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Sarah Simmons

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MEDICAL MARIJUANA USE IN FEDERALLY SUBSIDIZED HOUSING: THE ARGUMENT FOR OVERCOMING FEDERAL PREEMPTION

Sarah Simmons[*]

I. INTRODUCTION

Anita Nelson was a fifty-eight-year-old woman living in a federally subsidized housing complex in Greenfield, Massachusetts.[1] Nelson was bound to her motorized wheelchair and suffered from a laundry list of medical ailments including spinal injuries, distressed organs, PTSD, double vision, gallstones, and permanent nerve damage.[2] Since Massachusetts law provides for legal medical marijuana prescriptions, Nelson obtained her medical marijuana card in 2015 and expressed delight that it provided her with an alternative to addictive prescription painkillers.[3] In July 2017, however, she received an eviction notice from her landlord saying she was in violation of the property's no-smoking policy.[4] She was then told she had little legal ground to stand on to challenge the eviction in court because she was in violation of her leasing contract.[5] Aghast at this contradiction between state and federal law, Nelson was forced to choose between utilizing her medication and finding another home.[6]

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* J.D. Candidate, May 2019, University of Baltimore School of Law; B.A., History, 2012, University of Vermont. The author would like to specially thank Professor Audrey McFarlane for her guidance and support on this piece. She would also like to thank Matthew Zernhelt for sharing his knowledge and materials regarding *Chateau Foghorn LP v. Hosford*. Lastly, she would like to thank the Law Review staff for their unwavering dedication and her friends and family for their continued support.

1. Joshua Solomon, *Greenfield Eviction Notice Highlights Possible Conflict in Medical Marijuana and Anti-Smoking Laws*, GREENFIELD RECORDER (Nov. 9, 2017), http://www.recorder.com/Eviction-papers-for-smoking-medical-marijuana-lead-to-question-marks-in-current-law-12936328.
2. *Id.*
3. *Id.*
4. *Id.* Nelson also noted that the cost of switching to non-smoked marijuana remedies, such as edibles or vaporized oil, was financially unfeasibly on her limited budget. *Id.*
5. *Id.*
6. *Id.*

This is not an uncommon scenario for residents of subsidized housing who are legally prescribed marijuana for their medical needs.[7] With medical marijuana dispensaries opening their doors nationwide, questions have been raised as to how state and federal law should treat medical marijuana in many contexts such as employment,[8] police searches,[9] veteran's benefits,[10] and more.[11] The constitutional contrast between state and federal law on these issues has been a subject of ongoing controversy as an increasing number of states have elected to legalize medical and recreational marijuana use.[12] In particular, this Comment will explore the conflicting law and implications thereof for individuals using medical marijuana while residing in federally subsidized housing units.[13]

Prohibiting residents in federally subsidized housing from utilizing their legally prescribed medication not only disproportionately affects minorities and individuals with low-incomes or disabilities, but it also forces patients to choose between living in pain or having a roof over their heads.[14] Compelling individuals to make this choice has potentially grave, long-lasting community consequences.[15] This Comment will argue, among other things, that the law and relevant parties should provide exceptions for medical situations as opposed to blanket prohibitions.[16] The purpose is to provide alternative

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7. Michaela Phillips, *How HUD Guidelines Impact Medical Marijuana Patients in Federally-Subsidized Housing*, MARIJUANA MORTGAGES (Jan. 10, 2017), https://www.marijuanamortgages.com/how-hud-guidelines-impact-medical-marijuana-patients-in-federally-subsidized-housing/.
8. Brad Reid, *Numerous Legal Issues Surround Medical Marijuana*, HUFFINGTON POST: THE BLOG (Feb. 5, 2015, 4:41 PM), https://www.huffingtonpost.com/brad-reid/numerous-legal-issues-sur_b_6624554.html.
9. Mark V. Rieber, *Criminal Law: Search and Seizure – Medical Marijuana Statute – Probable Cause to Search Based Solely on the Smell of Marijuana*, NAT'L LEGAL RES. GROUP, INC.: CRIM. L. BLOG (Jan. 19, 2016, 12:01 PM), http://www.nlrg.com/criminal-law-legal-research/criminal-law-search-and-seizure-medical-marijuana-statute-probable-cause-to-search-based-solely-on-the-smell-of-marijuana.
10. *See* James Clark, *A Well-Kept Secret: How Vets and Their Doctors Are Getting Around the VA's Medical Marijuana Policy*, TASK & PURPOSE (Oct. 26, 2017), https://taskandpurpose.com/va-medical-marijuana-policy-veterans/.
11. Reid, *supra* note 8.
12. Scott Bomboy, *Interest Picks Up in Legal Marijuana as Constitutional Issue*, CONST. DAILY (Apr. 16, 2015), https://constitutioncenter.org/blog/interest-picks-up-in-legal-marijuana-as-constitutional-issue.
13. *See infra* Part III.
14. *See* discussion *infra* Part IV.
15. *See* discussion *infra* Part V.
16. *See infra* Section III.C and Part VII.

