Reefer Madness: How Tennessee Can Provide Cannabis Oil Patients Protection from Workplace Discrimination

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I. INTRODUCTION

Employers often require their employees to take drug tests during the course of their employment. What if a particular employee fails a drug test due to his or her medical use of marijuana and the employer fires that employee solely for that reason? In a state that does not permit the use of marijuana for medical purposes, the answer is rather simple—the employer would be firing the employee for engaging in the illegal use of drugs; therefore, the employee would likely find it difficult to argue that he or she had a wrongful termination or discrimination claim. But what if the employee is employed in a state that does permit the use of marijuana for medical purposes? One could assume that because the employee is permitted to use medical marijuana as a therapeutic remedy for his or her disability, then the employee would be entitled to wrongful termination and discrimination claims under state law. However, two recent state supreme courts' decisions do not comply with this assumption.[1]

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For example, the Colorado Supreme Court held in *Coats v. Dish Network, L.L.C.* that employers could terminate employees for testing positive for marijuana, even if those employees had valid medical marijuana prescriptions.[2] The Colorado employment statute at issue protects employees from being discharged for "any lawful activity off the premises of the employer during nonworking hours," but the statute does not clearly define "lawful activities."[3] The ambiguity of Colorado's employment statute became a crucial point in this case because medical marijuana is lawful under Colorado law but unlawful under federal law.[4] The court essentially interpreted lawful activities to include federal law and therefore held that the employer rightfully terminated the employee for engaging in the illegal use of drugs.[5]

The same result occurred in *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*.[6] In *Emerald Steel*, the Oregon Supreme Court essentially reasoned that Oregon's Medical Marijuana Act,[7] which protected employees against discrimination for their valid outside-of-work medical marijuana use,[8] conflicts with the Controlled

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1. *See* Coats v. Dish Network, L.L.C., 350 P.3d 849, 850–51 (Colo. 2015); Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 529 (Or. 2010).

2. *Coats*, 350 P.3d at 851–52.

3. *Id.* at 852; *see* COLO. REV. STAT. § 24-34-402.5(1) (2012).

4. *Coats*, 350 P.3d at 852.

5. *Id.* at 852–53.

6. *Emerald Steel*, 230 P.3d at 529.

7. OR. REV. STAT. § 475B.400 to .525 (West, Westlaw though 2016 Sess.) (prohibiting employers from denying employment opportunities to an otherwise qualified disabled person when denial is based on the failure to make reasonable accommodation to the employee's impairments).

8. Oregon's Medical Marijuana Act indirectly protected employees for their valid outside-of-work use. By legalizing medical marijuana through the Oregon Medical Marijuana Act, Oregon effectuated a discrimination claim under its employment discrimination statute for medical marijuana patients. OR. REV. STAT. § 659A.112 (2011) (prohibiting employers from denying employment opportunities to an otherwise qualified disabled person when denial is based on the failure to make reasonable accommodation to the employee's impairments). See Section III.B.1 for a further discussion.

Substances Act ("CSA")[9] and gave the federal law priority.[10] This made Oregon's employment discrimination statute inapplicable to medical marijuana patients who claim they were terminated based on their outside-of-work use.[11] In light of the above, while courts have analyzed state medical marijuana and employment statutes differently, the end result is the same—qualified medical marijuana patients are not protected in the employment setting.[12]

"[M]arijuana regulation is one of the most important federalism conflicts in a generation. The ongoing clash of federal and state marijuana laws forces us to consider the preemptive power of federal drug laws and the appropriate roles for state and federal governments in setting drug policy."[13] The states that are moving to permit the use of marijuana face a "deliberating instability" created from this conflict of laws; despite this, however, twenty-eight states and the District of Columbia permit the use of medical marijuana and seventeen states permit the medical use of cannabis oil.[14] Medical cannabis oil statutes differ from medical marijuana statutes because they are medical marijuana *component* statutes.[15] Particularly, these statutes limit the amount of tetrahydrocannabinol ("THC"), a component of marijuana, allowed in medical cannabis oil.[16] While there is a difference between

9. 21 U.S.C. §§ 802(16), 812(c), 844(a) (2012) (prohibiting marijuana for all purposes).

10. *Emerald Steel*, 230 P.3d at 529.

11. *Id.*

12. *See* Coats v. Dish Network, L.L.C., 350 P.3d 849, 850–51 (Colo. 2015); *Emerald Steel*, 230 P.3d at 529.

13. Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 77 (2015).

14. *State Medical Marijuana Laws*, NCSL (Sept. 29, 2016), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx. Cannabis oil is a compound of the marijuana plant that has relatively high levels of cannabidiol ("CBD") and low levels of tetrahydrocannabinol ("THC"). *Id.*

15. *Compare* COLO. CONST. art. XVIII, § 14(1)(i) ("'Usable form of marijuana' means the seeds, leaves, buds, and flowers of the plant (genus) cannabis, and any mixture or preparation thereof, which are appropriate for medical use as provided in this section, but excludes the plant's stalks, stems, and roots."), *with* TENN. CODE ANN. § 39-17-402(16)(D) (West, Westlaw through 2015 1st Reg. Sess.) (defining legal cannabis oil as CBD with a THC amount less than 0.9%).

16. *See, e.g.*, TENN. CODE ANN. § 39-17-402 (limiting the THC concentration to 0.9%).

the two,[17] the medical use of marijuana and cannabis oil both remain illegal under federal law.[18]

Tennessee recently has joined the states that permit the medical use of cannabis oil for qualified patients.[19] On May 4, 2015, Tennessee enacted Tennessee Senate Bill 280 ("Senate Bill 280"), which permits the use of cannabis oil for patients who suffer from epilepsy and seizures.[20] With the enactment of Senate Bill 280, Tennessee amended its statutory definition of marijuana by excluding cannabidiol ("CBD") with a THC amount of less than 0.9%.[21] Therefore, under Tennessee law, cannabis oil with a THC concentration of less than 0.9% is now legal for qualified patients.[22]

Valid cannabis oil patients under Tennessee law face the same threats in an employment setting as the employee in *Coats* because, like Colorado's employment statute, Tennessee's wrongful termination statute does not expressly protect cannabis oil patients from wrongful termination or discrimination for their outside-of-work use.[23]

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17. For example, it would only be lawful for a qualified cannabis oil patient in Tennessee to use cannabis oil with a THC amount less than 0.9%. *See* TENN. CODE ANN. § 39-17-402. Cannabis oil patients could not legally use medical marijuana or medical cannabis oil with a THC concentration higher than 0.9%. *See id.*

18. *See* 21 U.S.C. § 802(16) (2012) (including all components of marijuana in the statutory definition).

19. *See* S.B. 280, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015) (permitting the medical use of cannabis oil for patients who suffer from epilepsy and seizures).

20. *Id.*

21. *See id.* ("The term 'marijuana' does not include cannabis oil containing the substance cannabidiol, with less than nine-tenths of one percent (0.9%) of tetrahydrocannabinol."). The effect of limiting the THC amount makes cannabis oil a weaker drug than marijuana.

22. *See* S.B. 280 (permitting medical use of cannabis oil for patients who suffer from epilepsy and seizures by amending section 39-17-402 of the Tennessee Code Annotated). This amendment to section 39-17-402 of the Tennessee Code Annotated is effective until July 1, 2018. *See* TENN. CODE ANN. § 39-17-402 (West, Westlaw through 2015 1st Reg. Sess.). The new version of section 39-17-392 that will be in effect on July 1, 2018, does not change the implications that cannabis oil patients face in the employment setting. *See* TENN. CODE ANN. § 39-17-402(16) (effective July 1, 2018) (deleting the subsection regarding manufacturing, processing, transferring, dispensing, or possessing by a four-year public institution and deleting "any compound, . . . mixture, or preparation which contains any quantity of [the substances marijuana consists of]" from the definition of "marijuana").

23. *Compare* TENN. CODE ANN. § 50-1-304(d) (2012) (prohibiting employers from terminating employees for engaging in outside-of-work activities "not otherwise

Despite Colorado's and Tennessee's statutory neglect in this area of law, not all states have ignored the implications that come with permitting the medical use of marijuana and cannabis oil.[24] Some states have created statutes that expressly protect qualified medical marijuana patients in the employment setting.[25]

To protect qualified medical cannabis oil patients from workplace discrimination and wrongful termination, this Note will propose that Tennessee adopt Arizona's employment statute that prohibits employers from discriminating against medically qualified cannabis oil patients. Specifically, this would prohibit employers from terminating qualified users based on their positive drug tests for marijuana components unless the qualified patients were impaired by marijuana components during the hours of employment.

Part II of this Note will discuss the history of medical marijuana regulations under federal law and the states that permit the use of medical marijuana and medical marijuana components. Part III will discuss the conflict of state and federal laws with regard to medical marijuana use, employment discrimination, and wrongful termination for lawful outside-of-work activities, including how courts interpret these statutes. Part IV will first assess three potential legal paths to securing wrongful termination and discrimination claims for Tennessee cannabis oil patients: (a) courts should interpret section 50-1-304(d) of the Tennessee Code Annotated in a way that gives cannabis oil patients these claims, (b) Congress should amend the CSA, or (c) Tennessee's legislature should adopt a state statute that provides employment protection for cannabis oil patients. Part IV will then explain why option (c) is the most efficient way for Tennessee to protect cannabis oil patients in the employment setting. Next, part IV will discuss the important role that Tennessee courts will play in enforcing this proposed

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proscribed by law" but not specifying if that includes federal law or creating an exception for medical cannabis oil use), *with* COLO. REV. STAT. § 24-34-402.5(1) (2012) (prohibiting employers from terminating employees for participating in lawful outside-of-work activities but not specifying whether the activities had to be lawful under federal law).

24. *See* discussion *infra* Section IV.C.1.

25. *See* ARIZ. REV. STAT. ANN. § 36-2813(B) (2009 & Supp. 2012) (prohibiting employers from discriminating against medical marijuana users in hiring, terminating, or penalizing them because of their outside-of-work medical use); CONN. GEN. STAT. ANN. § 21a-408p(b)(3) (2013); DEL. CODE ANN. tit. 16 § 4905A(a)(3) (West 2003 & Supp. 2012); ME. REV. STAT. ANN. tit. 22, § 2423-E(2) (2012).

law by applying a proper obstacle preemption analysis when faced with a conflict of laws issue. Lastly, part IV will discuss the productivity concerns of employers in regard to this proposed statute and will suggest that employers implement saliva drug testing procedures to determine whether employees abuse their cannabis oil prescriptions during the hours of employment. Part V will discuss the future of medical marijuana in Tennessee and the importance of adopting a law that protects this class of persons. Part VI will conclude the analysis.

II. BACKGROUND OF MEDICAL MARIJUANA AND CANNABIS OIL

Marijuana and its components are illegal under federal law, including when used for medical purposes;[26] however, states have created their own laws to allow qualified patients to use marijuana and cannabis oil for medical purposes.[27]

A. Marijuana and its Components Defined Under Federal Law

The Controlled Substances Act ("CSA") prohibits the use of marijuana.[28] All components of marijuana are included in the CSA's definition of marijuana, including all amounts of cannabis oil.[29] Further, the CSA does not provide an exception for the use of medical marijuana or medical marijuana components. Therefore, all types of

26. *See* 21 U.S.C. §§ 802(16), 812(c), 844(a) (2012) (defining marijuana, classifying marijuana as a Schedule I drug, and prohibiting possession of controlled substances, which includes all Schedule I drugs).

27. *State Medical Marijuana Laws*, *supra* note 14.

28. 21 U.S.C. §§ 802(16), 812(c), 844(a) (defining marijuana, classifying marijuana as a Schedule I drug, and prohibiting possession of controlled substances, which includes all Schedule I drugs).

