup>85</sup> After investigating the complaint, BoLI filed formal charges against the employer.<sup>86</sup>

The Supreme Court of Oregon held against the employee, reasoning that, to the extent that the Oregon MED statute affirmatively authorized MED use, it

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Sales & Mktg., LLC, 78 N.E.3d 37, 44-45 (Mass. 2017). Such an interactive process will often require the patient to produce documentation that shows that MED use is either the only or most effective treatment for their condition and does not require the employer to accommodate on-site MED use. *See id.* at 46-47.

<sup>79</sup> This remedy has to come from state law because cannabis is illegal under federal law. Parties have attempted to invoke remedies already present in state law, such as employment antidiscrimination provisions, as well as remedies contained within the cannabis statutes themselves. *See Coats v. Dish Network, LLC*, 2015 CO 44, ¶ 7, 350 P.3d 849, 851 (detailing that plaintiff claimed remedy through off-duty conduct statute); *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 WL 2321181, at \*15 (R.I. Super. Ct. May 23, 2017) (finding remedy through private right of action within Rhode Island MED statute).

<sup>80</sup> *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 521 (Or. 2010).

<sup>81</sup> OR. REV. STAT. § 475.309 (2002) (current version at OR. REV. STAT. § 475B.415 (2018)).

<sup>82</sup> *Emerald Steel*, 230 P.3d at 520.

<sup>83</sup> Employment disability laws commonly require an interactive process to accommodate an employee's handicap. *See supra* note 51 (presenting state employment disability statutes with such provisions).

<sup>84</sup> *Emerald Steel*, 230 P.3d at 521.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

was preempted,<sup>87</sup> and therefore the employee was not entitled to a reasonable accommodation under the Oregon employment antidiscrimination statute.<sup>88</sup> The decision turned on section 659A.124 of the Oregon Revised Statutes, which provides in relevant part that the state’s antidiscrimination protections do not apply if the employee was engaged in “the illegal use of drugs” and the employer took action based on that use.<sup>89</sup> This in turn depended on whether the plaintiff’s MED use was “authorized under . . . other provisions of state or federal law.”<sup>90</sup> It was at this point that the court held that to the extent Oregon law authorized this MED use, it was preempted, and so the plaintiff’s MED use was an “illegal use of drugs,” and fell within the statutory exception.<sup>91</sup>

This analysis of *Emerald Steel* shows how statutory interpretation, and not preemption, is the primary tool that courts use to rule against individuals terminated for their cannabis use.<sup>92</sup> For example, had there been no exception for any “illegal use of drugs,” then the employee’s claim likely would have been able to proceed, similar to that of Cristina Barbuto. When analyzed not as cases of preemption, but as cases of statutory interpretation, the state precedents not only provide a clearer view of the case law and allow for the development of a consistent picture of current cannabis policy, but they also provide a good indication of how future cannabis-related cases will be decided.

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<sup>87</sup> See *supra* Section II.A (discussing state-imposed duty to accommodate and preemption).

<sup>88</sup> OR. REV. STAT. § 659A.112 (2018); *Emerald Steel*, 230 P.3d at 521.

<sup>89</sup> OR. REV. STAT. § 659A.124(1).

<sup>90</sup> *Id.* § 659A.122(2) (defining “[i]llegal use of drugs” as “any use of drugs, the possession or distribution of which is unlawful under state law or under the federal Controlled Substances Act . . . but does not include . . . uses authorized . . . under other provisions of state or federal law”).

<sup>91</sup> *Emerald Steel*, 230 P.3d at 536. This reasoning is somewhat problematic, because if the court had found that the Oregon MED statute did *not* authorize this MED use, then MED use was still an “illegal use of drugs” because it was unlawful under the CSA. While *Emerald Steel* is, in the author’s opinion, a poorly-crafted decision, it is important to see how preemption and statutory interpretation have been used here as scalpels, not hammers, to invalidate or nullify cannabis laws.

<sup>92</sup> While the crux of the decision, whether the employee’s MED use was an “authorized” use under state law, was purportedly decided by the court on preemption grounds, the inquiry the court used was not whether the Oregon MED statute directly conflicted with or stood as an obstacle to the CSA, but rather was a semantic inquiry into the statutory language itself. *Id.* at 538-39 (Walters, J., dissenting) (stating that majority focused too heavily on words of authorization, not authorization in effect, as words of authorization “serve only to make operable the exceptions to and exemptions from state prosecution . . . [and] do not grant permission that would not exist if those words were eliminated or replaced with words of exception or exclusion”).

## 2. Statutory Interpretation of Off-Duty Conduct Statutes

A good example of how statutory interpretation is more significant than preemption in MED cases can be seen in *Coats v. Dish Network, LLC*.<sup>93</sup> Brandon Coats, who was paralyzed from a car accident as a teenager, had a prescription for MED.<sup>94</sup> He was fired from his job at Dish Network when he tested positive for cannabis.<sup>95</sup> Coats filed a wrongful termination claim against Dish under section 24-34-402.5 of the Colorado Revised Statutes, which prohibits employers from terminating employees for “engaging in any lawful activity off the premises of the employer during nonworking hours . . . .”<sup>96</sup> On the merits, Coats may have had a good claim, but the Supreme Court of Colorado held that “lawful activity” as used in the off-duty conduct statute did not include conduct that was illegal under federal law, thus holding that Coats could not sue for wrongful termination.<sup>97</sup> The court reasoned that interpreting “lawful” to mean legal under state law would put a limitation on the meaning of the term that was not present in the statute.<sup>98</sup> This notion that both state and federal legality is the plain meaning of this terminology runs counter to common intuition. As Brandon Coats put it, “I was under the impression that we had passed a law, and that we had made it legal.”<sup>99</sup>

## 3. Statutory Interpretation in *Barbuto*

Just because there was no reference to “lawful” or “legal” statutory language within the purview of the *Barbuto* case does not mean that the SJC necessarily

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<sup>93</sup> 2015 CO 44, 350 P.3d 849.

<sup>94</sup> *Id.* ¶ 5, 350 P.3d at 850.

<sup>95</sup> *Id.* ¶ 6, 350 P.3d at 850-51.

<sup>96</sup> COLO. REV. STAT. § 24-34-402.5(1) (2016) (referring to such actions as “discriminatory or unfair employment practice[s]”).

<sup>97</sup> *Coats*, 2015 CO 44, ¶¶ 16-19, 350 P.3d at 852-53.

<sup>98</sup> *Id.* ¶ 18, 350 P.3d at 852. While the court characterized the interpretation of “lawful” meaning “lawful under state law” as restrictive and *limiting* the meaning of “lawful,” it could just have easily reasoned that such a reading expanded the definition of “lawful” to include more activities. The justification the court gives for its reading of the statute is minimal and arguably insufficient, especially considering the subsequent cases that depend on, and seem to expand upon, this statutory interpretation. *See* *People v. Crouse*, 2017 CO 5, ¶ 8, 388 P.3d 39, 41 (holding that officers that return unlawfully seized cannabis are not “lawfully engaged” because “[t]his court has held [in *Coats*] that an act is ‘lawful’ only if it complies with both state and federal law”).