solutions and guidance for any state implementing medicinal marijuana policies.[17]

Part II will begin by discussing the history of the criminalization of marijuana in the United States[18] and its development as a political issue following changes in attitudes toward the drug.[19] Part III will review the history of public housing[20] and the various restrictions and barriers placed on residents.[21] Part IV will discuss how the application of federal anti-drug laws in public housing discriminates against certain populations and demographics.[22] Part V will examine the potential community consequences of implementing policies banning the use of medical marijuana in public housing.[23] Part VI will then discuss the constitutional doctrine of federal preemption[24] and the various arguments against federal law preempting state law in this particular arena.[25] Finally, Part VII will offer numerous recommendations for responsible medical marijuana reform.[26]

II. HISTORY OF CRIMINALIZATION OF MARIJUANA AND THE ADVENT OF MEDICAL MARIJUANA AS A POLITICAL ISSUE

Marijuana has a long history of cultivation as both a commodity and a medicinal product.[27] Throughout the world, the marijuana plant has been used by humans for almost 10,000 years in the production of various everyday items such as cloth and pottery.[28] The medicinal properties of marijuana were first mentioned in the writings of Chinese emperor Shen Nung as far back as 2737 B.C.[29] These medicinal qualities were also cited in the works of many other civilizations throughout history, including the Romans, Greeks, and

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17. *See* discussion *infra* Part VII.
18. *See* discussion *infra* Part II.
19. *See* discussion *infra* Part II.
20. *See* discussion *infra* Part III.A.
21. *See* discussion *infra* Part III.B.
22. *See infra* Part IV.
23. *See infra* Part V.
24. *See* discussion *infra* Part VI.
25. *See* discussion *infra* Part VI.A.
26. *See infra* Part VII.
27. *See infra* notes 28–30 and accompanying text.
28. David McDonald, *The Racist Roots of Marijuana Prohibition*, FOUND. FOR ECON. EDUC. (Apr. 11, 2017), https://fee.org/articles/the-racist-roots-of-marijuana-prohibition/.
29. *Id.*

Egyptians, who referenced marijuana's ability to treat a variety of ailments such as edema, inflammation, and earaches.[30]

Prior to the 20th century, marijuana in the United States was viewed as a commodity.[31] It is only in modern times that our society has politicized and criminalized its usage as a result of a number of social, political, and economic factors.[32] In 1611, the settlers at Jamestown, Virginia began to cultivate marijuana plants as a source of strong fiber.[33] Hemp, a product of the marijuana plant, was used to make rope, sails, and clothing.[34] In fact, the U.S. government at the time encouraged farmers to grow the crop for these purposes and certain states even considered it legal tender.[35] Marijuana production played an important role in the early U.S. economy until the post-Civil War era when it was replaced by other materials and cash crops.[36] Although primarily used in the manufacturing of goods, the marijuana plant was also commonly used medicinally during this period in various tinctures and medicines.[37]

Marijuana first became criminalized in the U.S. with the influx of Mexican immigration in the early 1900s following the outbreak of the Mexican Revolution in 1910.[38] These immigrants brought with them their foreign tradition of smoking the plant for recreational purposes.[39] As a result, "the fear and prejudice about the Spanish-

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30. *Historical Timeline*, PROCON, https://medicalmarijuana.procon.org/view.timeline.php?timelineID=000026 (last updated Jan. 30, 2017, 12:02 PM) (citing MARTIN BOOTH, CANNABIS: A HISTORY 31 (2005); LISE MANNICHE, AN ANCIENT EGYPTIAN HERBAL 82 (Univ. of Tex. Press 1993) (1989); NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING app. Part I (1972), http://www.druglibrary.org/schaffer/library/studies/nc/nc1a_2.htm).
31. *See* Laura Rojas, *California's Compassionate Use Act and the Federal Government's Medical Marijuana Policy: Can California Physicians Recommend Marijuana to Their Patients Without Subjecting Themselves to Sanctions?*, 30 MCGEORGE L. REV. 1373, 1376–77 (1999).
32. *See id.* at 1377–80.
33. *Id.* at 1376.
34. *Marijuana Timeline*, PUB. BROAD. SERV.: FRONTLINE, https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html (last visited Nov. 10, 2018). "Marijuana is the mixture of dried, shredded flowers and leaves that comes from the hemp plant." *Id.*
35. *Id.*
36. *Id.*; McDonald, *supra* note 28.
37. *See* Rojas, *supra* note 31, at 1380–82.
38. Malik Burnett & Amanda Reiman, *How Did Marijuana Become Illegal in the First Place?*, DRUG POL'Y ALLIANCE (Oct. 8, 2014), http://www.drugpolicy.org/blog/how-did-marijuana-become-illegal-first-place; *Marijuana Timeline*, *supra* note 34.
39. *Marijuana Timeline*, *supra* note 34.