29. 21 U.S.C. § 802(16) ("The term 'marihuana' means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.").

medical marijuana use are illegal under federal law.[30] The CSA's prohibition on marijuana creates an issue for employees who are wrongfully terminated or discriminated against due to their status as state-authorized medical marijuana and cannabis oil patients, because the CSA prevents these employees from bringing medical marijuana-related discrimination claims under federal law.[31]

Theoretically, if employees could bring discrimination claims based on their status as medical marijuana or cannabis oil patients under federal law, their only vehicle would be to bring a claim under the Americans with Disabilities Act ("ADA").[32] The ADA provides a federal claim for disabled employees who face discrimination in the workplace because of their disability.[33] However, the ADA expressly states that an "individual with a disability" does not include one "currently engaging in the illegal use of drugs."[34] The ADA defines the "illegal use of drugs" as "the use of drugs, the possession or distribution of which is unlawful under the [CSA]."[35] Because the CSA considers all components of medical marijuana to be illegal drugs, employees who face discrimination as medical marijuana or cannabis oil patients cannot bring such discrimination claims under the ADA.[36] Thus, the only

30. 21 U.S.C. §§ 802(16), 812(c), 844(a) (defining marijuana, classifying marijuana as a Schedule I drug, and prohibiting possession of controlled substances, which includes all Schedule I drugs).

31. *See* 42 U.S.C. § 12210(a) (2012) ("For purposes of this chapter, the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."); *see also* 21 U.S.C §§ 802(16), 812(c), 844(a) (prohibiting all components of marijuana for all purposes).

32. 42 U.S.C. § 12112(b)(5)(B) (2012) (providing a federal discrimination claim for an individual with a disability who is denied "employment opportunities and is an otherwise qualified individual").

33. *See* 42 U.S.C. § 12102 (2012) (defining "disability" as a "physical or mental impairment that substantially limits one or more major life activities . . . ; a record of such an impairment" or "being regarded as having such an impairment").

34. 42 U.S.C. § 12210(a).

35. 42 U.S.C. § 12210(d).

36. *See* 21 U.S.C. §§ 802(16), 812(c) (defining marijuana and classifying marijuana as a Schedule I drug).

way employees can seek relief for this type of workplace discrimination is by bringing wrongful termination and discrimination claims under state law.[37]

B. States that Permit Medical Marijuana and Cannabis Oil Use

Twenty-eight states and the District of Columbia have legalized the use of medical marijuana.[38] Additionally, seventeen states permit the medical use of cannabis oil, a compound of the marijuana plant that has relatively high levels of CBD and low levels of THC.[39] Regardless of whether states legalize medical marijuana or lesser versions of medical marijuana such as cannabis oil, all forms of state legalization remain illegal under federal law.[40]

Despite states legalizing medical marijuana and cannabis oil use, the federal regulation of marijuana under the CSA is "squarely within Congress' commerce power because production of the commodity meant for home consumption . . . has a substantial effect on supply and demand in the national market for that commodity."[41] No expressed exception for medical marijuana exists, even if it is in accordance with state law.[42] Some state courts have interpreted this to mean that Congress did not "intend to enact a limited prohibition on the use of marijuana—i.e., to prohibit the use of marijuana unless states chose to authorize its use for medical purposes," but instead, Congress intended to impose a "blanket federal prohibition on the use of marijuana without regard to state permission to use marijuana for medical

37. *See* 42 U.S.C. § 12210(a) (precluding individuals who engage in the illegal use of drugs from the ADA).

38. *State Medical Marijuana Laws*, *supra* note 14.

39. *Id.*

40. 21 U.S.C. §§ 802(16), 812(c), 844(a) (defining marijuana, classifying marijuana as a Schedule I drug, and prohibiting possession of controlled substances, which includes all Schedule I drugs).

41. Gonzales v. Raich, 545 U.S. 1, 19 (2005).

42. *See id.* at 27 ("[B]y characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses."); Coats v. Dish Network, L.L.C., 350 P.3d 849, 852 (Colo. 2015) (citing 21 U.S.C. § 844(a) (1970)).

purposes."[43] Thus, the states permitting medical marijuana use, knowing that the federal government prohibits such use, should anticipate several conflict of law issues, including in the employment context.

III. CONFLICT OF LAWS

While some states have legalized medical marijuana and cannabis oil use, the CSA prohibits all amounts of marijuana for all purposes, including medical;[44] therefore, a conflict of laws issue arises between state regulation and federal prohibition.[45] To date, courts have taken two approaches when determining whether state laws provide medical marijuana patients with wrongful termination and discrimination claims: (1) by applying a statutory construction analysis to interpret whether these state employment statutes protect medical marijuana patients for their outside-of-work use[46] and (2) by applying an obstacle preemption analysis to determine whether the CSA preempts state medical marijuana laws.[47] These analyses differ because courts using a statutory construction analysis determine whether the language of the state law provides the employee a claim, while courts using a preemption analysis have found that the state law provides the employee a claim but that the state law may conflict with federal law.[48] Regardless of the analysis used, courts tend to reach the

43. Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 529 (Or. 2010) (citing United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 494 & n.7 (2001); Barnett Bank, N.A. v. Nelson, 517 U.S. 25, 31–35 (1996)).

44. *See Raich*, 545 U.S. at 27 (noting that Congress expressly found that the drug has no acceptable medical uses by scheduling marijuana as a Schedule I drug).

45. *See infra* Sections III.A, III.B.1.

46. *See Coats*, 350 P.3d at 852–53 (applying the canons of statutory construction to determine whether the term "lawful activities" included activities lawful under federal law).

47. *See Emerald Steel*, 230 P.3d at 529 (applying an obstacle preemption analysis to determine whether the CSA preempted the Oregon Medical Marijuana Act that protected medical marijuana patients for their outside-of-work medical marijuana use).

48. *Compare Coats*, 350 P.3d at 852–53 (applying a statutory construction analysis to determine whether Colorado's statute provided the employee a claim), *with Emerald Steel*, 230 P.3d at 529 (applying an obstacle preemption analysis to determine whether the CSA preempted the Oregon Medical Marijuana Act).

same result—medical marijuana patients do not have wrongful termination or discrimination claims for their outside-of-work use because all types of marijuana use are illegal under federal law.[49]

A. Applying a Pure Statutory Construction Analysis to Determine Whether Medical Marijuana and Cannabis Oil Patients Have Wrongful Termination and Discrimination Claims Under State Law

Wrongful termination statutes forbid employers from terminating employees for participating in lawful activities during nonworking hours and/or while off the premises of employment.[50] The issue with these statutes is that lawful activity under state law may not be lawful under federal law.[51] This issue particularly affects medical marijuana and cannabis oil patients because medical marijuana and cannabis oil use may be legal under state law but remain illegal under federal law.[52] One court presented with this issue applied a statutory construction analysis to determine what lawful outside-of-work activities the state legislature intended for this statute to include.[53]

In *Coats v. Dish Network, L.L.C.*, an employee claimed that his employer violated section 24-34-402.5 of the Colorado Revised Statutes by discharging him due to his medical marijuana use at home and during nonworking hours.[54] This section of Colorado's employment

49. *See Coats*, 350 P.3d at 852–53 (finding that the language of Colorado's statute precluded the employee from having a claim); *Emerald Steel*, 230 P.3d at 529 (finding that CSA's preemption over the Oregon's law precluded the employee from having a claim).

50. *See, e.g.*, COLO. REV. STAT. § 24-34-402.5(1) (2012) (prohibiting an employer from terminating an employee "due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours"); TENN. CODE ANN. § 50-1-304(d) (2012) (prohibiting employers from terminating employees for activities conducted outside-of-work that is "not otherwise proscribed by law").

51. *Compare* COLO. CONST. art. XVIII, § 14 (permitting the use of medical marijuana), *with* 21 U.S.C. §§ 802(16), 812(c), 844(a) (2012) (prohibiting the use of medical marijuana).

52. *See Coats*, 350 P.3d at 852–53 (construing "lawful" to mean lawful under state and federal law); *see also* 21 U.S.C. §§ 802(16), 812(c), 844(a) (prohibiting medical marijuana use).

53. *See Coats*, 350 P.3d at 852–53 (applying a statutory interpretation analysis to determine whether Colorado's employment statute included the use of medical marijuana).

54. *Id.* at 852.

statute deems it "discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours . . . ."[55]

The issue here revolved around the undefined term "lawful."[56] The employee argued that Colorado's Medical Amendment constructs "lawful" in section 24-34-402.5 as lawful "notwithstanding any federal laws prohibiting medical marijuana use."[57] The Colorado Supreme Court, however, did not agree.[58] The court first took "the language of the statute itself 'with a view toward giving the statutory language its commonly accepted and understood meaning'"[59] and found that the "commonly accepted meaning of the term 'lawful' is 'that which is permitted by law' or conversely, that which is 'not contrary to, or forbidden by law.'"[60] Next, the court determined whether medical marijuana use, which is legal under Colorado's law but prohibited under federal law, is "lawful" for purposes of section 24-34-402.5 of the Colorado Revised Statutes.[61] The court found that when using "lawful" in its "general, unrestricted sense," a "'lawful' activity" is an activity that "complies with applicable 'law,' including state and federal law."[62] Additionally, the court found no indication that the General Assembly intended to extend section 24-34-402.5 of the Colorado Revised Statutes to protect activities that are illegal under federal law.[63] The court thus concluded that the employee did not have a claim under section 24-34-402.5 of the Colorado Revised Statutes because Colorado's law permitting the use of medical marijuana conflicted with federal law,

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55. COLO. REV. STAT. § 24-34-402.5(1).

56. *Coats*, 350 P.3d at 852.

57. *Id.* at 850.

58. *Id.*

59. *Id.* at 852 (quoting People v. Schuett, 833 P.2d 44, 47 (Colo. 1992)).

60. *Id.* (quotations omitted). The court had previously construed "lawful" and found that the "generally understood meaning" of "lawful" is "in accordance with the law or legitimate." *Id.* (citing *Schuett*, 833 P.2d at 47 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1279 (1986))). "[C]ourts in other states have construed 'lawful' to mean 'authorized by law and not contrary to, nor forbidden by law.'" *Id.* (citing, inter alia, Hougum v. Valley Mem'l Homes, 574 N.W.2d 812, 821 (N.D. 1998)).

61. *Id.*

62. *Id.*

63. *Id.* at 853.

and in order to have a claim under Colorado's employment statute, the employee's marijuana use had to be lawful under both.[64]

Because the *Coats* court decided that the language of Colorado's employment statute complied with federal law, it was not presented with the issue of whether the employment statute conflicted with federal law. Had the court found that Colorado's employment statute exempted medical marijuana use from the term "unlawful," a conflict of laws issue might have arisen. In such a case, it would be proper for the court to apply a preemption analysis to determine whether the employee had a valid claim.[65]

B. Applying an Obstacle Preemption Analysis to Determine Whether the CSA Preempts State Medical Marijuana Laws

Federal law may preempt state law in several different ways.[66] First, there are two high-level types of preemption: (1) "express preemption," where Congress preempts state law by express terms;[67] and (2) "implied preemption," where "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation."[68] Under the umbrella of implied preemption, two broad subtypes of preemption exist: (a) "field preemption," where Congress intends to occupy the entire field of law;[69] and (b) "conflict preemption," where Congress only intends to preempt state laws that actually conflict with a federal statute.[70] Under conflict preemption, a state law may be preempted in the following two ways: (i) "when 'compliance with both federal and

64. *Id.* at 852–53.

65. Where federal law conflicts with state law, the federal law preempts the state law because the Supremacy Clause of the U.S. Constitution directs that federal law is the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2. For an example, see discussion *infra* Section B.1.

66. Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).

67. *Id.* (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

68. *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

69. *Id.*

70. *Id.*

state regulations is a physical impossibility,'"[71] or (ii) "when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[72] Courts refer to the latter as "obstacle preemption."[73]

State courts have applied obstacle preemption analyses to determine whether the CSA preempts state medical marijuana statutes in various fields of law.[74] The CSA only preempts state laws that positively conflict with the CSA "so that the two laws could not consistently stand together."[75] To determine whether state law stands as an obstacle to federal law, courts must first determine: (1) the purpose of the federal law; and (2) whether Congress has "legislated in a field which the states have traditionally occupied."[76] As recent cases have

71. *Id.* (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)). Courts refer to this type of preemption as "impossibility preemption." *See, e.g.*, Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 528 (Or. 2010) (stating implied preemption expands into impossibility preemption).

72. *Automated Med. Labs*, 471 U.S. at 713 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). *See, e.g.*, *Emerald Steel*, 230 P.3d at 528 (stating implied preemption expands into obstacle preemption).