<sup>99</sup> *The Profit, Marijuana Country: The Cannabis Boom* (CNBC television broadcast Jan. 5, 2015).

had to hold that Cristina Barbuto's case could proceed.<sup>100</sup> Because the SJC did not have to decide any preemption claims or interpret any language pertaining to "lawful" conduct, Barbuto could argue that she had the right to a reasonable accommodation from her employer if she met the standard of a "qualified handicapped person" under section 151B of the Massachusetts General Laws.<sup>101</sup> The SJC found Barbuto met this standard, so she had the right to a reasonable accommodation.<sup>102</sup> Because there was no preemption language muddying the issues as in *Emerald Steel*, *Barbuto* can be seen clearly for the case of statutory interpretation that it is. Similarly, while state cases concerning cannabis and employment protections can be seen at first glance as cases involving preemption, there is really little preemption present. Rather, each is a case of statutory interpretation, and the differences between them can largely be attributed to the differences in the relevant state statutes. The question remains then: what statutory language can give rise to employment protections for MED patients and what cannot?

### III. STATUTORY EMPLOYMENT PROTECTIONS

*Barbuto* held that MED patients terminated because of their MED use could sue for handicap discrimination under section 151B of the Massachusetts General Laws.<sup>103</sup> While some courts ruled on the meaning of "legal" or "lawful" in their state's antidiscrimination laws,<sup>104</sup> the SJC had no such ambiguous language to consider in section 151B.<sup>105</sup> While some courts have considered specific employment provisions in their state's MED law, the Massachusetts MED law contained no employment provision.<sup>106</sup> When states legalize cannabis

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<sup>100</sup> Remember that *Barbuto* was an appeal from a motion to dismiss, so while the legal standards from the case are binding, the *Barbuto* decision did not hold for Cristina Barbuto on the merits. *Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37, 50-51 (Mass. 2017).

<sup>101</sup> A "qualified handicapped person" is "a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap." MASS. GEN. LAWS ch. 151B, § 1(16) (2017). A "handicapped person" is a person with a handicap, which is "a physical or mental impairment which substantially limits one or more major life activities of a person . . ." *Id.* § 1(17), (19).

<sup>102</sup> *Barbuto*, 78 N.E.3d at 43.

<sup>103</sup> *Id.*

<sup>104</sup> See *Coats v. Dish Network, LLC*, 2015 CO 44, ¶¶ 16-19, 350 P.3d 849, 852-53.

<sup>105</sup> See MASS. GEN. LAWS ch. 151B.

<sup>106</sup> See *id.* ch. 94I, § 1-4 (providing protections for qualified medical cannabis patients from government, but not from private actors). Other states have provided explicit provisions in their MED laws protecting patients from adverse employment action. See, e.g., DEL. CODE ANN. tit. 16, § 4905A(3) (2019) ("[A]n employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person,

for medical or recreational use, they can omit, mistakenly or not, important provisions to protect the benefited person from adverse actions. Many states extend no protections to MED patients against adverse employment actions,<sup>107</sup> and those that do include no remedy for that proscription in the statutory language.<sup>108</sup> This creates problems for cannabis consumers who wish to obtain or retain a job, and especially for those who use cannabis medically to alleviate symptoms of a debilitating disease. These problems can be seen by taking another look at *Coats*.

Brandon Coats had a prescription for MED, but was fired from his job at Dish Network when he failed a drug test.<sup>109</sup> Coats was understandably surprised by this action and sued Dish under Colorado's off-duty conduct law, but he lost his case in the Colorado Supreme Court.<sup>110</sup> Coats's lawyer Michael Evans lamented the decision, saying that medical marijuana patients would have to "choose between using medical marijuana and work."<sup>111</sup> Coats himself stated, "If we're making marijuana legal for medical purposes we need to address issues that come along with it."<sup>112</sup>

Brandon Coats's story is just one of many, and it illustrates the need for states to seriously and thoroughly address the extensive problems created by missing or incomplete provisions in cannabis legalization laws.<sup>113</sup> Because the previous

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if the discrimination is based upon . . . [a] registered qualifying patient's positive drug test for marijuana . . .").

<sup>107</sup> See Elizabeth Rodd, *Light, Smoke, and Fire: How State Law Can Provide Medical Marijuana Users Protection from Workplace Discrimination*, 55 B.C. L. REV. 1759, 1774-75 (2014) (stating that most states' cannabis laws do not address employment disability discrimination).

<sup>108</sup> See, e.g., MINN. STAT. § 152.32 Subd. 3(c) (2019) (prohibiting employment discrimination based on carholder status and testing positive for cannabis, but not providing for private right of action); see also MASS. GEN. LAWS ch. 94G, § 2(e) (stating, as only mention of employers in REC act, that act "shall not require an employer to permit or accommodate conduct otherwise allowed by this chapter in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees," thereby creating no express protections for employees).

<sup>109</sup> See *Coats*, 2015 CO 44, ¶¶ 5-7, 350 P.3d at 850-51.

<sup>110</sup> *Id.* ¶¶ 2-4, 350 P.3d at 850 (holding that meaning of "lawful" under Colorado's prohibition on adverse employment actions based on lawful off-duty conduct did not include drug use that was legal under state law but illegal federally).

<sup>111</sup> Bruce Barcott, *Even in Colorado Medical Marijuana Can Still Get You Fired*, TIME (June 15, 2015), <http://time.com/3921738/coats-colorado-dish-medical-marijuana-work-law/> [<https://perma.cc/54S5-PPRG>].

<sup>112</sup> *Id.*

<sup>113</sup> Because cannabis is illegal under the CSA regardless of whether it is used for medical or recreational purposes, the problems found in state MED laws are for the most part going to be the same for recreational cannabis laws. See *Noffsinger v. SSC Niantic Operating Co.*, 273

Part illustrated that the statutory language at play is often dispositive of a court finding employment protections for MED patients, this Part will examine the different strains of employment protections found in current MED statutes, and some protections that are not found. This Part thereby seeks to provide a map of the existing statutory landscape, and further seeks to provide lawmakers and advocates advice on how to craft future cannabis legislation.

A. *Employment Provisions and Preemption*

Some employers may believe that it violates federal law to knowingly employ someone who consumes (and therefore presumably possesses) controlled substances. However, the CSA is silent on the employer-employee relationship, thus creating no direct conflict with state employment laws.<sup>114</sup> This not only means that employers that do not require termination for cannabis users are not at risk of federal sanction,<sup>115</sup> but it also means that provisions of state cannabis laws that govern employment do not conflict with the CSA. Therefore, when states have provisions in their cannabis regulations that provide employment protections for MED patients or cannabis consumers, preemption never comes into the picture.

Both Connecticut and Rhode Island have provisions in their respective MED statutes prohibiting employers from discriminating against employees based on their status as medical marijuana patients.<sup>116</sup> In two recent cases, *Noffsinger v. SSC Niantic Operating Co.*<sup>117</sup> and *Callaghan v. Darlington Fabrics Corp.*,<sup>118</sup> employers challenged these provisions, in part arguing that they were preempted

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F. Supp. 3d 326, 330 (D. Conn. 2017) (contrasting state medical marijuana legality with “federal law [which] categorically prohibits the use of marijuana even for medical purposes”).

<sup>114</sup> Mikos, *supra* note 35, at 33-34 (“Some states likewise prohibit employers from discriminating against medical marijuana patients. . . . Employment laws such as this do not pose a direct conflict with the CSA because the CSA does not prohibit (most) firms from employing drug users.”).

<sup>115</sup> This is of course not the case for certain companies and positions, such as safety-related jobs regulated by OSHA. See Jay S. Becker & Saranne E. Weimer, *Legalization of Marijuana Raises Significant Questions and Issues for Employers*, 2014 N.J. L. 51, 53 (stating that accommodations that interfere with OSHA-regulated safety conditions should not be provided).