speaking newcomers became associated with marijuana."[40] Newspapers, as well as opponents of the new influx of immigrants, began calling it the "[m]arijuana [m]enace," and Mexican users were held responsible for various, sometimes violent, crimes.[41] Moreover, marijuana was used as an "excuse to search, detain, and deport Mexican immigrants."[42] Taking a page out of its own history books, the U.S. government demonized marijuana use in order to control Mexican immigrants, which mirrored its attempts to control Chinese immigrants by criminalizing opium in the late 19th century.[43]

By 1937, forty-six states had laws on the books prohibiting marijuana.[44] That same year, Congress passed the Marijuana Tax Act, which effectively criminalized marijuana on a national scale.[45] This Act was later replaced with the Controlled Substances Act (CSA) in the 1970s.[46] The CSA created schedules for categorizing illegal substances by their "dangerousness and potential for addiction."[47] Marijuana was categorized as a Schedule I substance, the most restrictive, after President Nixon rejected a report by the bipartisan Shafer Commission that recommended decriminalization.[48]

In contrast to this federal law classification, this period also marked the cultural shift in marijuana use and attitudes.[49] While marijuana was originally viewed as a drug used only by Mexican immigrants, recreational marijuana use by white middle-class Americans became

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40. *Id.* The plant was original referred to as "cannabis" or "hemp," but the U.S. government purposely adopted the Mexican terminology of "marihuana" in the early 1900s to seize on racial fears in an attempt to make it sound more ethnic. McDonald, *supra* note 28.
41. *Marijuana Timeline*, *supra* note 34; Matt Thompson, *The Mysterious History of 'Marijuana'*, NAT'L PUB. RADIO (Jul. 22, 2013, 11:46 AM), https://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana.
42. Burnett & Reiman, *supra* note 38.
43. *Id.*
44. Rojas, *supra* note 31, at 1378.
45. *Marijuana Timeline*, *supra* note 34. The passage of this Act was largely due to the efforts of Harry J. Anslinger, the first Commissioner of the newly established Federal Bureau of Narcotics, who engaged in a tireless and sensational campaign to outlaw marijuana. Rojas, *supra* note 31, at 1377–79.
46. Burnett & Reiman, *supra* note 38; *see* 21 U.S.C. § 812 (2012).
47. Burnett & Reiman, *supra* note 38.
48. *Id.* Schedule I substances are classified as such because they are determined to have a high potential for abuse and have no currently accepted medical use in treatment. 21 U.S.C. § 812(b)(1) (2012).
49. Ghilmaan Hussain, *Drug Culture in the 1960's – Marijuana*, PREZI (Oct. 25, 2012), https://prezi.com/dg39pdibtd_j/drug-culture-in-the-1960s-marijuana-/.

a symbol of counter-culture in the 1960s.[50] The late 20th century also saw the implementation of the so-called "[w]ar on [d]rugs," a toughening of drug policies within the criminal justice system through the creation of mandatory minimums and other heightened penalties for drug possession.[51] Despite continued cultural shifts in norms and attitudes, an active legalization movement, and repeated attempts to roll back the policies from the failed war on drugs, marijuana remains a Schedule I controlled substance today.[52]

As of 2018, thirty-three states and the District of Columbia have legalized medical marijuana either through legislative or voter action.[53] It is prescribed to treat a variety of symptoms such as muscle spasms caused by multiple sclerosis, nausea resulting from chemotherapy, loss of appetite due to a chronic illness, seizure disorders, and Crohn's disease.[54] While the Food and Drug Administration (FDA) has approved two medications containing synthetic THC (the active ingredient in marijuana) and another containing cannabidiol (more commonly known as CBD and also deriving from the marijuana plant) to treat a rare seizure disorder, the federal agency remains skeptical about approving marijuana as a safe or effective drug for most ailment.[55]

This skepticism is partially a symptom of the fact that it is difficult to study the health effects of the marijuana due to federal procedural restrictions and bureaucratic limitations.[56] For instance, in order to conduct clinical research, researchers must obtain marijuana through