73. *See, e.g.*, *Emerald Steel*, 230 P.3d at 528.

74. Courts have found that 21 U.S.C. § 903 shows Congress's intent to reject express and field preemption of state laws concerning controlled substances; therefore, express and field preemption analyses are not proper to determine if the CSA preempts a state medical marijuana law. Cty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 479 (Cal. Ct. App. 2008). Further, courts have agreed that state medical marijuana laws do not make it impossible for Congress to enforce the CSA; therefore, a physical impossibility preemption analysis would also not be proper here. *Id.* Rather, courts have focused on obstacle preemption analyses in this area of law. *See, e.g.*, White Mountain Health Ctr. Inc. v. Cty. of Maricopa, No. CV 2012-053585, 2012 WL 6656902, at *8 (Ariz. Super. Ct. Dec. 3, 2012) (applying an obstacle preemption analysis to determine if the CSA preempts Arizona's Medical Marijuana Act); *San Diego NORML*, 81 Cal. Rptr. 3d at 479 (applying an obstacle preemption analysis to a California medical marijuana law); People v. Crouse, No. 14SC109, 2017 WL 365800, at *1 (Colo. Jan. 23, 2017) (analyzing obstacle preemption in regard to a Colorado medical marijuana law); *Emerald Steel*, 230 P.3d at 529 (Or. 2010) (applying an obstacle preemption analysis to determine whether the CSA preempted a part of the Oregon Medical Marijuana Act).

75. *San Diego NORML*, 81 Cal. Rptr. 3d at 478 (citing 21 U.S.C. § 903).

76. *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009) (directing courts to look to the purpose of the federal law to determine whether state law stands as an obstacle to the full purposes and objectives of Congress).

shown, how courts interpret the second prong is outcome-determinative because it can guide the courts through two different analyses where they will ultimately decide whether a state law conflicts with federal law.[77]

1. *Emerald Steel*'s Obstacle Preemption Analysis—the CSA Preempts Oregon's Medical Marijuana Act

To date, Oregon is the only state to apply an obstacle preemption analysis to determine whether the CSA preempts its medical marijuana act with regard to employment protection.[78] The Oregon Supreme Court applied this analysis in *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries* to determine whether a medical marijuana patient had a discrimination claim under Oregon's state law.[79] Unfortunately for the employee, the court applied the analysis incorrectly.[80]

In *Emerald Steel*, a temporary employee used medical marijuana daily but not during the hours of employment or on his employer's premises.[81] Knowing that he was being considered for permanent employment, and aware that he would be required to pass a drug test in order to be so hired, the employee showed his supervisor his registry identification card issued under the Oregon Medical Marijuana Act and informed his supervisor that he used marijuana for medicinal purposes.[82] This resulted in the employee's termination, after which he filed a complaint with the Bureau of Labor and Industries for discrimination based on his medical condition.[83]

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77. *Compare Emerald Steel*, 230 P.3d at 529 (finding preemption), *with Emerald Steel*, 230 P.3d at 536–44 (Walters, J., dissenting) (arguing for no preemption), *and White Mountain Health*, 2012 WL 6656902, at *8–9 (finding no preemption).

78. *See Emerald Steel*, 230 P.3d at 529 (being the only court to address whether a medical marijuana patient had a discrimination claim under state law by employing an obstacle preemption analysis).

79. *Id.* at 527–34.

80. *See id.* at 537–42 (Walters, J., dissenting) (arguing that both the federal and state statutes are capable of being enforced, and therefore the state statute poses no "obstacle" to the CSA).

81. *Id.* at 520 (majority opinion).

82. *Id.* at 521.

83. *Id.*

The employee brought his claim under section 659A.112 of the Oregon Revised Statutes.[84] The lower courts found that the employer violated the following two subsections of that statute: (1) an employer is prohibited from discriminating against a qualified employee because the employee's disability requires the employer to make reasonable accommodations for the employee's disability;[85] and (2) an employer is prohibited from denying a qualified disabled person employment opportunities because the employer does not want to make reasonable accommodations to the employee's impairments.[86]

First, the Oregon Supreme Court noted that the protections afforded by section 659A.112 of Oregon's employment statute do not apply to an employee who is "currently engaged in the illegal use of drugs."[87] This would excuse the employer from any obligation under Oregon's employment statute to allow for the employee's use of medical marijuana.[88] However, the court found that according to the Oregon Medical Marijuana Act, the phrase "illegal use of drugs" in Oregon's employment statute "does not include uses that are legal under state law even though those same uses are illegal as a matter of federal law."[89] Thus, the court found that the Oregon Medical Marijuana Act affirmatively authorized the use of medical marijuana, which would give the employee a discrimination claim under section 659A.112 of Oregon's employment statute.[90]

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84. *Id.*

85. *Id.* (quoting OR. REV. STAT. § 659A.112(2)(e) (2011)).

86. *Id.* (quoting OR. REV. STAT. § 659A.112(2)(f)).

87. *Id.* at 524.

88. *Id.*

89. *Id.* at 525. The court refers to section 659A.122 of the Oregon Revised Statutes to define "illegal use of drugs" as "any use of drugs, the possession or distribution of which is unlawful under state law or under the [CSA] as amended, but does not include the use of a drug taken under supervision of a licensed health care professional, or other uses authorized under the [CSA] or under other provisions of state or federal law." *Id.* The court particularly looked at the question whether the employee's medical marijuana use is "authorized under . . . other provisions of state . . . law" and found that the Oregon Medical Marijuana Act affirmatively authorizes the use of medical marijuana. *Id.* (concluding that as a statutory matter, the use of medical marijuana fits within one of the exclusions from the "illegal use of drugs" phrase in section 659A.122).

90. *Id.*

However, the employer argued that the Supremacy Clause required the court to interpret Oregon's law consistently with the CSA.[91] In other words, the employer argued that, although the Oregon Medical Marijuana Act affirmatively authorizes the use of medical marijuana, the CSA preempts the Oregon Medical Marijuana Act in terms of legalizing the use of medical marijuana, leaving the medical marijuana exemption to Oregon's employment statute without effect and the employee without a claim.[92] The court then applied an obstacle preemption analysis[93] and found that the CSA preempted the section of the Oregon Medical Marijuana Act[94] that affirmatively authorized the use of medical marijuana because it stood "as an obstacle to the implementation and execution of the full purposes and objectives of the [CSA]" by "[a]ffirmatively authorizing a use that [the CSA] prohibits."[95] Under this analysis, the section of the Oregon Medical Marijuana Act at issue was left "without effect."[96]

Because the section of the Oregon Medical Marijuana Act that authorized the use of medical marijuana was not enforceable when the employer terminated the employee, no enforceable state law authorized the employee's medical marijuana use or excluded the employee's use from the "illegal use of drugs" phrase provided by Oregon's employment statute.[97] Therefore, the court held that the employee did not have a claim under section 659A.112 of the Oregon Revised Statutes

91. *Id.* at 526.

92. *Id.*

93. *Id.* at 527–34; *see also supra* notes 75–79 and accompanying text.

94. OR. REV. STAT. § 475.306(1) (2011).

95. *Emerald Steel*, 230 P.3d at 529, 536 (emphasis added) (limiting its holding to the *use* of medical marijuana under the Oregon Medical Marijuana Act).

96. *Id.*

97. *Id.*

both because the employee engaged in the illegal use of drugs and because his employer discharged him for that reason.[98] This analysis and holding, however, is an outlier[99] and did not come without criticism.[100]

2. Criticism of *Emerald Steel*—The CSA Does Not Preempt State Medical Marijuana Laws Under a Proper Obstacle Preemption Analysis

Had the *Emerald Steel* court applied a proper obstacle preemption analysis, it would have found that the CSA does not preempt the Oregon Medical Marijuana Act.[101] The purpose of an obstacle preemption analysis is to determine whether state law stands as an obstacle to federal law.[102] Courts properly analyzing such an issue must determine: (1) the purpose of the federal law; and (2) whether Con-

98. *Id.* (finding that section 475.306(1) of the Oregon Revised Statutes, which permitted the use of medical marijuana, affirmatively authorized conduct prohibited by the CSA); *see also id.* at 533, 536 (finding that the protections of section 659A.112 did not apply to the employee).

99. *See* White Mountain Health Ctr. Inc. v. Cty. of Maricopa, No. CV 2012-053585, 2012 WL 6656902, at *8–9 (Ariz. Super. Ct. Dec. 3, 2012) (noting that the *Emerald Steel* court majority "stands virtually alone when it suggested that almost any State statute that affirmatively authorizes federally conflicting conduct is preempted"). In fact, according to the *White Mountain Health* court, "[m]ost courts . . . more closely examine the purposes of the federal statute and would permit conflicting [s]tate law that does not directly undermine federal law." *Id.*

100. *Emerald Steel*, 230 P.3d at 537–59 (Walters, J., dissenting) (arguing that the majority misapplied the obstacle preemption analysis and should have found that the CSA does not preempt Oregon's Medical Marijuana Act).

101. *Id.*

102. *Id.* The purpose is not to preclude a state legislature from making its own decisions. *See White Mountain Health*, 2012 WL 6656902, at *8–9 (citing *Emerald Steel*, 230 P.3d at 544–45 (Walters, J., dissenting)) (stating that the *Emerald Steel* dissenters concluded that the majority incorrectly yielded Oregon's right to make its own laws that furthered the same goals as the CSA and that the majority could not enjoin the polices of their state and preclude Oregon's legislature from making its own decisions about what to criminalize). The dissenters in *Emerald Steel* noted that Oregon's statute does not undermine the execution of the CSA. "The only difference between the Oregon statute and the CSA . . . was 'Oregon's differing policy choice and lack of respect it signifies.'" *Id.*

gress has "legislated in a field which the states have traditionally occupied."[103] If courts find the answer to the second prong to be affirmative, then they must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[104] Then, courts must identify the purposes and objectives of the state law in order to find whether the state and federal laws conflict.[105]

The first step in a proper obstacle preemption analysis is to find the purpose of the federal law.[106] The underlying purposes of the CSA are to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances"[107] and to "combat *recreational* drug use . . . ."[108] The *Emerald Steel* court's analysis was sound with respect to this prong because it correctly identified Congress's purpose of the CSA.[109]

The next step in a proper obstacle preemption analysis is to determine whether Congress has "legislated in a field which the states have traditionally occupied."[110] States have always had "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."[111] Medical marijuana

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103. *Id.* at 536–37 (citing Wyeth v. Levine, 555 U.S. 555, 565 (2009)) (explaining that obstacle preemption looks to the purpose of the federal law to determine whether the state statute stands as an obstacle to the full purposes and objectives of Congress).

104. *Id.*

105. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144–46 (1963).

106. *Wyeth*, 555 U.S. at 565.

107. Gonzales v. Raich, 545 U.S. 1, 12–13 & n.20 (2005); *see* 21 U.S.C. § 801(6) (2012) (stating that "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic").

108. Cty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 481–82 (Cal. Ct. App. 2008) (emphasis added) (citing Gonzales v. Oregon, 546 U.S. 243, 270–72 (2006)) ("The purpose of the CSA is to combat recreational drug use, not to regulate a state's medical practices.").

109. *Emerald Steel*, 230 P.3d at 537 (Walters, J., dissenting).

110. *Id.* at 536 (citing *Wyeth*, 555 U.S. at 565).

111. Gonzales v. Oregon, 546 U.S. 243, 270 (2006) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996)). Further, ninety-nine percent of marijuana-based arrests are made under state law rather than federal law, which illustrates that "the CSA controls an area historically governed by state police powers . . . ." Elizabeth Rodd, *Light, Smoke, and Fire: How State Law Can Provide Medical Marijuana Users*

addresses the protection of health and comfort through therapeutic remedy and medicine, and is therefore, historically controlled by the states.[112] Thus, with respect to the CSA, courts should find that Congress has legislated in a field in which states traditionally occupied because "the CSA controls an area historically governed by state police powers."[113]

After finding that a particular act of Congress encroaches into an area traditionally controlled by the states, courts are then required to start the obstacle preemption analysis "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[114]

Congress did not intend for the CSA to supersede the historic police powers of the states.[115] This is evident because Congress did not include an express preemption clause in the CSA, showing it intended to preserve state power over controlled substance regulation.[116] Moreover, Congress expressly wrote a savings clause, which gives "states the authority to pass their own drug laws so long as there is no positive conflict between [the CSA] and the state law so that the two cannot consistently stand together."[117] This savings clause shows that Congress recognized that it was "encroaching on an area traditionally

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Protection from Workplace Discrimination, 55 B.C. L. REV. 1759, 1788–89 (2014) (citing MICH. COMP. LAWS ANN. § 333.26422 (West 2001 & Supp. 2014)).