<sup>116</sup> CONN. GEN. STAT. § 21a-408p(b)(3) (2017) (“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 or primary caregiver under sections 21a-408 to 21a-408n, inclusive.”); 21 R.I. GEN. LAWS § 21-28.6-4(d) (2018) (“No school, employer, or landlord may refuse to enroll, employ, or lease to, or otherwise penalize, a person solely for his or her status as a cardholder.”).

<sup>117</sup> 273 F. Supp. 3d 326 (D. Conn. 2017).

<sup>118</sup> No. PC-2014-5680, 2017 WL 2321181 (R.I. Super. Ct. May 23, 2017).

by the CSA.<sup>119</sup> Both the federal district court of Connecticut and the Rhode Island Superior Court held that such provisions were not preempted by the CSA.<sup>120</sup>

As previously mentioned, there is no provision of the CSA that addresses the employer/employee relationship, and thus there was no provision that could preempt the state MED provisions.<sup>121</sup> Because the plaintiff in *Noffsinger* sought only to enforce the employment discrimination provision, the Connecticut district court held:

[This court] must focus on [the MED law's] specific anti-employment discrimination provision rather than the statute as a whole, because in preemption cases, "state law is displaced only to the extent that it actually conflicts with federal law," and "a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it."<sup>122</sup>

This principle, similar to that of constitutional avoidance, governs cases addressing specific provisions of state MED statutes.<sup>123</sup> The presumption against preemption still applies "in cases involving powers traditionally delegated to the states," and "[e]mployment law and anti-discrimination law are examples of two such delegated powers."<sup>124</sup> The case against federal preemption for MED patients' employment provisions is strong because (1) employment provisions of cannabis laws should be considered on their own and not as a part of the cannabis law in totality; (2) there is a presumption against preemption in the realm of employment and antidiscrimination law; and (3) "[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

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<sup>119</sup> Both cases involved failures to hire on the basis that plaintiffs were medical cannabis consumers. *Noffsinger*, 273 F. Supp. 3d at 326; *Callaghan*, 2017 WL 2321181, at \*2. The fact that both patients were denied employment rather than terminated from an existing position is irrelevant to these decisions because both the Connecticut and Rhode Island MED statutes prohibit discrimination in hiring as well as termination. *See supra* note 116.

<sup>120</sup> *Noffsinger*, 273 F. Supp. 3d at 336; *Callaghan*, 2017 WL 2321181, at \*14-15.

<sup>121</sup> *Noffsinger*, 273 F. Supp. 3d at 336 ("The CSA, however, does not make it illegal to employ a marijuana user. Nor does it purport to regulate employment practices in any manner."); *Callaghan*, 2017 WL 2321181, at \*14-15.

<sup>122</sup> *Noffsinger*, 273 F. Supp. 3d at 334.

<sup>123</sup> *See Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996) (holding that in preemption cases, state law is only displaced "to the extent that it actually conflicts with federal law" (citations omitted)).

<sup>124</sup> *Callaghan*, 2017 WL 2321181, at \*14.



decided to ‘stand by both concepts and to tolerate whatever tension there [is] between them.’”<sup>125</sup>

#### B. *Strains of Statutory Employment Provisions*

What rights, if any, MED statutes provide to MED patients is then a question of statutory interpretation. There are four strains of employment protections possible in state cannabis laws: those that provide (1) express employment protections and an express private right of action,<sup>126</sup> (2) express employment protections but no private right of action,<sup>127</sup> (3) no express employment protections but express guarantees of other rights or privileges,<sup>128</sup> and (4) no employment protections.<sup>129</sup> This Section will analyze each of these in turn in the context of how they have been and can be interpreted by courts, thereby showing how the holding in *Barbuto*, that Cristina Barbuto’s exclusive remedy was a claim of handicap discrimination, follows directly from the employment language in Massachusetts’s MED statute.

##### 1. Express Employment Protections and Private Right of Action

If a state cannabis law has both express employment protections and an express private right of action, then a reviewing court need not interpret the statute to determine whether someone may file a claim under the act. Instead, the reviewing court would only need to determine whether the plaintiff satisfies the standard to file that claim. To date, no state cannabis statutes provide both express employment protections and an express private right of action.

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<sup>125</sup> *Id.* at \*15 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989)).

<sup>126</sup> There are not any such MED statutes that exist currently, but it is easy to imagine one. For example, a statute might provide, “An employer may not terminate or refuse to hire a registered medical marijuana patient on the basis of that patient’s cardholder status and medical marijuana use. If an employer does so, the terminated employee may file a civil claim in Superior Court for employment discrimination.”

<sup>127</sup> For example, such a statute might provide, “An employer may not terminate or refuse to hire a registered medical marijuana patient on the basis of that patient’s cardholder status and medical marijuana use.” Statutes that provide these protections but do not provide an express private right of action still may incorporate the MED patient protections into larger antidiscrimination statutes. *See, e.g.*, N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2018) (stating that being certified MED patient is deemed having disability under general antidiscrimination statute).

<sup>128</sup> For example, such a statute might provide, “A registered medical marijuana patient shall not be denied any right or privilege on the basis of that patient’s cardholder status or medical marijuana use.” *See, e.g.*, MASS. GEN. LAWS ch. 94I, §§ 1-4 (2017).

<sup>129</sup> For example, the statute might describe the standards for registry as a patient but not enumerate any employment protection nor have a general “rights or privileges” clause. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2017).

## 2. Express Employment Protections and No Private Right of Action

Several states have enacted MED statutes that proscribe employers from discriminating against certified MED patients.<sup>130</sup> However, without an express private right of action or some other provided avenue for private remedy, reviewing courts would have to find an implied private right of action in order for a MED patient to file a claim for relief.<sup>131</sup> In *Noffsinger* and *Callaghan*, courts in Connecticut and Rhode Island did exactly that. In addition to deciding the preemption issue,<sup>132</sup> the *Callaghan* and *Noffsinger* courts had to find implied private rights of action in order for the respective plaintiffs to have a claim for employment discrimination. Both the *Callaghan* and *Noffsinger* courts found that without a private right of action as an enforcement mechanism, the prohibition against employment discrimination on the basis of MED patient status is hollow.<sup>133</sup> Thus, when states have specific employment protections for MED patients but no express private right of action, a reviewing court can find an implied private right of action, not only because there is a strong presumption against interpreting laws as nugatory, but also because private rights of action are commonly implied by courts in the civil rights context.<sup>134</sup>

## 3. No Express Employment Protections but Rights and Privileges Clause

Several state cannabis statutes, even those with express employment protections, have a clause providing that those covered under the statute shall not be “denied any right or privilege” based upon their compliance with the statute.<sup>135</sup> Such cannabis statutes without express employment protections must

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<sup>130</sup> See, e.g., DEL. CODE ANN. tit. 16, § 4905A(3) (2019).

<sup>131</sup> See, e.g., N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2018) (explicitly classifying MED patients as handicapped under general antidiscrimination statute, implicitly providing right of action for handicap discrimination).

<sup>132</sup> See *supra* Section III.A (describing these cases’ findings that employment provisions of state MED statutes are not federally preempted).