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50. *Marijuana Timeline*, *supra* note 34.
51. *Id.* The war on drugs was a leading contributor to the mass incarceration of minority populations, as its policies disproportionately affected communities of color. *Race and the Drug War*, DRUG POL'Y ALLIANCE, http://www.drugpolicy.org/issues/race-and-drug-war (last visited Nov. 10, 2018).
52. 21 U.S.C. § 812 (2012). A 2017 Gallup poll reported that 64% of Americans support the legalization of marijuana. Justin McCarthy, *Record-High Support for Legalizing Marijuana Use in U.S.*, GALLUP (Oct. 25, 2017), http://news.gallup.com/poll/221018/record-high-support-legalizing-marijuana.aspx.
53. *33 Legal Medical Marijuana States and DC*, PROCON, https://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last updated Nov. 7, 2018, 1:12 PM).
54. Anne Harding, *Medical Marijuana*, WEBMD, https://www.webmd.com/pain-management/features/medical-marijuana-uses (last updated Nov. 4, 2013).
55. *See FDA and Marijuana*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/NewsEvents/PublicHealthFocus/ucm421163.htm (last updated June 25, 2018); *see also* Peter Grinspoon, *Medical Marijuana*, HARV. HEALTH PUB. (Jan. 15, 2018, 10:30 AM), https://www.health.harvard.edu/blog/medical-marijuana-2018011513085.
56. Shaunacy Ferro, *Why It's So Hard for Scientists to Study Medical Marijuana*, POPULAR SCI. (Apr. 18, 2013), https://www.popsci.com/science/article/2013-04/why-its-so-hard-scientists-study-pot.

the National Institute on Drug Abuse, who has notoriously denied this request when researchers are running trials attempting to show the positive effects of the drug.[57] The federal government's investment in keeping marijuana illegal remains influential and procedural hurdles continue to make it difficult to obtain comprehensive data and accurate information.[58]

III. THE STATE OF PUBLIC HOUSING IN THE UNITED STATES TODAY

Many recipients of medical marijuana reside in federally subsidized housing.[59] However, since these housing units are administered by the federal government and subject to those laws, the use of medical marijuana in the unit is restricted despite concurrent state law allowing its use at the privately-owned property down the street.[60]

A. Structure and Statistical Make-Up of Federally Subsidized Housing

The structure and history of public housing in the U.S. is complex.[61] The program was initially created following the New Deal in 1937 as an attempt to revive the crippled housing industry following the Great Depression.[62] By 2017, there were over five million low-income households using some form of federal rental assistance in the U.S.[63] These households have an average income of only $13,000 per year.[64] Tenants generally pay 30% of their income

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57. *Id.*
58. *Id.*
59. Matthew Koehler, *Cannabis May Be Legal in the District, But Not In Federally-Subsidized Homes*, GREATER GREATER WASH. (Nov. 8, 2017), https://ggwash.org/view/65484/cannabis-may-be-legal-in-the-district-but-not-in-government-subsidized-homes.
60. *Id.*
61. *A Brief Historical Overview of Affordable Rental Housing*, NAT'L LOW INCOME HOUS. COAL. 1–7 (2015), http://nlihc.org/sites/default/files/Sec1.03_Historical-Overview_2015.pdf.
62. Emily Badger, *How Section 8 Became a 'Racial Slur'*, WASH. POST (June 15, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/06/15/how-section-8-became-a-racial-slur/.
63. *United States Fact Sheet: Federal Rental Assistance*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 30, 2017), https://www.cbpp.org/sites/default/files/atoms/files/4-13-11hous-US.pdf.
64. Badger, *supra* note 62, at 8.

for rent and utilities, while the remaining costs are subsidized.[65] Additionally, 89% of federally subsidized households include children, the elderly, or the disabled.[66] Although the federal public housing program is managed by the Department of Housing and Urban Development (HUD), it is locally administrated by smaller public housing authorities (PHA).[67] PHAs are issued federal funding by HUD and are then "responsible for the management and operation of its local public housing program."[68] To make matters more complicated, there are a variety of programs that provide some form of subsidized housing including public housing, housing choice voucher programs, tenant-based Section-8 voucher programs, and project-based Section-8 voucher programs.[69] Nonetheless, all structures of subsidized housing incorporate certain federally mandated restrictions, which include barring drug use like medical marijuana regardless of conflicting state law.[70]

B. Drug Use Is One of Many Restrictions Placed on Residents in Exchange for Affordable, Subsidized Housing

In addition to prohibitions on drug use, HUD also places unjust restrictions on renting to individuals who have criminal records[71] or histories of alcohol or drug use.[72] Federal guidelines require PHAs to implement such restrictions, but these guidelines also provide broad discretion to the PHA and landlords to "create more severe