112. Rodd, *supra* note 111, at 1788–89; *see San Diego NORML*, 81 Cal. Rptr. 3d at 478–79 (stating that the California Medical Marijuana Program addresses medicine, which is historically controlled by states; therefore, the preemption analysis must begin with an assumption against preemption).

113. Rodd, *supra* note 111, at 1788–89.

114. *Emerald Steel*, 230 P.3d at 536–37 (Walters, J., dissenting) (citing *Wyeth*, 555 U.S. at 565). Courts should start a preemption analysis with the "assumption that Congress did not intend to displace state law." Maryland v. Louisiana, 451 U.S. 725, 746 (1981). This assumption is stronger if the federal law involves a "field which states have traditionally occupied" because federal law does not generally supersede the states' "historic police powers" unless Congress has expressed a "clear and manifest purpose" to do so. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

115. *Emerald Steel*, 230 P.3d at 536–37 (Walters, J., dissenting).

116. *Id.* at 537.

117. Rodd, *supra* note 111, at 1769 (internal quotation marks omitted (internal quotation marks omitted) (quoting 21 U.S.C. § 903 (2012)). The savings clause allows states to pass their own drug laws unless the state law conflicts with the CSA. *Id.* at 537 (Walters, J., dissenting).

governed by states, and this clause significantly narrows the scope of Congress's intended invalidation of state law."[118] Thus, rather than starting its analysis with the assumption that Congress did not intend for the CSA to supersede the Oregon Medical Marijuana Act,[119] *Emerald Steel*'s majority incorrectly inferred that Congress intended to impose a blanket prohibition on the use of marijuana regardless of state laws allowing the use of medical marijuana.[120] *Emerald Steel* provides the perfect example of the crucial importance of correctly analyzing this prong in obstacle preemption analyses.

Finally, the last step in a proper obstacle preemption analysis is to identify the purposes and objectives of the state law.[121] The states' objectives and purposes of their medical marijuana statutes are medicinal; therefore, courts should realize that state "statutes that affirmatively authorize the use of medical marijuana do not undercut the federal government's ability to combat recreational drug abuse at the federal level."[122] Thus, the *Emerald Steel* court should have found that the Oregon Medical Marijuana Act does not override federal law or prevent the federal government from enforcing the CSA because the two laws do not overlap.[123] "Because the CSA can be implemented and enforced in the federal sphere" while "Oregon authorizes the use of medical marijuana in the state sphere," there should be no federal preemption.[124]

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118. Rodd, *supra* note 111, at 1789 (citing Cty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 479 (Cal. Ct. App. 2008)).

119. *Emerald Steel*, 230 P.3d at 537 (Walters, J., dissenting) (citing *Wyeth*, 555 U.S. at 565).

120. *See id.* at 529 (majority opinion).

121. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144–46 (1963).

122. Rodd, *supra* note 111, at 1789; *see* Memorandum from James M. Cole, Deputy Att'y Gen., to United States Att'ys, Guidance Regarding Marijuana Enforcement, (Aug. 29, 2013), http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf (stating that state medical marijuana statutes do not preclude the federal government from prosecuting recreational marijuana use at the federal level).

123. Rodd, *supra* note 111, at 1789–90 (citing *Emerald Steel*, 230 P.3d at 544 (Walters, J., dissenting)). The purpose of the CSA is to control trafficking of controlled substances and combat recreational drug use, not medical use. Gonzales v. Raich, 545 U.S. 1, 12–13 & n.20 (2005); Cty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 481–82 (Cal. Ct. App. 2008).

124. Rodd, *supra* note 111, at 1783.

Based on the purpose of the CSA, the purpose of state medical marijuana laws, and the presumption that Congress did not intend for the CSA to supersede the historic police powers exercised by the states, courts should find that CSA does not preempt state medical marijuana statutes.[125] *Emerald Steel*'s holding and dissent show that the way in which courts apply obstacle preemption analysis to these conflicting laws is outcome-determinative.[126]

IV. SOLUTIONS

Three options could potentially provide Tennessee cannabis oil patients wrongful termination and discrimination claims for their outside-of-work medical use: (a) Tennessee courts interpreting section 50-1-304(d) of the Tennessee Code Annotated in a way that gives cannabis oil patients a claim; (b) the federal government amending the CSA to create nation-wide uniformity; or (c) Tennessee's legislature creating a statute that prohibits employers from terminating employees solely for their outside use of cannabis oil or due to their status as a cannabis oil patient. While these options may potentially result in protecting cannabis oil patients in the workplace, Tennessee's legislature adopting a statute to provide cannabis oil patients with wrongful termination and discrimination claims for their outside-of-work use is the most effective way for Tennessee to protect this class of persons because it provides certainty to cannabis oil patients attempting to bring these claims that they will have remedies available.

A. Courts Construing Tennessee's Wrongful Termination Statute to Exclude Cannabis Oil Use—A Not-So-Promising Solution

Tennessee cannabis oil patients could ask the courts to construe Tennessee's *wrongful* termination statute in a way that excludes the

125. *Emerald Steel*, 230 P.3d at 537 (Walters, J., dissenting) (citing Wyeth v. Levine, 555 U.S. 555, 565 (2009)).

126. *See, e.g.*, San Diego NORML, 81 Cal. Rptr. 3d at 479 (finding that it is not impossible for both the CSA and California's medical marijuana law to simultaneously be enforced and therefore finding no preemption); Beek v. City of Wyoming, 846 N.W.2d 531, 539 (Mich. 2014) (noting that Michigan's medical marijuana statute acknowledges the CSA and finding that it is not an obstacle to the CSA).

illegal use of medical cannabis oil under federal law;[127] however, this solution is not promising for cannabis oil patients because Tennessee courts are likely to follow *Coats* and apply a pure statutory construction analysis to determine that the patients do not have a wrongful termination claim for their outside-of-work use. Tennessee's wrongful termination statute is similar to Colorado's employment statute—both prohibit employers from terminating employees for their lawful outside-of-work activities and both are ambiguous as to whether such activities include the use of medical marijuana or cannabis oil.[128]

Under section 50-1-304(d) of the Tennessee Code Annotated, an employee cannot be terminated for "participating or engaging in the use of an agricultural product not regulated by the alcoholic beverage commission that is *not otherwise proscribed by law*" as long as the employee complies with the employer's policies regarding the employee's use of the agricultural product while working.[129] An employer is also prohibited from terminating an employee for "participating or engaging in the use of [a nonagricultural] product not regulated by the alcoholic beverage commission that is *not otherwise proscribed by law*" as long as the employee's use of such product is not during times when the employee is working.[130] Regardless of which subsection of 50-1-304(d) cannabis oil patients use to try to establish a wrong-

127. *See* Rodd, *supra* note 111, at 1791 ("[C]ourts should not consider the federal definition of 'illegal use of drugs' when deciding state disability discrimination claims.").

128. *Compare* TENN. CODE ANN. § 50-1-304(d) (2012) (prohibiting employers from terminating employees for participating in outside-of-work activities "not otherwise proscribed by law"), *with* COLO. REV. STAT. § 24-34-402.5(1) (2012) (prohibiting employers from terminating employees "due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours").

129. TENN. CODE ANN. § 50-1-304(d)(1) (emphasis added). This section of the Tennessee Code Annotated was established to protect employees who smoked tobacco off the premises of their workplaces during off hours. Employers could not fire employees for their outside-of-work tobacco use. *See id.* Cannabis oil is a component of marijuana, which would also comply with the definition of "agricultural product." *See 5 Differences Between Hemp and Marijuana*, LEAF SCIENCE (Sept. 16, 2014), http://www.leafscience.com/2014/09/16/5-differences-hemp-marijuana/ ("Cannabis is believed to be one of the oldest domesticated crops. Throughout history, humans have grown different varieties of cannabis for industrial and medical uses.").

130. TENN. CODE ANN. § 50-1-304(d)(2) (emphasis added).

ful termination claim, they face an obstacle with the phrase "not otherwise proscribed by law."[131] Because "by law" is not defined in section 50-1-304(d), this phrase is ambiguous as to whether the statute means "not otherwise proscribed by [state] law" or "not otherwise proscribed by [state and federal] law."[132]

Because "not otherwise proscribed by law" is ambiguous, Tennessee courts would look to the canons of statutory construction to interpret section 50-1-304(d) of the Tennessee Code Annotated.[133] In doing so, Tennessee courts would likely apply the following five canons of statutory construction: (1) find the plain meaning;[134] (2) read the statutory provision by reference to the whole act;[135] (3) apply a definition provided in one subsection to the entire statute;[136] (4) interpret same or similar terms in a statute in the same way;[137] and (5) avoid interpreting a provision in a way that is inconsistent with a necessary assumption of another provision.[138] If Tennessee courts follow the canons of statutory construction, they would find that "not otherwise proscribed by law" includes state and federal law.

First, in determining the meaning of "not otherwise proscribed by law," Tennessee courts would look to find the plain meaning of the phrase.[139] And by breaking down and defining each term of "not oth-

131. *See id.*

132. *See id.* (excluding specification as to whether "not otherwise proscribed by law" includes federal law).

133. *See* State v. Dycus, 456 S.W.3d 918, 924 (Tenn. 2015) (citing State v. Marshall, 319 S.W.3d 558, 561 (Tenn. 2010)); State v. Wilson, 132 S.W.3d 340, 341 (Tenn. 2004)) (noting that the Tennessee courts have a duty to apply the canons of statutory construction to interpret ambiguous statutes).

134. Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 526 (Tenn. 2010).

135. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987).

136. Burgess v. United States, 553 U.S. 124, 129–30 (2008).

137. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988).

138. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 99–100 (1992).

139. *See Beecher*, 312 S.W.3d at 526 ("Because the legislative purpose is reflected in a statute's language, the courts must always begin with the words that the General Assembly has chosen.") (citations omitted).

erwise proscribed by law," they would likely interpret the phrase similarly to the *Coats* court's interpretation of "lawful."[140] First, "otherwise" is defined as "something to the contrary."[141] Next, "proscribed" is defined as "to not allow."[142] Third, "law" is defined as "the whole system or set of rules made by government of a town, state, [and] country."[143] Thus, when read as a whole, the plain meaning of "not otherwise proscribed by law" is the following: something that is not contrary to that which is allowed by the whole system or set of rules made by government of a town, state, and country.[144] Based on this plain reading, "not otherwise proscribed by law" would include federal law.[145]

Next, if Tennessee courts do not find that the plain meaning of "not otherwise proscribed by law" resolves the issue of ambiguity, then they should look at the statute as a whole, and any definition they find in a particular subsection shall control the meaning of the statute.[146] Looking at section 50-1-304 of the Tennessee Code Annotated as a whole, subsection (a)(3) defines "illegal activities" as "activities that are in violation of the criminal or civil code *of this state or the United States* or any regulation intended to protect the public health, safety[,] or welfare."[147] Although the term "illegal activities" is not a specific definition for the phrase "not otherwise proscribed by law," the canons

140. *See* Coats v. Dish Network, L.L.C., 350 P.3d 849, 852–53 (Colo. 2015) (applying the canons of statutory construction, looking to the plain meaning of "lawful," and finding that the "commonly accepted meaning of the term 'lawful' is 'that 'which is permitted by law' or, conversely, that which is 'not contrary to, or forbidden by law'").

141. *Otherwise,* MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/otherwise (last visited Feb. 7, 2017).

142. *Proscribe,* MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/proscribed (last visited Feb. 7, 2017).

143. *Law,* MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/law (last visited Feb. 7, 2017).

144. *See supra* notes 141–43 and accompanying text.