<sup>133</sup> *Noffsinger v. SSC Niantic Operating Co.*, 273 F. Supp. 3d 326, 339 (D. Conn. 2017) (“[W]ithout a private cause of action, [the MED employment protection] would have no practical effect, because the law does not provide for any other enforcement mechanism.”); *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 WL 2321181, at \*8 (R.I. Super. Ct. May 23, 2017) (“The Hawkins-Slater Act must have an implied private right of action. Without one, [the MED employment protection] would be meaningless.”). For more recent instances of courts finding a private right of action, see *Whitmire v. Wal-Mart Stores*, No. CV-17-08108-PCT-JAT, 2019 WL 479842, at \*5-11 (D. Ariz. Feb. 7, 2019) and *Chance v. Kraft Heinz Foods Co.*, C.A. No. K18C-01-056 NEP, 2018 WL 6655670, at \*9-18 (Del. Super. Ct. Dec. 17, 2018).

<sup>134</sup> *Callaghan*, 2017 WL 2321181, at \*7 (“It is precisely in the civil rights context where courts have been most open to implying private rights of action . . .”).

<sup>135</sup> This language is in many MED laws, but, interestingly, is also present in recreational cannabis laws. See, e.g., MASS. GEN. LAWS ch. 94G, § 7(b) (2017) (“Notwithstanding any

then have a reviewing court imply both the right and remedy through the rights and privileges clause. While it is possible that a court could imply employment protections directly from the cannabis statute itself, the simplest way to read in employment protections is to bring in a right or privilege, and the corresponding remedy, from another statute, which is exactly what the SJC did in *Barbuto*.<sup>136</sup> Like the SJC, other courts can link their state's rights and privileges clause in the state's MED statute to a handicap discrimination provision elsewhere.<sup>137</sup> However, it is unclear to what rights or privileges recreational cannabis laws may be referring, as those using cannabis recreationally would not be able to meet the standard necessary for a handicap discrimination claim. Courts considering such statutes would be facing a case of first impression.<sup>138</sup>

#### 4. No Employment Protections

A few cannabis statutes, especially the first ones passed, have no express employment protections, no express private right of action, and no rights or privileges clause.<sup>139</sup> With *no* indication of legislative intent to provide employment protections, it is difficult for a court to imply employment

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other general or special law to the contrary, . . . a person 21 years of age or older shall not be . . . denied any right or privilege . . . for possessing, using, purchasing, cultivating, processing or manufacturing any amount of marijuana or marijuana products for personal use.”).

<sup>136</sup> See *Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37, 45 (Mass. 2017) (“Our conclusion finds support in the marijuana act itself, which declares that patients shall not be denied ‘any right or privilege’ on the basis of their medical marijuana use. A handicapped employee in Massachusetts has a statutory ‘right or privilege’ to reasonable accommodation . . . . If an employer’s tolerance of an employee’s use of medical marijuana were a facially unreasonable accommodation, the employee effectively would be denied this ‘right or privilege’ solely because of the patient’s use of medical marijuana.” (citations omitted)).

<sup>137</sup> This is precisely what New York’s MED statute does expressly. See N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2018).

<sup>138</sup> Because a REC consumer would not be able to meet the necessary standard for a claim of handicap discrimination, she might have to argue that employment is itself a right or privilege that the REC statute refers to, an argument unlikely to succeed. See *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 257 P.3d 586, 591 (Wash. 2011) (rejecting argument that statute’s rights or privileges clause confers obligation on private employers). This is a problem that this Note will discuss in Part IV, *infra*, specifically with regard to the Massachusetts REC law because of its rights or privileges clause. See MASS. GEN. LAWS ch. 94G, § 7(b).

<sup>139</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 11362.5 (West 2017) (failing to expressly codify any employment protections, private right of action, or rights or privilege clause covering patients).

protections and a private right of action.<sup>140</sup> Therefore, cases attempting to invoke employment protections in such regimes have largely failed.<sup>141</sup>

C. *Other Strains of Employment Protections*

The court in *Barbuto* held that the plaintiff's exclusive right of action was a handicap discrimination claim, but Cristina Barbuto's other claims illustrate the other possible avenues through which a court could find a right of action for a cannabis consumer terminated for that cannabis consumption. These claims included invasion of privacy, wrongful termination in violation of public policy, and an implied private right of action in the MED statute itself.<sup>142</sup> All of these are largely irrelevant for understanding Massachusetts cannabis law, but explaining them briefly may be instructive for cases outside the Commonwealth as well as for potential future cases involving REC consumers seeking employment protections.

Massachusetts has no statute addressing an employee's off-duty activities, but does have one providing a right to privacy.<sup>143</sup> The Massachusetts privacy statute has been interpreted to balance an employer's "legitimate business interests" against an intrusion on an employee's privacy.<sup>144</sup> Further, to state a claim, a plaintiff must show that the conduct in question was in fact private,<sup>145</sup> which likely would be very difficult to prove for MED patients and REC consumers.<sup>146</sup> In contrast, in Alaska, citizens have a basic right to privacy in their homes, and

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<sup>140</sup> See *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 208-09 (Cal. 2008) (holding plaintiff could not state cause of action under California MED statute); *Barbuto*, 78 N.E.3d at 45 n.7 (distinguishing *Ross* on the basis that California MED statute did not contain rights or privileges clause for patients).

<sup>141</sup> See, e.g., *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 300 P.3d 494, 501-02 (Cal. 2013) (stating that California MED statute does not provide employment protections); *Ross*, 174 P.3d at 209 (concluding that plaintiff could not invoke any employment protections for MED use).

<sup>142</sup> *Barbuto*, 78 N.E.3d at 41.

<sup>143</sup> MASS. GEN. LAWS ch. 214, § 1B ("A person shall have a right against unreasonable, substantial or serious interference with his privacy.").

<sup>144</sup> See *French v. United Parcel Serv., Inc.*, 2 F. Supp. 2d 128, 131 (D. Mass. 1998) ("In the employment context 'the employer's legitimate interest in determining the employees' effectiveness in their jobs [is] balanced against the seriousness of the intrusion on the employees' privacy.'" (citation omitted)).

<sup>145</sup> *Id.* (finding employee's smoking conduct not to be private because employee failed to attempt to conceal smoking).

<sup>146</sup> See *Rodrigues v. EG Sys., Inc.*, 639 F. Supp. 2d 131, 134 (D. Mass. 2009) ("[Plaintiff] does not have a protected privacy interest in the fact that he is a smoker because he has never attempted to keep that fact private.").

a cannabis consumer could invoke that right in reference to a rights or privileges clause.<sup>147</sup>

In states with off-duty conduct laws, it is possible, maybe even likely, that cannabis consumers could successfully invoke such a statute, but the outcome of their cases would depend largely on the wording of the statute in question.<sup>148</sup> Elsewhere though, the ability for a cannabis consumer to claim employment protections based on their cannabis consumption being purely off-duty depends largely on individual state laws.<sup>149</sup> In Massachusetts, at least, this claim would not go very far.

As an exception to the general policy of at-will employment, an employee may sue for wrongful termination if that employee's termination violates a "clearly established public policy."<sup>150</sup> This narrow category normally only includes terminations based on an employee (1) refusing to do what the law forbids, (2) asserting a legally guaranteed right, or (3) adhering to what the law requires.<sup>151</sup> Because cannabis use is not a refusal to take an action and is not mandated by law, a public policy wrongful termination claim would only give rise to employment protections for cannabis consumers if cannabis consumption were a legally guaranteed right, which seems unlikely.<sup>152</sup>

An implied private right of action, as discussed above, is more likely found when the cannabis statute would be nugatory without it. As noted above, no court has found an implied private right of action in a cannabis statute where no

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<sup>147</sup> See ALASKA CONST. art. 1, § 22 ("The right of the people to privacy is recognized and shall not be infringed."); *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975) ("[W]e conclude that citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution. This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home . . ."). While citizens in Alaska would likely be able to invoke employment protections through this basic right of privacy, neither the Alaska MED law nor the REC law contains a rights or privileges clause. ALASKA STAT. § 17.38.020 (2017) (applying to REC consumers); *id.* § 17.37.030 (applying to MED patients). Even without such a clause, though, it is still possible that Alaska citizens could invoke employment protections under *Ravin*.