65. *Policy Basics: Public Housing*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/research/policy-basics-public-housing (last updated Nov. 15, 2017).
66. *United States Fact Sheet: Federal Rental Assistance*, *supra* note 63.
67. *Policy Basics: Public Housing*, *supra* note 65, at 3.
68. *HUD's Public Housing Program*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/topics/rental_assistance/phprog (last visited Nov. 10, 2018).
69. *See Rules for Tenants in Public and Subsidized Housing*, PEOPLE'S L. LIBR. MD., https://www.peoples-law.org/rules-tenants-public-and-subsidized-housing (last updated May 17, 2017); Mass. L. Reform Inst., *Differences Between Public and Subsidized Housing*, MASSLEGALHELP, http://www.masslegalhelp.org/housing/public-subsidized-differences (last updated Dec. 2009).
70. *See infra* notes 71–77 and accompanying text.
71. Elayne Weiss, *Housing Access for People with Criminal Records*, NAT'L LOW INCOME HOUSING COAL., 6–21 (2017), http://nlihc.org/sites/default/files/AG-2017/2017AG_Ch06-S06_Housing-Access-Criminal-Records.pdf ("[J]ustice-involved individuals face additional barriers in accessing affordable housing, potentially placing them at risk of housing instability, homelessness, and ultimately recidivism.").
72. Marah A. Curtis, Sarah Garlington & Lisa S. Schottenfeld, *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, 15 CITYSCAPE: J. POL'Y DEV. & RES. 37, 38 (2013), https://www.huduser.gov/portal/periodicals/cityscpe/vol15num3/ch2.pdf.

restrictions" if they so choose.[73] This generates potential inconsistencies from PHA to PHA, and even between different staff members when discretionary standards are adopted.[74] Additionally, residents can be evicted for the actions of a third party, even if they have no subjective knowledge of the illicit behavior or history of that individual.[75]

These restrictions essentially "define those with alcohol, drug, or criminal histories as categorically undeserving" of housing assistance, which "undermines other important public policy goals" to support these individuals.[76] Medical marijuana restrictions are just another drop in this bucket. In fact, this restriction is even more egregious since medical marijuana patients are acting within the confines of state law.[77]

C. The HUD Memoranda Allow For a Discretionary Standard That Is Rarely Followed in Practice

As multiple states began to legalize medical marijuana in the early 2000s, there was confusion about how it would affect patients living in subsidized housing.[78] To clarify the federal government's position and provide guidelines, HUD issued memoranda in both 2011 and 2014 (HUD Memos) reiterating that no exceptions would be made to housing policies for medical marijuana use.[79] The two HUD Memos also stipulated that PHAs must deny admission to applicants who are known users and required PHAs to establish policies that allow for termination if a current tenant is found to be using marijuana.[80] Furthermore, owners are prohibited from including provisions that

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73. *Id.* Other common restrictions include "neighbor disturbance," "disorderly house," and "incarceration." *Id.* at 46.
74. *Id.* at 38.
75. *Id.* at 39–40; Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 136 (2002).
76. Curtis et al., *supra* note 72, at 38.
77. *See* discussion *supra* Part IV.
78. *See* Angela Sekerka, *Medical Marijuana in HUD-Assisted Properties: Updated Since HUD's January 2011 Memorandum*, JD SUPRA (May 25, 2015), http://www.jdsupra.com/legalnews/medical-marijuana-in-hud-assisted-60471/.
79. U.S. Dep't of Hous. & Urb. Dev., Opinion Letter on Medical Marijuana Use in Public Housing and Housing Choice Voucher Program (Feb. 10, 2011) [hereinafter HUD Memo 2011]; U.S. Dep't of Hous. & Urb. Dev., Opinion Letter on Use of Marijuana in Multifamily Assisted Properties (Dec. 29, 2014) [hereinafter HUD Memo 2014]; Sekerka, *supra* note 78.
80. HUD Memo 2014, *supra* note 79; *see also* Quality Housing and Work Responsibly Act of 1998, 42 U.S.C. § 13662 (2012).

affirmatively permit the tenant to use marijuana.[81] Notably, however, HUD does not require that landlords automatically evict tenants who are in violation of these policies.[82] Instead, the guidelines provide landlords with discretion to decide whether to take action on a case-by-case basis.[83] The HUD Memos remain the controlling authority on the subject, and HUD has maintained this position in the intervening years.[84]

Although these agency memorandums provide minimal leeway, federal regulations require landlords to "take into account the seriousness of the activity and the physical condition of the patient and their ability to find alternative shelter."[85] In theory, this helps to avoid *ad hoc* decision-making on the part of the landlords by requiring them to look at the individual circumstances.[86] However, it is evident by the countless stories of eviction and ongoing litigation surrounding the issue that, in practice, many landlords "continue to act as if their hands are tied" and evict regardless of individualized circumstances.[87]