145. *See supra* notes 141–43 and accompanying text.

146. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987) (citations omitted) ("[I]n expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."). With that said, when courts interpret a statute that includes a specific definition, that definition controls the meaning of the statute. Burgess v. United States, 553 U.S. 124, 129 (2008).

147. TENN. CODE ANN. § 50-1-304(a)(3) (2012) (emphasis added).

of statutory construction require courts to look to same or similar terminology in a statute and apply that definition to the ambiguous similar term to make the meaning of that term more clear.[148] With that said, "not otherwise proscribed by law" is a similar term to "illegal activities";[149] therefore, Tennessee courts should apply the "illegal activities" definition in section 50-1-304(a)(3) of the Tennessee Code Annotated to the phrase "not otherwise proscribed by law" in section 50-1-304(d), construing it to mean "not otherwise proscribed by [state and federal] law."[150]

Finally, if the courts follow the canons of statutory construction, they must avoid interpreting a provision in a way that is inconsistent with a necessary assumption of another provision.[151] Thus, there is a strong argument that Tennessee courts could not interpret "not otherwise proscribed by law" in subsection (d) of 50-1-304 to exclude federal law when the definition of "illegal activities" in subsection (a)(3) includes activities illegal under federal law because such exclusion would be inconsistent with the necessary assumption of the term "illegal activities."[152]

Because it is the language of Tennessee's wrongful termination statute at issue, Tennessee courts are likely to follow *Coats* and apply

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148. *See* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (citations omitted) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear.").

149. *Compare supra* notes 141–43 (defining not otherwise proscribed by law as not otherwise not allowed by the whole system or set of rules made by the government of a town, state, and country), *with* TENN. CODE ANN. § 50-1-304(a)(3) (**"**'Illegal activities' means activities that are in violation of the criminal or civil code of *this state or the United States* or any regulation intended to protect the public health, safety[,] or welfare.").

150. *See* TENN. CODE ANN. § 50-1-304(a)(3) (defining illegal activities as activities illegal under state and federal law); TENN. CODE ANN. § 50-1-304(d) (excluding a definition of "not otherwise proscribed by law"); *see also Timbers of Inwood Forest Assocs*., 484 U.S. at 371 (stating that courts must to look to same or similar terminology in the statute because it will make the meaning of the similar ambiguous term clear).

151. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 99–100 (1992) (stating that courts should look to the provisions of the whole law instead of being guided by a single sentence or a single term of a sentence).

152. *See* TENN. CODE ANN. § 50-1-304(a)(3) (defining illegal activities as activities illegal under state and federal law).

a pure statutory construction analysis to find that cannabis oil patients do not have a wrongful termination claim for their outside-of-work use.[153] Thus, in order to provide wrongful termination claims for cannabis oil patients, this is not a practical solution because the language of section 50-1-304(d) and the rules of statutory construction would not permit the courts to find that the statute provides these patients a claim.[154] Considering the above, Tennessee has two additional options it must consider: (1) wait for Congress to amend the CSA or (2) create a statute that protects employees from wrongful termination for their medical cannabis oil use.

B. Congress Amending the CSA—Another Not-So-Promising Solution

Even after the two controversial cases that resulted in courts denying state wrongful termination and discrimination claims for medical marijuana patients,[155] most state legislatures have not enacted additional statutes to ensure that medical marijuana patients have valid wrongful termination and discrimination claims under state law.[156]

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153. *See* TENN. CODE ANN. § 50-1-304; Coats v. Dish Network, L.L.C., 350 P.3d 849, 852–53 (Colo. 2015) (applying a statutory construction analysis to Colorado's employment law).

154. *See* TENN. CODE ANN. § 50-1-304. Moreover, the *Coats* decision shows how courts are still unlikely to evolve their interpretations of state medical marijuana laws. *Cf.* Matthew D. Macy, *Employment Law and Medical Marijuana—An Uncertain Relationship*, 41 COLO. LAW. 57, 61 (2012) (stating that courts' interpretations of state medical marijuana laws are likely to change for three reasons: (1) the conflict of medical marijuana and employment law is new and evolving; (2) existing case law on this subject is limited; and (3) the conflict creates confusion). *But see Coats*, 350 P.3d at 852–53 (disregarding the evolution of state medical marijuana laws).

155. *See Coats*, 350 P.3d at 852–53 (holding that the employee did not have a wrongful termination claim for his outside-of-work use); Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 539 (Or. 2010) (holding that the employee did not have a discrimination claim for his outside-of-work use).

156. *See, e.g.*, Johnson v. Columbia Falls Aluminum Co., No. DA 08-0358, 2009 WL 865308, at *4 (Mont. Mar. 31, 2009) (holding that an employee who was terminated for medical marijuana use could not state a claim under the Montana Human Rights Act or the ADA). Montana deliberately looked at this discriminatory issue and rejected the option to amend its Medical Marijuana Act to protect employees who are also medical marijuana patients. *Id.*; *see* MONT. CODE ANN. § 50-46-320(5) (2013) (noting that the Montana Medical Marijuana Act may not be construed to prohibit an employer from including a contract provision that prohibits the use of medical

This questionable lack-of-action may be caused by the states' discouragement in creating laws to protect medical marijuana and cannabis oil patients since "the federal government can and does enforce the stricter CSA provisions even in states that have decriminalized possession[,] or where patients, other users, and suppliers are in compliance with state medical and recreational marijuana laws[,] [and] [n]o one contests the power of the federal government to do so."[157] With that said, regardless of whether Tennessee is discouraged to protect cannabis oil patients in the employment setting because it is not within Tennessee's power to contest the CSA, leaving this issue in the hands of the federal government to create nationwide uniformity is not the proper solution for Tennessee to protect its cannabis oil patients.

If Tennessee were to wait for Congress to amend the CSA to permit the use of medical cannabis oil for qualified patients, it would be waiting for an indefinite amount of time.[158] It has been argued that Congress intended to only temporarily place marijuana in the Schedule I category of the CSA; however, the petitions to reschedule marijuana and to cut out a medical marijuana exception have been unsuccessful,[159] and "[i]t is unlikely that the federal government will legalize

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marijuana or permit a cause of action against an employer for wrongful discharge or discrimination). Further, California decriminalized the use and sale of medical marijuana but did not provide medical marijuana patients a claim for discrimination under the Fair Employment and Housing Act. *See* Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (LEXIS through Ch. 807 of the 2015 Legis. Sess.); *see also* Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 202–03 (Cal. 2008) (holding that the Compassionate Use Act does not give medical marijuana the same status as a legal prescription drug because no state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law). Similarly, Colorado decriminalized state-level criminal penalties on patients for using, possessing, and growing marijuana but does not require employers to accommodate the use of medical marijuana in any workplace. *See* COLO. CONST. art. XVIII, § 14(10)(b) (stating that "[n]othing in this section shall require any employer to accommodate the medical use of marijuana in any work place"); *see also Coats*, 350 P.3d at 852–53 (holding that employees who engage in medical marijuana use under Colorado's Medical Marijuana Act are not protected from wrongful discharge under Colorado state law).

157. Chemerinsky et al., *supra* note 13, at 110.

158. *See* 21 U.S.C §§ 802(16), 812(c), 844(a) (2012) (prohibiting the use of marijuana for all purposes since 1970).

159. Gonzalez v. Raich, 545 U.S. 1, 14–15 & n. 23 (2005). The first campaign to reclassify the status of marijuana and to accept a medical use was in 1972. *Id.* In 1988, an "Administrative Law Judge (ALJ) declared that the DEA would be acting in

medical marijuana use in the near future."[160] For instance, Congress has introduced a number of bills that would legalize medical marijuana and small amounts of cannabis oil use for medical purposes, but none of these bills have been successful.[161]

Moreover, conflicting state and federal laws would still exist if Congress legalized cannabis oil use but restricted the THC concentration to a lesser amount than the THC concentrations permitted by states.[162] For example, in order for Tennessee cannabis oil patients to

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an 'unreasonable, arbitrary, and capricious' manner if it continued to deny marijuana access to seriously ill patients, and concluded it should be reclassified as a Schedule III substance." *Id.* (citing Grinspoon v. DEA, 828 F.2d 881, 883–84 (1st Cir. 1987)). However, "[t]he DEA Administrator did not endorse the ALJ's findings" and has continuingly denied petitions to reschedule marijuana, most recently in 2001. *Id.* (citing 66 Fed. Reg. 20038 (Apr. 18, 2001)). "The Court of Appeals for the District of Columbia Circuit has reviewed the petition to reschedule marijuana on five separate occasions over the course of 30 years, ultimately upholding the Administrator's final order." *Id; see, e.g.*, Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1133 (D.C. Cir. 1994) (upholding the DEA administrator's decision to keep marijuana as a Schedule I Drug). Another petition to amend the CSA was filed in 2002 by the Coalition to Reschedule Cannabis and the Court of Appeals for the District of Columbia upheld the DEA's decision to deny this petition in 2012. *See* Ams. for Safe Access v. DEA, 706 F.3d 438, 441–42 (D.C. Cir. 2013) (reasoning that "although there was ongoing research, there were no studies of sufficient quality to assess 'the efficacy and full safety profile of marijuana for any medical condition,'" there was "a material conflict of opinion among experts," and "the raw research data typically were not available in a format that would allow 'adequate scientific scrutiny of whether the data demonstrate safety or efficacy'").

160. Rodd, *supra* note 111, at 1791–92.

161. *See e.g.*, States' Medical Marijuana Patient Protection Act, H.R. 689, 113th Cong. (2013) (proposing to protect states with medical marijuana patients from federal law preemption); Charlotte's Web Medical Access Act of 2015, H.R. 1635, 114th Cong. (2015) (proposing to remove cannabis oil with a THC concentration of less than 0.3% from the definition of "marihuana" in the CSA); *H.R. 689 (113th): States' Medical Marijuana Patient Protection Act*, GOVTRACK, https://www.govtrack.us/congress/bills/113/hr689 (last visited Feb. 7, 2017) (showing that the States' Medical Marijuana Patient Protection Act died in 2015); *H.R. 1635 (114th): Charlotte's Web Medical Access Act of 2015*, GOVTRACK, https://www.govtrack.us/congress/bills/114/hr1635 (last visited Feb. 7, 2017) (showing that the Charlotte's Web Medical Access Act of 2015 recently died).

162. *Compare* Charlotte's Web Medical Access Act of 2015, H.R. 1635, 114th Cong. (2015) (proposing to exclude cannabis oil with a 0.3% THC concentration from the definition of marijuana in the CSA), *with* TENN. CODE ANN. § 39-17-402(16)(D) (LEXIS through 2015 Reg. Sess.) (permitting the medical use of cannabis oil with THC concentration up to 0.9%).

be protected in the employment setting under this solution, Congress must enact a bill that amends the CSA in a way that allows the medical use of cannabis oil with a THC concentration equal to or greater than 0.9%.[163] A federal bill enacted that restricts the THC concentration to any amount less than 0.9% would pose the same issues that Tennessee cannabis oil patients already face because a THC concentration of 0.9% would remain illegal under federal law.[164]

In light of the above, "state legislatures need to take action to ensure that disabled citizens are afforded protection for their use of a state-sanctioned therapeutic remedy."[165] Tennessee, therefore, should take control over the issue of protecting cannabis oil patients in the employment setting because this federal solution is not reasonable for cannabis oil patients.[166]

C. Tennessee's Legislature Adopting a Statute that Provides Employment Protection for Cannabis Oil Patients—The Proper Solution

States have created statutes in different fields of law to protect medical marijuana patients from federal law preemption, but only some of these states have done so in the field of employment law.[167] Arizona is one of the few states that has created a statute to protect medical marijuana patients in the employment setting.[168] Through state legislation, Arizona prohibits employers from discriminating against medical marijuana patients for their outside-of-work use.[169] Because this the only reasonable way Tennessee can protect cannabis oil patients from wrongful termination and discrimination, Tennessee should adopt Arizona's employment statute.[170]

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163. *See* TENN. CODE ANN. § 39-17-402(16)(D) (allowing a 0.9% THC concentration in cannabis oil).

164. *See id.*

165. Rodd, *supra* note 111, at 1792.

166. *See supra* notes 160–65 and accompanying text.