<sup>148</sup> See *Coats v. Dish Network, LLC*, 2015 CO 44, ¶ 13, 350 P.3d 849, 851 (holding that plaintiff could not invoke off-duty conduct statute because it specified that plaintiff must be engaged in "lawful activities" to invoke it, which the court determined he was not).

<sup>149</sup> See generally Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625 (2004) (discussing off-duty conduct laws across several states).

<sup>150</sup> See, e.g., *King v. Driscoll*, 638 N.E.2d 488, 492 (Mass. 1994) (citing standard for wrongful termination claim).

<sup>151</sup> See *id.*

<sup>152</sup> While the *Barbuto* court dismissed the wrongful termination claim because of the exclusivity of the handicap discrimination claim, it noted that the claim was not likely to prevail on the merits. *Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37, 50 (Mass. 2017).

express employment protections were provided, and it is unclear what a future case would find.

This Part has attempted to lay out the legal field into which *Barbuto* fit, and has shown that while *Barbuto* may have seemed like a changing of the tide of cannabis employment protections, it actually fits nicely into the precedents of other states; if a case were brought in other states under similar conditions, statutory language, and legal arguments, it would be reasonable for a court to hold as the SJC did in *Barbuto*. Thus far, this Note has only touched on federalism concerns for employers and has largely focused only on MED statutes. The next Part will take the *Barbuto* decision, which, as this Note has argued, is representative of national precedents, and ask what it means for REC consumers in Massachusetts. After identifying some problematic conclusions, Part IV will examine why these inevitable results are concerning for individuals, employers, and legal norms. This Note will then posit that the problems are symptomatic of the underlying problem in cannabis-employment law, which is that current policies address cannabis use per se, when they should be focused on on-site impairment.

#### IV. RECREATIONAL CANNABIS AND EMPLOYMENT

In November 2016, Massachusetts voters passed Question 4, legalizing cannabis for recreational use statewide.<sup>153</sup> While it is not clear what effect this will have on overall consumption rates, the measure does bring recreational cannabis use into a more tenable legal position. Whereas before 2016, REC possession was entirely illegal, post-legalization REC possession, and therefore consumption, may be entitled to (or, at the very least, cannabis proponents will be able to seek) greater protections. In light of this recent measure, *Barbuto* may seem like a win for cannabis proponents, but this Part will argue that the decision actually cuts against REC consumers and, more importantly, fails to address the underlying problem at the core of cannabis and employment: it is difficult to actually test for cannabis impairment.

##### A. *Problematic Conclusions*

The *Barbuto* court found a cause of action for MED patients under section 151B of the Massachusetts General Laws for handicap discrimination, to the exclusion of all other remedies. If a REC consumer were to bring a claim against her employer over an adverse employment action, she would not be able to invoke the *Barbuto* decision and would need to find a separate remedy. When such a case comes to the SJC, assuming that the case is not decided on other grounds, the SJC will be forced to make one of two problematic conclusions: (1)

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<sup>153</sup> See Gintautas Dumcius, *Marijuana Legalization Ballot Initiative, Question 4, Passes in Massachusetts*, MASSLIVE (Nov. 9, 2016, 12:16 AM), [http://www.masslive.com/politics/index.ssf/2016/11/marijuana\\_legalization\\_ballot\\_1.html](http://www.masslive.com/politics/index.ssf/2016/11/marijuana_legalization_ballot_1.html) [<https://perma.cc/M4P8-5RMR>].

that there is no private right of action under the Massachusetts REC law and REC consumers have no employment protections; or (2) that there is a private right of action under the Massachusetts REC law, lessening the comparative rights of MED patients and essentially undermining the SJC's own reasoning in *Barbuto*. Conclusion (1) seems more likely than conclusion (2), but this Section will analyze how each could be decided and why neither is satisfactory.

If the SJC holds that there is no private right of action under the Massachusetts REC law, and thus Massachusetts REC consumers have no employment protections, the decision would generate problems for REC consumers, voters, employers, and legal standards generally. The most direct impact would be on REC consumers, who would have to choose between their refreshment of choice and their employment. Similarly, such a holding would put a burden on employers to change their cannabis policies or else face an artificially limited talent pool.<sup>154</sup> Not only could such a holding create a tragedy-of-the-commons problem for employers to restrict or remove their cannabis policies to reach a larger talent pool, but it could cause employers to do away entirely with cannabis policies and have no measures for testing for cannabis impairment, throwing the bud out with the bong water.<sup>155</sup> Moreover, conclusion (1) would allow for employment protections for MED patients consuming cannabis recreationally, but would not protect non-MED patients for the same behavior, creating an inequitable standard of justice.<sup>156</sup>

Conclusion (2), that there is a private right of action under the REC law, however, leads to a regime where MED patients do not have the greater legal protections that their status as MED patients is meant to confer relative to REC

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<sup>154</sup> The talent pool in Massachusetts is artificially limited for employers who maintain cannabis-free policies by the number of people who consume cannabis. In 2013-2014, roughly seventeen percent of all Massachusetts residents eighteen years old and older and roughly forty-three percent of Massachusetts residents between the ages of eighteen and twenty-five had consumed cannabis within the last year, and roughly twelve percent of residents eighteen years old or older and roughly twenty-nine percent of those aged between eighteen and twenty-five had consumed cannabis within the last month of the survey. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., 2013-2014 NATIONAL SURVEY ON DRUG USE AND HEALTH tbls. 53-54 (2016) (noting that Massachusetts cannabis consumption is above national average, behind only six other states in percentage of users in United States).

<sup>155</sup> As argued below, employer cannabis policies should concentrate on impairment, and doing away entirely with cannabis use policies could allow employees to be impaired on the job. See *infra* Section IV.B (analogizing to some states' DUI laws, which prohibit driving while impaired by cannabis, and describing challenges of testing for cannabis impairment).

<sup>156</sup> Because there is no difference between medical and recreational cannabis flower, under a conclusion (1) regime, MED patients would be able to consume cannabis recreationally, off-the-job without their employers being able to detect it. Therefore, MED patients would be protected from adverse employment action for the same behavior for which REC consumers could be terminated.

users.<sup>157</sup> Moreover, such a holding would seem to undermine the *Barbuto* holding, as both the Massachusetts REC and MED laws have similar language regarding protections for the persons they cover,<sup>158</sup> and *Barbuto* held that the MED statute did not provide for a private right of action.<sup>159</sup> If the SJC holds that the REC statute does provide for such a private right of action, the SJC would contradict its own holding in *Barbuto*, in that the SJC would be recognizing a private right of action in almost identical language as where it had previously denied one.<sup>160</sup>

Neither of the two conclusions is satisfactory and both are at least somewhat problematic. However, by looking at an analogous area of law, driving under the influence (“DUI”), the underlying problem in this area becomes clear: *Barbuto* and other such cases focus around employers testing for cannabis *consumption*, not impairment.