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81. HUD Memo 2014, *supra* note 79.
82. *Id.*
83. *HUD Issues Memo on Use of Marijuana in Multifamily Properties*, LEADING AGE N.Y., https://www.leadingageny.org/providers/housing-and-retirement-communities/hud/hud-issues-memo-on-use-of-marijuana-in-multifamily-properties/ (last visited Nov. 10, 2018); *see also* Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 133–34 (2002) (discussing how the relevant federal housing statute does not require eviction of a tenant for violating a lease provision, but instead leaves it within the discretion of local public housing authorities because they are most qualified to "take account of . . . the degree to which the housing project suffers from 'rampant drug-related or violent crime,' 'the seriousness of the offending action,' and 'the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action'") (internal citations omitted).
84. *Questions and Answers on HUD's Smoke Free Public Housing Proposed Rule*, U.S. DEP'T. OF HOUS. & URB. DEV., https://www.hud.gov/sites/documents/FINALSMOKEFREEQA.PDF (last visited Nov. 10, 2018) (discussing how HUD's proposed rule does not change the requirements of the 2011 HUD Memo in regard to medical marijuana).
85. *Landlords Are Not Required to Evict Medical Marijuana Patients, ACLU Explains in Letter*, AM. C. L. UNION OF MICH. (Mar. 17, 2011), http://www.aclumich.org/article/landlords-are-not-required-evict-medical-marijuana-patients-aclu-explains-letter; *see* 24 C.F.R. § 982.552(c)(xi)(2) (2017).
86. AM. C. L. UNION OF MICH., *supra* note 85.
87. Ruby Renteria, *HUD Has Cleared the Smoke: It Is Now Safe for Landlords and Public Housing Agencies to Come Down*, DRUG & L. POL'Y (Mar. 18, 2015), https://druglawandpolicy.wordpress.com/2015/03/18/hud-has-cleared-the-smoke-it-is-now-safe-for-landlords-and-public-housing-agencies-to-come-down/. The decision to automatically evict is often motivated by fear of losing federal funding, despite clear directives providing discretion. William Breathes, *Medical Marijuana Patients in*

IV. DISCRIMINATORY APPLICATION

Maintaining policies that prohibit individuals from utilizing legally prescribed medical marijuana in subsidized housing is not only unjust because it precludes patients from using their medicine, but is also inherently discriminatory in its application against both disabled and minority populations.[88]

Since medical marijuana is used to treat ailments often associated with a disability, denying these patients the ability to utilize their medicine in their homes is potentially discriminatory under existing disability laws.[89] States are divided as to whether rejecting such an accommodation can be considered disability discrimination under respective state laws.[90] Certain states explicitly recognize medical marijuana use as resulting from a disability in the employment context and have established protections accordingly.[91] For instance, Pennsylvania law provides that, "[n]o employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee . . . solely on the basis of such employee's status as an individual who is certified to use medical marijuana."[92] Other states implementing medical marijuana should recognize the nexus between its use and the underlying disability and, consequently, seek to implement similar statutes that provide for reasonable accommodations in order to prevent discrimination in all contexts.[93]

Although it is difficult to determine how many individuals are affected by this prohibition in subsidized housing, some logical

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Subsidized Housing Don't Have to be Evicted, Feds Say, WESTWORD (Mar. 18, 2011, 2:32 PM), http://www.westword.com/news/medical-marijuana-patients-in-subsidized-housing-dont-have-to-be-evicted-feds-say-5852226.

88. *See infra* Section VI.A.3.

89. *The Intersection of Medical Marijuana and Disability Laws in Maryland*, WHITEFORD, TAYLOR & PRESTON LLP (Dec. 1, 2017), https://www.wtplaw.com/documents/2017/12/the-intersection-of-medical-marijuana-and-disability-laws-in-maryland; *see infra* Section VI.A.3.

90. *The Intersection of Medical Marijuana and Disability Laws in Maryland*, *supra* note 89, at 4 (discussing how most claims arise out of employment law). *Compare* DEL. CODE ANN. tit. 16 § 4905A (West 2018), *and* Barbuto v. Advantage Sales and Mktg., L.L.C., 78 N.E.3d 37, 40 (Mass. 2017), *with* Coats v. Dish Network, L.L.C., 303 P.3d 147, 150–51 (Colo. App. 2013).

91. *The Intersection of Medical Marijuana and Disability Laws in Maryland*, *supra* note 89, at 4–6; *see* DEL. CODE ANN. tit. 16, § 4905A (West 2018); N.Y. PUB. HEALTH LAW § 3369 (McKinney, West 2018); 35 PA. STAT. AND CONS. STAT. ANN. §10231.2103(b) (West 2018).