167. *See* discussion *infra* Section C.1.

168. *See* ARIZ. REV. STAT. ANN. § 36-2813(B) (2009 & Supp. 2012).

169. *See* discussion *infra* Section C.2.

170. *See* discussion *infra* Section C.2.

1. States that Have Created Statutes to Protect Medical Marijuana and Cannabis Oil Patients in the Criminal Context

After reading opinions like *Coats* and *Emerald Steel*, states may be reluctant to protect medical marijuana and cannabis oil patients through statutory measures because of the potential conflict with the CSA; however, state legislatures should not weigh their decisions based on those holdings. "The federal government has never argued[]—nor has any court ever held—that the CSA completely preempts state marijuana laws that are more permissive than federal law."[171] In fact, some of the states that have legalized medical marijuana use have created statutes in different fields of law to protect medical marijuana patients.[172] For example, while the *Coats* court held that Colorado does not offer medical marijuana patients employment protection for their outside-of-work use,[173] Colorado has afforded medical marijuana patients protection in the criminal context.[174] Other states have joined Colorado in creating exemptions for medical marijuana patients by decriminalizing medical marijuana use under state

171. Chemerinsky et al., *supra* note 13, at 110; *see* United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1100 (N.D. Cal. 1998) (holding that California's Compassionate Use Act does not conflict with the CSA because on its face it does not purport to make any conduct legal that is prohibited by federal law). California courts have further found that the CSA does not compel states to impose criminal penalties for marijuana possession; therefore, California's law that requires "that counties issue cards identifying those against whom California has opted not to impose criminal penalties does not positively conflict with the CSA." Cty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 481 (Cal. Ct. App. 2008). Moreover, in *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 536 (Or. 2010), the court stated that its holding is limited only to the *use* of medical marijuana and that it is not prepared to say that the CSA preempts Oregon's Medical Marijuana Act as a whole.

172. *See, e.g.*, Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (LEXIS through Ch. 807 of the 2015 Legis. Sess.) (decriminalizing the use and sale of medical marijuana); COLO. CONST. art., XVIII § 14(2) (decriminalizing state-level criminal penalties on patients for using, possessing, and growing marijuana); N.J. STAT. ANN. § 24:6I-2 (2010) (protecting medical marijuana patients from arrest, prosecution, property forfeiture, and criminal penalties).

173. *See* Coats v. Dish Network, L.L.C., 350 P.3d 849, 852–53 (Colo. 2015) (holding that Colorado's employment statute does not protect Colorado medical marijuana patients for their outside-of-work use).

174. *See* COLO. CONST. art. XVIII, § 14(2) (decriminalizing state-level criminal penalties on patients for using, possessing, and growing marijuana).

law.[175] Tennessee is not one of these states. Senate bill 280 allows the medical use of cannabis oil, but it does not provide a way for patients to get cannabis oil in Tennessee.[176] Patients have had to travel to other states to fill their cannabis oil prescriptions and then illegally transport it across state lines.[177] This criminal implication raised by Senate Bill 280 is important, but Tennessee cannot prolong its acknowledgement of the other implications raised by this bill.[178] Employment law is another major area that states with medical marijuana and cannabis oil statutes cannot ignore.[179]

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175. *See* Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (decriminalizing the use and sale of medical marijuana); N.J. STAT. ANN. § 24:6I-2 (protecting medical marijuana patients from arrest, prosecution, property forfeiture, and criminal penalties).

176. *See* Philip Grey, *Marijuana Extract Now 'Legal,' but Can You Get It?*, THE TENNESSEAN (May 17, 2015), http://www.tennessean.com/story/news/2015/05/18/marijuana-extract-now-legal-can-get/27517847/.

177. *See id.*; *Tennessee Medical Marijuana Laws and Regulations*, AMS. FOR SAFE ACCESS, http://www.safeaccessnow.org/tennessee_medical_marijuana_laws_and_regulations (last visited Feb. 7, 2017); *see also* Kenneth Baumgartner, *Controlled Substances Hdbk. Act*, CONTROLLED SUBSTANCES HANDBOOK, 849 (2015) (stating that it is illegal for a person use "any facility of interstate commerce to transport drug paraphernalia").

178. *See* Grey, *supra* note 176. For examples of other implications addressed by other states, see COLO. CONST. art. XVIII, § 14(2)(e) (requiring the return of marijuana seized from a medical marijuana patient to the patient if a jury acquits the patient of state criminal drug charges arising from the seized marijuana) and Beek v. City of Wyoming, 823 N.W.2d 864, 872 (Mich. Ct. App. 2012) (holding that Michigan's city ordinance that prohibited the use of land in a manner that was contrary to federal law was preempted by the Michigan Marijuana Act that legalized medical marijuana).

179. *Cf.* Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (decriminalizing the use and sale of medical marijuana but not providing medical marijuana patients a claim for discrimination under the Fair Employment and Housing Act); Elizabeth Hurwitz, Comment, *Out of the Shadows, into the Light: Preventing Workplace Discrimination Against Medical Marijuana Users*, 46 U. S. FLA. L. REV. 249, 250 (2011) (arguing that California should go beyond its criminal protections for medical marijuana patients and amend the Compassionate Use Act to require employers to accommodate off-duty and off-premises medical marijuana use).

2. Tennessee Should Adopt Arizona's Employment Statute to Protect Cannabis Oil Patients from Wrongful Termination and Discrimination

Tennessee should adopt a statute that protects qualified cannabis oil patients from employment discrimination and wrongful termination for their outside-of-work use. In the fields of medical marijuana regulation and employment law, states that do not expressly protect patients from workplace discrimination for their outside-of-work medical use force patients to choose whether they want to be employed or whether they want to receive medical treatment.[180] With "current case law regarding medical marijuana use and employment discrimination . . . favor[ing] employers,"[181] Tennessee's legislature must recognize the necessity of balancing employees' health needs with employers' concerns of workplace safety and efficiency.[182] Moreover, and as stated above, because the CSA does not necessarily preempt state marijuana regulations,[183] Tennessee's legislature could expressly protect

180. *See* Rodd, *supra* note 111, at 1785–86 ("The current status of the law does not balance the competing interests of employees and employers, and it forces medical marijuana patients to make the impossible choice between employment and medical treatment.").

181. *Id.* at 1786, 1791 (citing, inter alia, Bates v. Dura Auto. Sys., Inc., 650 F. Supp. 2d 754, 772 & n.6 (M.D. Tenn. 2009) (reversed in part on other grounds)); *see* Coats v. Dish Network, L.L.C., 350 P.3d 849, 852–53 (Colo. 2015) (holding that employees do not have a wrongful termination claim for their outside-of-work medical marijuana use); Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 536 (Or. 2010) (holding that medical marijuana patients do not have a claim for wrongful termination under state law); Roe v. TeleTech Customer Care Mgmt., 257 P.3d 586, 594–95 (Wash. 2011) (rejecting the argument that medical marijuana use is sufficient public policy to support a wrongful termination claim).

182. *See Roe*, 257 P.3d at 599 (Chambers, J., dissenting) (urging Washington's legislature to "review and improve" Washington's Medical Marijuana Act after the outcome of the case prohibited employees from using medical marijuana regardless of whether the employee used on site, whether it affected the employee's job performance, or whether the employer could reasonably accommodate the employee's medical use).

183. *See* Cty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 479, 482 (Cal. Ct. App. 2008) (holding that the CSA does not preempt California's medical marijuana law that requires counties to issue identification cards to medical marijuana patients); People v. Crouse, No. 12CA2298, 2013 WL 6673708, at *9 (Colo. Ct. App. Dec. 19, 2013), *cert. granted*, 2015 WL 3745183 (Colo. June 15, 2015) (No. 14SC109) (concluding that the CSA does not preempt Colorado's law where the state

cannabis oil patients from wrongful termination and employment discrimination by adopting a statute such as Arizona's employment statute.[184]

Arizona considered employment discrimination for medical marijuana patients when it legalized medical marijuana, and it created an unambiguous statute to protect medical marijuana users from such workplace discrimination.[185] Section 36-2813 of the Arizona Revised Statutes prohibits employers from discriminating against an individual in "hiring, termination or imposing any term or condition of employment or otherwise penalize a person" because of the individual's "status as a cardholder" or "a registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment."[186] Tennessee should adopt Arizona's employment statute for three reasons: (1) Tennessee is an at-will employment state and currently has no statute protecting cannabis oil patients from termination without cause; (2) Tennessee courts would still be able to construe section 50-1-304(d) of the Tennessee Code Annotated in a way that would not shield other illegal activities under federal law; and (3) employers could treat medical cannabis oil as any other lawful drug that may impair an employee's functioning at work.

First, a statute as explicit as section 36-2813 of the Arizona Revised Statutes is crucial for medical marijuana and cannabis oil patients employed in at-will employment states.[187] Tennessee is an at-will em-

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directive requires police officers to return medical marijuana back to patients even though those patients' behavior violate the CSA).

184. *See* Rodd, *supra* note 111, at 1786, 1791 (stating the CSA does not explicitly preempt state medical marijuana laws). For examples of states that protect medical marijuana patients from workplace discrimination with state statutes, see ARIZ. REV. STAT. ANN. § 36-2813(B) (2009 & Supp. 2012), CONN. GEN. STAT. ANN. § 21a-408p(b)(3) (2013), DEL. CODE ANN. tit. 16 § 4905A(a)(3) (West 2003 & Supp. 2012), and ME. REV. STAT. ANN. tit. 22, § 2423-E(2) (2012).

185. *See* ARIZ. REV. STAT. ANN. § 36-2813(B) (prohibiting employers from discriminating against medical marijuana users in hiring, terminating, or penalizing them).

186. *Id.*

187. *See* Yardley v. Hosp. Housekeeping Sys., L.L.C., 470 S.W.3d 800, 804 (Tenn. 2015) (stating that the employment-at-will doctrine allows the employer to terminate an employee without cause)

ployment state, which means employers are permitted to terminate employees without cause.[188] Tennessee's employment-at-will doctrine came with certain limitations but none that protect cannabis oil patients.[189] Thus, the current status of Tennessee law allows employers to terminate qualified cannabis oil patients for their outside-of-work use because no statute expressly prohibits employers from doing so.[190] In light of the above, Tennessee should consider adopting Arizona's unambiguous statute to ensure that cannabis oil patients have the necessary protection against discrimination and wrongful termination in the employment setting.[191]

Second, by adopting Arizona's employment statute, Tennessee courts could still construe the phrase "not otherwise proscribed by law" in section 50-1-304(d) of the Tennessee Code Annotated by its ordinary meaning,[192] and qualified cannabis oil patients would still be protected by that interpretation.[193] This proposed law would eliminate the ambiguity issue that would arise if cannabis oil patients were to bring wrongful termination claims under section 50-1-304(d) of the Tennessee Code Annotated because they would now be bringing their claims under an entirely separate statute.[194] In addition, rather than altering

188. *Id.*

189. *See id.*

190. *See id.* (noting that "Tennessee recognizes the employment-at-will doctrine as 'the fundamental principle controlling the relationship between employers and employees'") (quoting Mason v. Seaton, 942 S.W.2d 470, 474 (Tenn. 1997)); *see also* sources cited *supra* notes 146–54.

191. *Cf.* William Bogot & Maura Neville, *Inside This Issue: Rethinking Drug-Free Workplace Policies: Will Your Zero-Tolerance Policy Go up in Smoke?*, 29 CBA REC. 30, 32 (2015) (arguing that because Illinois's medical marijuana laws in regard to employment are ambiguous, employers should update their handbooks and polices while taking medical marijuana into account). Illinois, however, is an at-will employment state; therefore, employers do not *have* to make accommodations for medical marijuana patients. *See Yardley*, 470 S.W.3d at 804 (stating that the employment-at-will doctrine allows the employer to terminate an employee without cause). Thus, the employment-at-will doctrine makes it crucial that states adopt express, unambiguous statutes to protect medical marijuana and cannabis oil patients.

192. *See supra* notes 141–45 and accompanying text (defining not otherwise proscribed by law as not otherwise not allowed by the whole system or set of rules made by the government of a town, state, and country).

193. *See supra* text accompanying notes 146–54.