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<sup>157</sup> Under *Barbuto*, MED patients can sue for handicap discrimination exclusively. See *Barbuto*, 78 N.E.3d at 50-51 (Mass. 2017). The standard for a handicap discrimination claim in Massachusetts allows an employer to argue that accommodating the MED patient’s cannabis consumption would put an undue burden upon the employer. See MASS. GEN. LAWS ch. 151B, § 4 (2017). It is unclear whether a private right of action under the Massachusetts REC law would allow for such a defense for the employer, as the right for a REC consumer would probably not be a right to a reasonable accommodation, which is reserved for handicap discrimination claims. See *id.*

<sup>158</sup> See MASS. GEN. LAWS ch. 94G, § 7(a) (“[A] person 21 years of age or older shall not be . . . denied any right or privilege . . . for: (1) possessing, using, purchasing, processing or manufacturing 1 ounce or less of marijuana . . .”); *id.* at ch. 94I, § 1-4 (“Any person meeting the requirements [for MED patient status] under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions.”).

<sup>159</sup> See *Barbuto*, 78 N.E.3d at 49-50 (“The Legislature’s provision of a . . . separate civil remedy, ‘weighs heavily against recognizing’ an implied private right of action in a statute.” (citations omitted)).

<sup>160</sup> However, the SJC could reason that *Barbuto* asked them to imply a private right of action in light of another available remedy, thus making the consideration of an implied private right of action unnecessary, and so *Barbuto* and conclusion (2) may not be inconsistent. The SJC is not likely to take this position, because if a private right of action could have been implied in the MED statute, then the SJC would likely have indicated its openness to such an argument in the future. As it is, the SJC positively held that there was no private right of action in the Massachusetts MED law, and discussed multiple reasons for this holding, indicating a lack of openness to the claim. See *id.* at 48-50 (finding lack of legislative or public intent to have private right of action in MED statute before discussing availability of alternative remedies).



## B. *Cannabis Impairment at Work*

### 1. Impairment vs. Per Se Framework

If one were to ask an employer in a state where recreational cannabis use is legal why it instituted or maintained a proscription on cannabis in its workplace, the employer may give one or both of two answers: federal illegality and intoxication at work.<sup>161</sup> This Note discusses above why federal illegality should not concern employers,<sup>162</sup> so the only concern addressed in this Note that should actually affect employers is on-the-job intoxication. However, current state and employer policies do not reflect this concern, and instead appear to be based on federal illegality, as they target any cannabis consumption, and not cannabis impairment on-the-job. This Section attempts to explain the legal difference between policies focusing on consumption per se and those focusing on impairment and illustrates that current policies ultimately do not focus on cannabis impairment because of the practical problems that employers face in testing for it.

Every state prohibits driving under the influence of cannabis.<sup>163</sup> However, while some states only prohibit driving while impaired under the influence of cannabis, others also prohibit driving with cannabis in the body, regardless of whether the driver is impaired.<sup>164</sup> Employment drug screenings concentrate exclusively on per se testing, i.e., testing for any amount of cannabis in the body. While there are some reasons why a per se standard is appropriate for employers

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<sup>161</sup> There are of course other reasons that employers could have for instituting no-tolerance cannabis policies, such as believing negative stereotypes about cannabis consumers, wanting to reduce health insurance costs that might be related to cannabis use, or a general belief that drug use is immoral. This Note only engages with the two employer concerns that appear to be most related to potential legal action.

<sup>162</sup> See *supra* Section III.A.

<sup>163</sup> See AMANDA BODDIE & AUDRA O'BRIEN, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DEP'T OF TRANSP., DOT HS 812 468, 2016 DIGEST OF STATE LAWS: DRIVING UNDER THE INFLUENCE OF DRUGS, at x (2018). For an example of such a statute, see MISS. CODE ANN. § 63-11-30(1) (2018).

<sup>164</sup> Compare, e.g., 75 PA. CONS. STAT. § 3802(d) (2017) ("An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances: . . . The individual is under the influence of a drug or combination of drugs to a degree which impairs the individual's ability to safely drive, operate or be in actual physical control of the movement of the vehicle."), with ARIZ. REV. STAT. ANN. § 28-1381(A) (2017) ("It is unlawful for a person to drive or be in actual physical control of a vehicle in this state under any of the following circumstances: . . . While there is any drug defined in [Arizona's CSA] or its metabolite in the person's body.").

to use, the reasons fall far short of those that apply in the context of driving under the influence.<sup>165</sup>

*Barbuto* plays into the per se system of cannabis proscription in the workplace. Instead of reasoning that impairment is the key factor in an employment action, the SJC decided to focus on *who* was being terminated on a per se basis.<sup>166</sup> In doing so, the SJC reinforced the idea that employers may discriminate against persons for having any level of cannabis or cannabis metabolites in their system but made an exception for when that person is a MED patient. This Note asserts that the reason that the SJC avoided the real issue, and the reason that per se employment drug testing pervades the job market, is that cannabis impairment is particularly difficult to test for.

## 2. The Difficulties of Testing for Cannabis Intoxication

Unlike other substances, cannabis use can be detected in testing for weeks to months after a single consumption and for regular consumers it can be even longer.<sup>167</sup> A person could consume alcohol on a Friday, come into work on Monday, and test positive only for cannabis she smoked three weeks ago.<sup>168</sup> The disparities in how employers and others test for cannabis consumption compared to other substances boils down to three factors that come together to make cannabis testing unique: (1) the way the human body breaks down and stores cannabis, (2) the metabolites that normal urinalysis or blood tests detect, and (3) the standards by which cannabis consumption is measured and penalized.

While we cannot fundamentally change how the human body interacts with cannabis, we can change how we test for its consumption and for what exactly we test. The main psychoactive component of cannabis is delta-9-tetrahydrocannabinol (“THC”), which, when metabolized by the body, primarily breaks down into 11-hydroxy-THC (“Hydroxy-THC”) and 11-nor-9-carboxy-THC (“THC-COOH”).<sup>169</sup> Hydroxy-THC is psychoactive, thereby causing impairment, but does not stay in the body for very long, as it is quickly converted

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<sup>165</sup> A no-tolerance policy in the context of DUI statutes can be justified by the compelling public safety interest of eliminating *potentially* intoxicated driving, though as mentioned in this Note, it is not efficient. Setting such a bright-line rule in this safety-sensitive context, however, is far more justified than it is in a non-safety-sensitive context.

<sup>166</sup> As the case notes, Cristina Barbuto did not show up to work intoxicated. *See Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37, 41 (Mass. 2017) (“She did not use marijuana at the workplace and did not report to work in an intoxicated state.”).

<sup>167</sup> *See Marijuana Drug Test Detection Times*, CALIFORNIA NORML, <http://www.cano.rml.org/healthfacts/drugtestguide/drugtestdetection.html> [https://perma.cc/VZ4P-SA5Y] (last visited Feb. 21, 2019).

<sup>168</sup> *See id.*

<sup>169</sup> *See id.*

into THC-COOH.<sup>170</sup> By contrast, THC-COOH is not psychoactive, but stays in the body for much longer: roughly one month.<sup>171</sup> While hair tests can detect cannabis use from as far back as a year, most tests for cannabis use attempt to detect it through testing blood or urine and test for the presence of THC-COOH.<sup>172</sup>

Some courts have dismissed impairment charges based solely upon the presence of THC-COOH in the bloodstream,<sup>173</sup> but employers generally have not followed suit. This description is an oversimplification of cannabis testing, as there are many more cannabis metabolites that can be tested,<sup>174</sup> and there is significant debate regarding the efficacy of testing for psychoactive metabolites.<sup>175</sup> However, the methodology used for cannabis testing is far from exact and often is more focused on testing for *any* past cannabis use instead of current cannabis impairment.