92. 35 PA. STAT. AND CONS. STAT. ANN. §10231.2103(b) (West 2018).

93. *The Intersection of Medical Marijuana and Disability Laws in Maryland*, *supra* note 89; *see infra* Section VI.A.3 and accompanying text.

conclusions can be drawn.[94] Given the large percentage of disabled individuals that reside in federally subsidized housing, the issue will likely continue to impact an increasingly significant portion of the population as the amount of marijuana prescriptions continues to rise.[95] According to the HUD Resident Characteristics Report, 17% (573,979 individuals) of all program recipients in the U.S. are elderly and disabled, and 25% (718,422 individuals) are non-elderly and disabled.[96] As of May 2018, there was estimated to be 2,132,777 medical marijuana users in the U.S.[97] While statistics that synthesize these figures are not available, one can logically conclude that there is overlap and thus potential for discrimination under the current regulations and laws.

Furthermore, these policies disproportionately affect minority communities in states where subsidized housing residents predominantly consist of these populations.[98] While nationally, the heads of households in all programs are 49% white and 46% African American, these statistics change drastically when looking at states with legal medical marijuana that have large minority populations in subsidized housing.[99] For instance, in Delaware, 88% of household heads in subsidized housing units are African American.[100] Thus, when applied, prohibiting tenants in Delaware from utilizing medical marijuana would disproportionately impact African Americans.

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94. *See infra* notes 95–100.
95. *Resident Characteristics Report (RCR)*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/systems/pic/50058/rcr (last visited Nov. 10, 2018) [hereinafter *HUD Resident Characteristics Report*]. Select program type as "all relevant programs," then select level of information as "National" and select "TTP."
96. *Id.* Effective dates included are September 1, 2016 through December 31, 2017.
97. *Number of Legal Medical Marijuana Patients*, PROCON, https://medicalmarijuana.procon.org/view.resource.php?resourceID=005889 (last updated May 18, 2018).
98. *See infra* notes 99–100.
99. *HUD Resident Characteristics Report*, *supra* note 95. Select "All Relevant Programs," then select "National," and then select "Race/Ethnicity"; Badger, *supra* note 62.
100. *HUD Resident Characteristics Report*, *supra* note 95. Select program type as "All Relevant Programs," select level of information as "State," select "Delaware," then select "Race/Ethnicity."

V. COMMUNITY CONSEQUENCES OF MARIJUANA RELATED EVICTIONS

Evicting or denying housing to medical marijuana users also carries deleterious community consequences.[101] First, policies that encourage eviction leave the door wide open to homelessness.[102] In fact, eviction is the leading cause of homelessness.[103] This is an especially tangible threat when an individual's income is sufficiently low so as to be eligible for federal subsidies.[104] If someone's income is meager enough to qualify, that person likely does not have any additional financial options for housing.[105] This is particularly true given the increasingly grave crisis surrounding the lack of affordable housing in the U.S.[106]

Furthermore, medical marijuana patients are often unable to work due to their underlying condition, which forces them to rely on social safety nets such as disability and subsidized housing.[107] When the "final option for people in financial straits" is subsidized housing, pulling the rug out from these under individuals inevitably leads to an increase in the homeless population.[108]

Moreover, the threat of eviction is even greater if the landlord has initially acquiesced to the drug use, but then later moves to evict using the marijuana as a pretext when the tenant attempts to report substandard living conditions in the unit.[109] This threat of retaliatory eviction may lead medical marijuana users to remain quiet about poor living conditions to avoid provoking the landlord or drawing attention to themselves.[110] Allowing these situations invites abuse by

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101. Koehler, *supra* note 59.
102. Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction* 2 (Inst. for Res. on Poverty, No. 22–2015, Mar. 2015), https://www.irp.wisc.edu/publications/fastfocus/pdfs/FF22-2015.pdf.
103. *Id.* at 4.
104. Koehler, *supra* note 59.
105. *Id.*
106. *See* Pam Fessler, *Lack of Affordable Housing Puts the Squeeze on Poor Families*, NAT'L PUB. RADIO (May 27, 2014, 3:23 AM), https://www.npr.org/2014/05/27/316110665/lack-of-affordable-housing-puts-the-squeeze-on-poor-families.
107. Letter from Michael Steinberg, Legal Dir., ACLU of Mich., to Chris LaGrand, Gen. Couns. and Dir. of Legal Aff., Mich. State Hous. Dev. Auth. 6 (Mar. 17, 2011), http://www.aclumich.org/sites/default/files/Letter%20to%20Chris%20LaGrand(1).pdf.
108. Koehler, *supra* note 59.
109. *Id.*
110. *Id.*

landlords and unjust evictions, potentially leading to increased homelessness.[111]