194. Because the ambiguity issue in section 50-1-304(d) of the Tennessee Code Annotated of whether "not otherwise proscribed by law" includes medical cannabis

section 50-1-304(d) of the Tennessee Code Annotated, adopting Arizona's statute is a more effective way for Tennessee to solve this issue because a separate exception that is narrowly tailored to qualified cannabis oil patients would not shield other illegal federal activities that Tennessee intended section 50-1-304(d) to cover.[195]

Third, Arizona's employment statute allows employers to treat medical marijuana as any other lawful drug that "may impair an employee's functioning at work."[196] Arizona's statute states, "an employee is not considered 'impaired' merely because of the presence of marijuana metabolites that appear in the employee's system."[197] Nor are employees considered "under the influence" if they are registered qualified patients with a presence of marijuana components that appear "insufficient to cause impairment."[198] An employer, however, is permitted to document signs of impairment or use witness testimony to determine whether an employee is impaired during work hours or on the premises of employment.[199] This effect of Arizona's statute is considerate to employers because it would not leave them without recourse in the event that an employee is actually impaired on the job.[200] This

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oil use would be eliminated; Tennessee courts would not have to apply the canons of statutory construction where they would likely find in favor of the employer.

195. *See* TENN. CODE ANN. § 50-1-304(d) (2012) (stating that employers cannot terminate employees for participating in outside-of-work activities as long as the activities are "not otherwise proscribed by law").

196. Liana Abreu, Note, *No Employment Protection for Medical Marijuana Users*, 39 SETON HALL LEGIS. J. 389, 412–13 (2015) (citing ARIZ. REV. STAT. ANN. § 36-2813 (2009 & Supp. 2012)).

197. *Id.* at 391 (citing ARIZ. REV. STAT. ANN. § 36-2814(A)(3) (defining "impairment" to exclude a registered qualifying patient of marijuana components that appear insufficient to cause impairment)).

198. RaeAnne Marsh, *FAQ: Arizona Medical Marijuana Act*, INBUSINESS, http://inbusinessmag.com/in-business/faqs-arizona-medical-marijuana-act#.VKwA-IEu9Uds (last visited Feb. 7, 2017).

199. *Id.*

200. *See* ARIZ. REV. STAT. ANN. § 36-2814(B). To compare cannabis oil to any lawful prescription drug, the current status of Tennessee law protects employees who are prescribed opiates such as OxyContin, Percocet, and morphine. *See* TENN. CODE ANN. § 50-1-304(d) (2012) (preventing employers from terminating employees for engaging in lawful outside-of-work activities). To combat prescription abuse at work, employers would look at the employees' behavior, work-related accidents, and other employee testimony to determine misuse. *See* Abreu, *supra* note 196, at 412–13. The employer could not simply terminate these employees because they have a prescription for opiates. *See id.;* TENN. CODE ANN. § 50-1-304(d) (2012).

would also benefit cannabis oil patients in the employment setting because cannabis oil would be treated as any other prescription drug.[201]

Based on the benefits, Tennessee should adopt Arizona's statute to protect cannabis oil patients for their outside-of-work use. This solution, however, does not present itself without issues, but these issues can be solved through reasonable means.

3. Concerns with Adopting Arizona's Employment Statute

While there are many benefits of adopting Arizona's employment statute, this solution presents the following two issues: (1) cannabis oil patients bringing claims under this proposed statute could be faced with a preemption argument in court; and (2) Arizona's statute heavily favors employees.[202] First, while this Note primarily advocates for Tennessee's legislature to adopt an employment statute to protect cannabis oil patients, Tennessee's legislature cannot protect this class of persons on its own. Indeed, adopting Arizona's employment statute is necessary to get to this point, but such adoption does not guarantee that Tennessee courts will find that the CSA does not preempt Tennessee's cannabis oil statute.[203] With such a finding, this proposed employment statute would be left without effect.[204] Thus, it is crucial that Tennessee cannabis oil patients who are faced with a preemption question in court urge the courts to apply the proper obstacle preemption analysis shown in *Emerald Steel*'s dissent.[205] Second, while this proposed law tends to favor employees over employers, employers should

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201. Abreu, *supra* note 196, at 412–13 (citing ARIZ. REV. STAT. ANN. § 36-2813).

202. *See* Michael D. Moberly & Charitie L. Hartsig,: *Smoke—And Mirrors? Employers and the Medical Marijuana Act*, 47 AZ. ATTORNEY 30, 30 (2011).

203. See Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 529 (Or. 2010) for an example of a court finding that the CSA preempts a state's medical marijuana statute, which left the statute that protected medical marijuana users without effect.

204. *See id.* (finding that the Oregon Medical Marijuana Act provided an exception to the "illegal use of drugs" definition that would not preclude the employee from bringing a claim for discrimination for his outside-of-work medical marijuana use but concluding that the CSA preempts Oregon's Medical Marijuana Act; therefore, the exception was left without effect and the employee did not have a claim under Oregon law).

205. *See id.* at 538–39 (Walters, J., dissenting) (arguing that the CSA does not preempt Oregon's law permitting the medical use of marijuana).

take on roles to prevent medical cannabis oil misuse at the workplace, such as short-detection drug testing, in order to balance the competing interests between employers and employees.[206]

a. Cannabis Oil Patients in the Courtroom

Although adopting Arizona's employment statute would expressly give Tennessee employees a wrongful termination claim based on their outside-of-work cannabis oil use, employers will likely argue that Tennessee's law overlaps with the CSA.[207] Tennessee courts may also choose to raise this issue *sua sponte* and find that an obstacle preemption analysis is necessary.[208] If this is the case, Tennessee courts should apply the proper preemption analysis by following *Emerald Steel*'s dissent to find that the CSA does not preempt Tennessee's cannabis oil statute.[209]

To follow *Emerald Steel*'s dissent, Tennessee courts should first find that the purpose of the CSA is to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances"[210] and "to combat *recreational* drug use."[211] Next, Tennessee courts must determine whether Congress has "legislated in a field

206. *See id.* (stating that employers have legitimate concerns about being required to permit medical marijuana outside-of-work use); *see also* Moberly & Hartsig, *supra* note 202, at 30 (stating that Arizona's statute heavily favors employees).

207. See Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 526, 529 (Or. 2010) for an example of this argument being made by the employer.

208. See Mzamane v. Winfrey, 693 F. Supp. 2d 442, 468 (E.D. Penn. 2010) for an example of a court raising a preemption analysis *sua sponte*.

209. *See* Rodd, *supra* note 111, at 1788 (stating that courts should cease adopting *Emerald Steel*'s holding because "it gives employers an unwavering defense against employment claims from employees using medical marijuana").

210. Gonzales v. Raich, 545 U.S. 1, 12–13 & n.20 (2005); *see* 21 U.S.C. § 801(6) (2012) (stating that "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic").

211. Cty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 481–82 (Cal. Ct. App. 2008) (emphasis added) (citing Gonzales v. Oregon, 546 U.S. 243, 270–72 (2006)) ("The purpose of the CSA is to combat recreational drug use, not to regulate a state's medical practices.").

which the states have traditionally occupied."[212] Tennessee courts should find the answer to this to be in the affirmative,[213] which requires them to start their obstacle preemption analysis with the presumption that the CSA does not supersede Tennessee's cannabis oil statute unless Congress has shown that it intended for the CSA to do so.[214] Tennessee courts should find that that Congress did not intend for the CSA to supersede state historic police powers—e.g., regulating cannabis oil for health and comfort—for two reasons: (1) Congress did not write an express preemption clause in the CSA; and (2) Congress expressly wrote a savings clause that gives states authority to pass their own drug laws so long as those laws do not positively conflict with the CSA.[215] Finally, after finding that Tennessee's cannabis oil statute is within the State of Tennessee's historic police powers and that Congress did not intend for the CSA to supersede that power,[216] Tennessee courts should conclude that the purpose of Tennessee's cannabis oil statute is for the medicinal use of its citizens.[217]

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212. *Emerald Steel*, 230 P.3d at 536 (Walters, J., dissenting) (quoting Wyeth v. Levine, 555 U.S. 555, 565 (2009)).

213. *See* Rodd, *supra* note 111, at 1788–89 and accompanying text. Tennessee's cannabis oil statute regulates the health and comfort of cannabis oil patients in its state, which is a historic police power. *See San Diego NORML*, 81 Cal. Rptr. 3d at 478–79 (stating that medicine is historically controlled by states); *see also* Gonzales v. Oregon, 546 U.S. 243, 270 (2006) (noting that states have "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons") (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996)).

214. *See San Diego NORML*, 81 Cal. Rptr. 3d at 478–79 (stating that the California Medical Marijuana Program addresses medicine, which is historically controlled by states; therefore, the preemption analysis must begin with an assumption against preemption); *Emerald Steel*, 230 P.3d at 536–37 (Walters, J., dissenting) (arguing that the majority erred in not beginning its obstacle preemption analysis with the assumption that Congress did not intend the CSA to supersede Oregon's historic police powers of regulating health).

215. *See Emerald Steel*, 230 P.3d at 537 (Walters, J., dissenting) (citing *Wyeth*, 555 U.S. at 565). This shows that Congress recognized that it was "encroaching on an area traditionally governed by states" and that it intended to preserve state power in this area. Rodd, *supra* note 111, at 1789.

216. *See* Rodd, *supra* note 111, at 1788–89 and accompanying text.

217. *See id.* at 1783 (citing *Emerald Steel*, 230 P.3d at 537 (Walters, J., dissenting)) (stating that "the CSA can be implemented and enforced in the federal sphere" while "Oregon authorizes the use of medical marijuana in the state sphere," so there is no federal preemption). *Compare* TENN. CODE ANN. § 39-17-402 (West, Westlaw

In light of the above, Tennessee courts should find that Tennessee's cannabis oil statute "do[es] not undercut the federal government's ability to combat recreational drug abuse at the federal level."[218] Therefore, Tennessee courts should find that the CSA does not preempt Tennessee's cannabis oil statute because the two laws do not positively conflict.[219] This result would leave the proposed employment statute in effect, giving cannabis oil patients a claim in the employment setting.[220]

It is important for Tennessee courts to take notice of the following three points when considering whether to follow *Emerald Steel*'s dissent. First, the federal government has never argued, and no court has held, "that the CSA completely preempts state marijuana laws that are more permissive than federal law."[221] Second, Tennessee courts should look to precedent from other states illustrating the possibility that state medical marijuana laws and the CSA can be simultaneously enforced.[222] Third, if Tennessee courts adopted *Emerald Steel*'s outlying holding rather than the dissent, it would be "giv[ing] employers

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through 2015 1st Reg. Sess.) (permitting the use of cannabis oil for patients with epilepsy and patients who suffer from seizures), *with* 21 U.S.C. § 801(6) (2012) (stating that purpose of the CSA is to control interstate incidents of controlled substances), *and* Gonzales v. Raich, 545 U.S. 1, 12 (2005) (stating that the underlying purpose of the CSA is to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances").

218. Rodd, *supra* note 111, at 1789.

219. San Diego NORML, 81 Cal. Rptr. 3d at 480 (citing 21 U.S.C. § 903 (2012)) (stating that the CSA only preempts state laws that positively conflict with the CSA "so that the two sets of laws could not consistently stand together").

220. *Cf. Emerald Steel*, 230 P.3d at 529 (stating that if the CSA preempts Oregon's Medical Marijuana Act, Oregon's law that protects medical marijuana patients from workplace discrimination for their outside-of-work use is left without effect).