Underlying the difficulty of cannabis impairment testing is a larger root cause: a lack of research caused by federal prohibition. Because cannabis is federally illegal, studies on its effects on the body are almost nonexistent.<sup>176</sup> Few technologies to test for cannabis impairment are being researched, much less in development, though there are some attempts to achieve an efficacious test.<sup>177</sup>

<sup>170</sup> *See id.*

<sup>171</sup> *See State ex rel. Montgomery v. Harris*, 322 P.3d 160, 163-64 (Ariz. 2014) (finding that because “[THC-COOH] can remain in the body as many as twenty-eight to thirty days after ingestion” non-impaired drivers may not be convicted of driving while impaired despite presence of marijuana metabolite).

<sup>172</sup> Karen E. Moeller et al., *Urine Drug Screening: A Practical Guide for Clinicians*, 83 MAYO CLINIC PROC. 66, 66 (2008).

<sup>173</sup> *See Montgomery*, 322 P.3d at 164 (holding that presence of THC-COOH in defendant cannot be justification for charge of impaired driving).

<sup>174</sup> It may be significant to note, especially for the purposes of driving and general legality, that the CSA specifies that cannabis and THC metabolites are also covered under its definition of controlled substances. *See* Controlled Substances Act of 1970, 21 U.S.C. §§ 811, 812, 844 (2012) (defining as controlled substance any material “which contains any quantity of the following hallucinogenic substances . . . (17) Tetrahydrocannabinols”).

<sup>175</sup> It is unclear exactly how quickly psychoactive metabolites metabolize in any specific person, and so testing for psychoactive components of cannabis may sometimes reveal some false negatives. *See Marijuana Drug Test Detection Times*, *supra* note 167.

<sup>176</sup> *See* JOHN HUDAK & GRACE WALLACK, ENDING THE U.S. GOVERNMENT’S WAR ON MEDICAL MARIJUANA RESEARCH 1-2 (2015) (discussing difficulties in getting approval for cannabis research).

<sup>177</sup> *See, e.g.*, CANNABIX TECHNOLOGIES, <http://www.cannabixtechnologies.com/thc-breathalyzer.html> [<https://perma.cc/5QCP-GMRW>] (last visited Feb. 21, 2019) (describing THC-breathalyzer in development); Carrie Kirby, *Stanford Engineers Develop the ‘Potalyzer,’ a Roadside Saliva Test for Marijuana Intoxication*, STANFORD NEWS (Sept. 8, 2016), <https://news.stanford.edu/2016/09/08/potalyzer-roadside-marijuana-tests/> [<https://perma.cc/7MEZ-HJEF>] (reporting on new experimental method of cannabis intoxication testing).

The technology of cannabis testing is not likely to change overnight, so this Note will not focus on this as an avenue of positive change in the legal and employment context.<sup>178</sup>

While the epistemic and technological gaps in cannabis testing are not easily solved by the legal community, the legal standards by which we judge cannabis testing are possible to affect. As an analogy, in states that have cannabis-impairment-DUI laws, i.e., require evidence of impairment for a conviction, not just a per se presence in the body, the government must show that the defendant was *impaired to the extent that it affected her driving*.<sup>179</sup> In such states, a mere showing that a traffic violation occurred when cannabis was in the defendant's system is insufficient to convict for a DUI charge, as the government must show causation.<sup>180</sup> There are many ways to show impairment, and a positive test for cannabis can be just one of many factors.<sup>181</sup> Similarly, the biological and technological barriers to testing for cannabis impairment need not preclude employers from testing for cannabis impairment.

#### V. WHO CAN, AND SHOULD, PROTECT CANNABIS CONSUMERS' JOBS?

What can be done to protect the interests of employers, MED patients, REC consumers, and the legal community? This Part will examine multiple actors and what they can do to effectuate this change, focusing specifically on Massachusetts and the *Barbuto* decision, but with an understanding that the proposed solutions can be equally applied in other states.

Massachusetts faces a difficult problem moving forward in light of the reasoning in *Barbuto*.<sup>182</sup> When faced with a REC-based claim for employment discrimination, the SJC could recognize a private right of action for REC consumers by reasoning that such a claim is available for MED patients as well

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<sup>178</sup> However, if a large demand were created for such technology, it seems likely that a supply would rise to meet it. With ten states now permitting cannabis for recreational use, changing legal standards for cannabis impairment could provide such a demand.

<sup>179</sup> See, e.g., *Webb v. Georgia*, 476 S.E.2d 781, 783 (Ga. Ct. App. 1996) (holding that for DUI charge, "the mere fact that defendant has ingested marijuana is not sufficient to support a conviction" because government must show detrimental impact of impairment on driving).

<sup>180</sup> See *id.*

<sup>181</sup> See *Pennsylvania v. Hutchins*, 42 A.3d 302, 308-09 (Pa. Super. Ct. 2012) (holding that evidence including glassy eyes, calm demeanor, and confession of consuming cannabis earlier was sufficient to show defendant's cannabis impairment, even without presence of psychoactive metabolite in defendant's system); see also *Commonwealth v. Gerhardt*, 81 N.E.3d 751, 787-88 (Mass. 2017) (holding that police officer may testify about physical characteristics of defendant, such as bloodshot eyes or drowsiness, but may not offer opinion in court that defendant was high on cannabis due to failure of field sobriety test).

<sup>182</sup> See *supra* Section II.A (arguing that way in which SJC interpreted its duty of accommodation in *Barbuto* all but prevents finding of cause of action for REC users).

and such a claim was not recognized given only the specifics of *Barbuto*.<sup>183</sup> However, this seems particularly unlikely given that the Massachusetts REC law has nearly identical language to the MED law regarding protections for persons covered by the law.<sup>184</sup> Such a holding, while protecting REC consumers from employment discrimination, would do little to address the concerns of employers who do not want their employees intoxicated at work.<sup>185</sup> Moreover, recognizing such a claim would likely go far beyond what the drafters intended.

Employers could, of course, independently change their cannabis policies in order to attract a larger talent pool and avoid being the test case for REC-based employment discrimination. However, relying on employers to do this themselves has two problems: (1) it does not address concerns of cannabis consumers who are employed, or want to be employed, at companies that do not change their stance on cannabis consumption; and (2) it does nothing to set a universal standard under which cannabis consumers, employers, and courts can all operate. In order to correct this problem, the solution needs to come from legislative reform.

While MED and REC laws are largely passed through state referendums, referendums are slow and unwieldy, and should not be used to address small provisions of larger measures. Therefore, it falls upon state legislatures to create employment protections for cannabis consumers in states that have legalized REC. In order to address the concerns of both cannabis consumers and employers, state legislatures must: (1) create employment protections for REC

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<sup>183</sup> See *Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37, 43-44 (Mass. 2017) (holding private right of action need not be implied given separate remedy—handicap discrimination).

<sup>184</sup> While at the time of the *Barbuto* decision, the Massachusetts legislature had not yet passed their version of the referendum that would be codified into law, nine months had passed since Massachusetts voters had approved Question 4, legalizing cannabis for recreational use in the state, and the text of the referendum (which for the purposes of the following comparison was unchanged) was knowable to the SJC. In *Barbuto*, the SJC interpreted the MED statute to allow a claim of handicap discrimination partly finding support “in the marijuana act itself, which declares that patients shall not be denied ‘any right or privilege’ on the basis of their medical marijuana use.” *Id.* at 45. However, the Question 4 referendum, now codified into law, had the exact same language as the MED statute and cannot be interpreted as recognizing a claim of handicap discrimination for all cannabis consumers. See MASS. GEN. LAWS ch. 94G, § 7(a) (2017); *id.* ch. 94I, §§ 1-4. Because of the similar language in both the REC and MED statutes, *Barbuto* creates some tension between the two, indicating that the SJC is unlikely to find a private right of action in the REC statute.

<sup>185</sup> While the private right of action recognized could include guidance as to how to recognize impairment, such that it addressed the problem of cannabis impairment at work, it would likely take several cases to develop an effective legal remedy. In the meantime, the unfairness inherent in per se cannabis policies would continue. If employers cannot be given some assurances that they will be able to terminate employees who are intoxicated on-site, they are unlikely to change their policies.

consumers; (2) recognize greater employment protections for MED patients than for REC consumers; (3) set a standard by which an employee may be terminated for on-site cannabis impairment, but not off-duty cannabis consumption; and (4) explicitly create a private right of action by which individuals may claim employment discrimination for their cannabis consumption. Satisfying these criteria gives all cannabis consumers protections from and remedies for employment discrimination, rightfully provides MED patients greater protections for their consumption than REC consumers without depriving REC consumers of any protection,<sup>186</sup> and gives objective criteria to employers so as to remove concerns of legal compliance.

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<sup>186</sup> As a side note, in some REC-legal regimes, MED programs are in decline for myriad reasons, meaning that some MED patients may be forced to engage only in the REC market. See COLO. DEP'T OF REVENUE, MARIJUANA ENF'T DIV., 2017 MID-YEAR UPDATE 3, 5 (2017), <https://www.colorado.gov/pacific/sites/default/files/2017%20Mid-Year%20Update%20122017.pdf> [<https://perma.cc/V26L-A59M>] (showing MED-licensed establishments and number of cultivated MED plants dropped for first time since MED legalization during first half of 2017, while REC equivalents continued to increase); Hilary Bricken, *Cashed and Counting: California Starts Crackdown on Gray Marijuana Marketplace*, ABOVE THE LAW (Mar. 19, 2018), <https://abovethelaw.com/2018/03/cashed-and-counting-california-starts-crackdown-on-gray-marijuana-marketplace/?rf=1> [<https://perma.cc/FP2J-7R4P>] (“[The Medicinal and Adult-Use Cannabis Regulation and Safety Act (“MAUCRSA”)] preserves the criminal immunity of [Compassionate Use Act (“CUA”)] collectives and cooperatives for up to one year after the first MAUCRSA licenses begin to issue. The MAUCRSA drop-dead date on those collectives and cooperatives is now January 9, 2019 . . . . This though has not stopped the California Bureau of Cannabis Control from targeting those CUA collectives and cooperatives that openly engage in unlicensed commercial cannabis activity.”); Jayson Chesler, *Washington Merges Recreational and Medical Marijuana to Stop Illegal Sales*, NEWS21 (Aug. 15, 2015), <http://weedrush.news21.com/washington-merges-recreational-and-medical-marijuana-to-stop-illegal-sales/> [<https://perma.cc/R3PF-PACW>] (describing impact of SB 5052, specifically with regard to expansion of REC market to include MED patients and products); Emery Garcia, *RIP to the OMMP: The Death of Medical Cannabis in Oregon*, CANNABISNOW (Nov. 25, 2017), <https://cannabisnow.com/ommp-medical-cannabis-oregon/> [<https://perma.cc/NQ2F-DMCN>] (recounting challenges that one Oregon MED grower has encountered under Oregon enacting more lenient regulations for REC businesses, while still prohibiting MED growers from selling to REC businesses); Owen Poindexter, *Can Medical Cannabis Survive in Oregon?*, CANNABISNOW (Dec. 19, 2017), <https://cannabisnow.com/can-medical-cannabis-survive-oregon/> [<https://perma.cc/NV7Z-4P7S>] (“Additionally, the [Oregon Liquor Control Commission (“OLCC”)] allows recreational stores to sell ‘medical-grade’ product, which is only available to medical card holders, but comes with a much less rigid set of standards than the medical regulations enforced by the [Oregon Health Authority (“OHA”)]. Medical card holders pay no taxes on their purchase—just like at a medical dispensary—giving recreational vendors the ability to cater to patients, as well as a much larger market that tourists can access.”); John Schroyer, *California Initiates Enforcement Against Approximately 500 Unlicensed Marijuana Businesses*, MARIJUANA BUS. DAILY (Feb. 21, 2018), <https://mjbizdaily.com/california-initiates-enforcement-unlicensed-marijuana-businesses/> [<https://perma.cc/B7RC-QVFQ>] (describing California’s crackdown on unlicensed MED dispensaries in wake of REC legalization).

Massachusetts State Senator Jason Lewis has recently introduced such a measure, which reads in relevant part,

SECTION 2. Chapter 94G of the General Laws is hereby amended by inserting after section 21, the following section:-

Section 22.

(a) An employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon a person's use of marijuana provided that:-  
(i) The use of marijuana by the employee is neither in the work place during work hours, nor while the employee is performing tasks related to employment; and (ii) an employee is not impaired due to the consumption of marijuana in the workplace or while performing tasks related to employment.

(b) Subsection (a) shall not apply to employers who are compelled to test for marijuana due to requirements established by the federal government.

(c) Nothing in this Section prohibits an employer from taking adverse employment action: (i) if an employee who is unable to maintain licenses, credentials, or other qualifications that are reasonably necessary for the performance of the employee's position, even if such licensing, credentialing, or other qualifications prohibit the employee from using marijuana; or (ii) the employee is charged with a crime relating to his or her use, possession, sale, manufacture, distribution, dispensation, or transfer of marijuana and, based on the employer's investigation into the matter, the employer reasonably believes the employee committed a crime.

(d) Any person claiming to be aggrieved under subsection (a) may bring a civil action under this section for damages or injunctive relief, or both, and shall be entitled to a trial by jury on any issue of fact in an action for damages regardless of whether equitable relief is sought by a party in such action. If the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to 2 times such amount if the court finds that the act or practice complained of was committed with knowledge, or reason to know, that such act or practice violated the provisions of this section.

(e) The executive office of labor and workforce development in consultation with the executive office of public safety and security shall promulgate regulations to enforce this section.<sup>187</sup>

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<sup>187</sup> SD1517, 191st Gen. Court (Mass. 2019).

Forming protections in this way allows all parties to have their concerns addressed while not upending legal precedent. While there can be many different ways to form such statutory protections, any legislative solution should touch upon all of the same points as this example.

#### CONCLUSION

*Barbuto* was a step in the right direction towards providing protections to cannabis consumers, and when examined closely, it fits into the nationwide precedents, such that its holding could have occurred with similar legal arguments in just about any other state with similar statutory language. Therefore, what we can learn from *Barbuto* is applicable to most other states with legalized cannabis consumption. Looking at what the *Barbuto* decision means for cannabis and employment, the future can seem bleak, because it illustrates that the underlying problem of concentrating on cannabis impairment remains unaddressed. While taking on this problem is difficult, state legislatures should craft legislation to specifically address this problem and treat cannabis consumption in the same manner that voters intended for it to be treated: legal.