221. Chemerinsky et al., *supra* note 13, at 110.

222. *See* White Mountain Health Ctr. Inc. v. Cty. of Maricopa, No. CV 2012-053585, 2012 WL 6656902, at *8 (Ariz. Super. Ct. Dec. 3, 2012); *San Diego NORML*, 81 Cal. Rptr. 3d at 479–80 (holding that the CSA does not preempt California's medical marijuana law); *Emerald Steel*, 230 P.3d at 537 (Walters, J., dissenting) (stating the CSA should not preempt Oregon's Medical Marijuana Act); Beek v. City of Wyoming, 846 N.W.2d 531, 539 (Mich. 2014) (holding that the CSA does not preempt Michigan's Medical Marijuana Act). *But see* People v. Crouse, No. 14SC109, 2017 WL 365800, at *1 (Colo. Jan. 23, 2017) (holding that the CSA preempts Colorado's law where the state directive *requires* police officers to return medical marijuana back to patients). It is important to distinguish Colorado's recent holding in *People v. Crouse*, No. 14SC109, 2017 WL 365800, at *1 (Colo. Jan. 23, 2017) from these other

an unwavering defense against employment discrimination claims from employees using medical marijuana."[223] With that said, Tennessee courts should recognize that the approach taken by *Emerald Steel's* dissent balances the competing interests of employers and employees in a way that that the majority's holding does not.[224]

Again, it is important to note that in order for courts to even reach the point of applying this proper preemption analysis, the proper legislation is necessary.[225] Tennessee's legislature would be creating the protection, but the variation in outcomes based on different courts and analyses puts that protection in jeopardy.[226] Thus, if Tennessee adopted Arizona's employment statute, then Tennessee courts must enforce that protection by following *Emerald Steel*'s dissent if and when they are presented with this conflict of laws issue.[227]

b. Creating a Balance for Employers with Saliva Drug Tests

Adopting Arizona's employment statute raises rather significant concerns for employers.[228] Arizona's employment statute heavily

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cases. In *Crouse*, the law at issue *required* police officers to engage in activity that was illegal under federal law, which created a positive conflict with the CSA. *Id.* To the contrary, employment protection statutes *do not require* employers to engage in illegal federal activity. See ARIZ. REV. STAT. ANN. § 36-2813(B) (2009 & Supp. 2012) for an example of how the proposed employment statute does not pose the same conflict of laws issue as the statute at issue in *Crouse*.

223. Rodd, *supra* note 111, at 1788 (citing *Emerald Steel*, 230 P.3d at 543 (Walters, J., dissenting)).

224. *See id.* at 1791.

225. Tennessee needs to adopt Arizona's statute to get to this point because the current status of Tennessee's law in this respect does not conflict with the CSA; therefore, a preemption analysis would not be necessary.

226. *Compare Emerald Steel*, 230 P.3d at 529 (finding that Congress intended to impose a blanket prohibition on marijuana and therefore holding that the CSA preempted Oregon's medical marijuana statute), *with Emerald Steel*, 230 P.3d at 537 (Walters, J., dissenting) (arguing that the majority should have found that Congress did not intend to impose a blanket prohibition on state medical marijuana laws and held that the CSA does not preempt Oregon's statute).

227. *See Emerald Steel*, 230 P.3d at 537 (Walters, J., dissenting) (arguing that the CSA does not preempt Oregon's Medical Marijuana Act under a proper obstacle preemption analysis).

228. *See* Weller v. Ariz. Dep't of Econ. Sec., 860 P.2d 487, 495 (Ariz. Ct. App. 1993) (noting that employers have a legitimate interest in prohibiting employees to

favors employees, and employers are "understandably and justifiably concerned about the loss of productivity that may attend an employee's use of marijuana, as well as the liability to which they may be subject if third parties are injured by the actions of an employee working while under the influence of the drug."[229] This is because THC, a component in medical marijuana and cannabis oil, "may impair the user's cognitive functions and ability to perform complex tasks requiring attention and mental coordination, and that the impairment may persist well after the drug was ingested."[230] Thus, if Tennessee adopted Arizona's employment statute, this Note recommends that employers implement saliva drug testing for cannabis oil patients to determine whether the employee was impaired on the premises of employment and/or during work hours.[231]

Saliva drug testing is a new methodology, during which the inside of an employee's cheek is swabbed for saliva and then sent to a lab to be tested.[232] One of the primary benefits of saliva drug testing is its short detection period with a four to forty-eight hour window.[233] This benefits both employers and employees because a shorter detection period makes it easier for employers to pinpoint when employees engaged in the use of cannabis oil and determine whether they were

work while impaired by drugs because impaired workers are a "menace" to "the safety of the community and other workers").

229. Moberly & Hartsig, *supra* note 202, at 30.

230. *Id.*; *see also* Loder v. City of Glendale, 927 P.2d 1200, 1222–23 (Cal. 1997) (noting "the well-documented problems that are associated with the abuse of drugs and alcohol by employees [are] increased absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to third parties, and more frequent turnover").

231. *See* Moberly & Hartsig, *supra* note 202, at 30 (stating that employers have legitimate productivity, efficiency, and safety concerns in having medical marijuana patients as employees).

232. *Oral Fluid Versus Urine*, FORENSIC FLUIDS LABS., http://forensicfluids.com/oral-v-urine/ (last visited Feb. 7, 2017).

233. *Methods*, MID-SOUTH DRUG TESTING, http://midsouthdrugtesting.com/methods/ (last visited Feb. 7, 2017). Benefits of saliva drug testing include: shorter windows of detection between 4–48 hours, no restroom needed, no known adulterants, no known specimen substitutes, and good for cause/post-accident testing. *Id.*

off-duty and off the premises of employment.[234] This shorter detection period is most useful in post-accident and reasonable suspicion testing to determine recent drug use.[235]

Moreover, implementing a reasonable, fair method of drug testing would prevent employees from abusing their status as a "cardholder," meaning that saliva drug testing will be able to protect employers from the cannabis oil patients who claim that they failed their drug tests due to their outside-of-work use when in reality they used cannabis oil during work hours.[236] With saliva drug testing, cannabis oil patients will not be able to use their status as an ultimate shield from the prohibition on using cannabis oil while on the job.[237]

Because Arizona's statute heavily favors employees and because employers have legitimate concerns about medical marijuana and cannabis oil patients being able to abuse their status, Tennessee employers should consider implementing saliva drug testing to create a balance between employers' and employees' competing interests.[238] This would help solve employers' safety, efficiency, and liability concerns in a way that does not subject cannabis oil patients to employment discrimination.[239]

V. THE FUTURE OF MEDICAL MARIJUANA IN TENNESSEE

A large class of persons who suffer from epilepsy and seizures currently faces the risk of employment discrimination in Tennessee if they choose cannabis oil as a therapeutic remedy during their off-hours

234. *See id.* (noting that urine drug testing detects most drugs over a period of one to seven days and saliva drug testing has shorter windows of detection between 4–48 hours).

235. *Id.*

236. *See Saliva Drug Testing*, TRANSMETRON, http://www.transmetrondrugtest.com/saliva_testing.php (last visited Feb. 7, 2017) ("Most drugs . . . disappear [from saliva] anywhere from twelve to twenty-four hours. Because of this, saliva drug testing is being considered for drug detection in situations where recent drug use must be detected such as vehicle and equipment drivers and those involved in workplace or other accidents [and not] as a method to detect past drug use.").

237. *See id.*

238. *See* ARIZ. REV. STAT. ANN. § 36-2813(B) (2009 & Supp. 2012) (prohibiting employers from discriminating against medical marijuana users in hiring, terminating, or penalizing them for their outside-of-work and off-hours use).

239. *See Oral Fluid Versus Urine*, *supra* note 232 (listing all the benefits of saliva drug tests).

of employment.[240] "[About] 1 in 26 people will develop epilepsy at some point in their life."[241] This means the total number of Americans "affected by epilepsy and seizures" is over 3 million, with about 200,000 new cases of seizures and epilepsy occurring in the United States each year.[242] Specifically in Tennessee, "[t]here are approximately 140,000 individuals in Middle and West Tennessee with epilepsy."[243] While these numbers do not directly represent the amount of people who currently suffer from epilepsy and seizures in Tennessee, at the very least, Senate Bill 280 permits the use of medical cannabis oil for 140,000; therefore, at least 140,000 cannabis oil patients are subject to workplace discrimination.[244]

Moreover, Senate Bill 280 is likely to soon affect more classes of patients than only those who suffer from epilepsy and seizures. "[Governor] Haslam and other supporters argue [Senate Bill 280 is] not the first step toward legalizing marijuana for recreation[al] use, but there is certainly a push in Tennessee toward a broader legalization of medical marijuana."[245] Paul Kuhn, chairman of Tennesseans United[246] who is currently contributing to the draft of a bill that would expand medical marijuana use, stated "[Senate Bill 280] is a step in the right direction and an acknowledgement by our state leaders that marijuana

240. *See* S.B. 280, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015) (permitting medical use of cannabis oil for patients who suffer from epilepsy and seizures); TENN. CODE ANN. § 50-1-304(d) (2012) (excluding specification as to whether "not otherwise proscribed by law" includes federal law); *see also* TENN. CODE ANN. § 50-1-304(a)(3) (defining "illegal activities" as activities illegal under state and federal law).

241. *Epilepsy Statistics,* EPILEPSY FOUND., http://www.epilepsy.com/learn/epilepsy-statistics (last visited Feb. 7, 2017).

242. Christian Nordqvist*, Epilepsy: Causes, Symptoms and Treatments*, MNT, http://www.medicalnewstoday.com/articles/8947.php (last updated Dec. 31, 2015).

243. *About Epilepsy: The Basics*, EPILEPSY FOUND. MIDDLE & W. TENN.*,* http://epilepsytn.org/about-epilepsy-the-basics (last visited Feb. 7, 2017).

244. *See id.*; *see also* S.B. 280, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015) (permitting medical use of cannabis oil for patients who suffer from epilepsy and seizures).

245. Dave Boucher, *Gov. Bill Haslam Signs Cannabis Oil Bill*, THE TENNESSEAN (May 4, 2015), http://www.tennessean.com/story/news/2015/05/04/haslam-signs-cannabis-oil-bill/26866905/.

246. Tennesseans United is a nonprofit organization advocating for legalizing medical marijuana in Tennessee. Boucher, *supra* note 245.

has therapeutic properties . . . ."[247] Thus, with the likelihood of Tennessee's cannabis oil statute expanding, it is crucial that Tennessee adopt a statute that ensures protection to cannabis oil patients in the workplace before the class of persons who may become eligible for medical use expands.[248] As of March 2016, there have been 1,246,170 legal medical marijuana patients reported in nineteen of the twenty-eight states and District of Columbia with medical marijuana laws.[249] This figure does not account for the states with cannabis oil patients, but by representing the trend of medical marijuana patients emerging in each state with broad medical marijuana laws, this figure shows that the amount of Tennessee citizens subject to potential employment discrimination raised by Senate Bill 280 and section 50-1-304(d) of the Tennessee Code Annotated will substantially increase if and when Tennessee expands its medical cannabis oil laws.[250]

VI. CONCLUSION

The goal of adopting a statute that prohibits employers from terminating employees based on their qualified outside-of-work medical use of cannabis oil is to prevent employment discrimination and to provide a wrongful termination claim for this class of persons. Without adopting Arizona's employment statute, Tennessee will continue to allow its courts to construe activities "not otherwise proscribed by law" in section 50-1-304(d) of the Tennessee Code Annotated as lawful activities under state and federal law, which would include medical cannabis oil use for qualified patients; therefore, cannabis oil patients would be left without a wrongful termination claim under Tennessee law.[251] Further, without a proper statute, Tennessee will continue to

247. *Id.*

248. *See id.*

249. *Number of Legal Medical Marijuana Patients*, PROCON.ORG, (last updated Mar. 3, 2016), http://medicalmarijuana.procon.org/view.resource.php?resourceID=005889 (excluding cannabis oil patients from this statistic). This figure does not account for patients in the four most recent states of the twenty-eight that have legalized medical marijuana. *See id.* (excluding states that legalized marijuana in 2017).

250. *Id*.

251. *See* Coats v. Dish Network, L.L.C., 350 P.3d 849, 852–53 (Colo. 2015) (holding that employees who engage in medical marijuana use under Colorado's Medical Marijuana Act are not protected from wrongful termination under Colorado state law).

leave this discrimination problem in the hands of the federal government, which has neither amended nor shown much promise of successfully amending the CSA to provide such protection.[252] Based on the above reasoning, it is crucial that Tennessee not only adopt Arizona's employment statute to protect cannabis oil patients but also that it adopt it quickly because the class of cannabis oil patients is likely to expand, subjecting more people to potential workplace discrimination.[253]

252. *See supra* notes 158–65 and accompanying text.

253. *See supra* text accompanying notes 240–50.