Even when eviction is not a direct route to homelessness, it invariably causes residential instability, which then frequently leads to other forms of instability–such as educational, vocational, and familial.[112] Consequently, an eviction perpetuates a cycle of poverty that creates instability in communities and families.[113] For these reasons, it is in the community's best interest to limit the avenues to eviction.[114] Policies should favor keeping tenants in their homes and providing alternatives to eviction for individuals with medical needs when they pose no threat.[115]

Additionally, allowing medical marijuana patients to utilize medicine in their homes could help stem the current opiate crisis in the U.S.[116] A common sentiment among patients who are prescribed marijuana is a feeling of relief that there is an alternative to taking addictive painkillers.[117] In fact, in 2014, one study found that opioid painkiller deaths were "nearly 25% lower in states that permitted medical marijuana."[118] While this and other studies do not explicitly target individuals in subsidized housing in relation to limiting opioid use, it stands to reason that prohibiting tenants from using marijuana may leave them with no alternative besides addictive opioids if they want to keep their homes. Injecting more opioids into the market exacerbates an ongoing public health epidemic that kills over 100 Americans every day and costs the U.S. economy hundreds of billions of dollars each year.[119] Accordingly, it would be beneficial

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111. *Id.*; *see also* Desmond, *supra* note 102, at 4.
112. Desmond, *supra* note 102, at 4.
113. Editorial, *Evictions Perpetuate Baltimore's Cycle of Poverty*, BALT. SUN (May 8, 2017, 12:36 PM), http://www.baltimoresun.com/news/opinion/editorial/bs-ed-eviction-20170508-story.html. For instance, a Milwaukee Area Renters Study found that renters who were evicted "were almost 25 percent more likely to experience long-term housing problems" than non-evicted renters. Desmond, *supra* note 102, at 4.
114. Desmond, *supra* note 102, at 5.
115. *Id.* at 4.
116. Greg Miller, *Could Pot Help Solve the U.S. Opioid Epidemic?*, SCI. MAG. (Nov. 3, 2016, 2:00 PM), https://www.sciencemag.org/news/2016/11/could-pot-help-solve-us-opioid-epidemic.
117. *Id.*; *see* Solomon, *supra* note 1.
118. Miller, *supra* note 116. Another study found that "[i]n medical marijuana states, each physician prescribed an average of 1826 fewer doses of conventional pain medication each year." *Id.*
119. Lucia Mutikani & Ginger Gibson, *Opioid Crisis Cost U.S. Economy $504 Billion in 2015: White House*, REUTERS (Nov. 21, 2017, 4:31 PM), https://www.reuters.com/article/legal-us-usa-opioids-cost/opioid-crisis-cost-u-s-economy-504-billion-in-2015-white-house-idUSKBN1DL2Q0.

for courts, legislatures, and landlords to recognize the choice they are putting before tenants and provide explicit exceptions.

VI. MEDICAL MARIJUANNA AND CONSTITUTIONAL DOCTRINE OF PREEMPTION

The issue at the heart of this juxtaposition between federal and state law lies in the constitutional doctrine of federal preemption. This principle is rooted in the Supremacy Clause of the U.S. Constitution that states federal law is the "supreme [l]aw of the [l]and."[120] In other words, state and local laws are subservient to federal laws in certain areas where they conflict.[121] There are three types of preemption: field, express, and conflict preemption.[122]

Field preemption occurs when "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'"[123] Express preemption is when there is "language in the federal statute that reveals an explicit congressional intent to pre-empt state law."[124] Conflict preemption applies when the state and federal statutes directly conflict so that "compliance with both federal and state regulations is a physical impossibility."[125] While there may be an argument that all three types of preemption are potentially at issue in the discussion of marijuana in subsidized housing, conflict preemption is likely the most accurate categorization and courts have largely treated it as such.[126]

Despite this apparent hurdle, when analyzing a preemption issue in an area of law traditionally occupied by the states, there is a strong

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120. U.S. CONST. art. VI, cl. 2.
121. *The Basics on Preemption*, AM. BAR ASS'N 1, http://apps.americanbar.org/abastore/products/books/abstracts/5010047samplechp_abs.pdf (last visited Nov. 10, 2018).
122. Forest City Residential Mgmt., Inc. *ex rel.* Plymouth Square Ltd. Dividend Hous. Ass'n. v. Beasley, 71 F. Supp. 3d 715, 726 (E.D. Mich. 2014).
123. Cipollone v. Liggett Grp., 505 U.S. 504, 516 (1992) (quoting Fid. Fed. Sav. & Loan Ass'n. v. De la Cuesta, 458 U.S. 141, 153 (1982)).
124. Barnett Bank, N.A. v. Nelson, 517 U.S. 25, 31 (1996)*; see also* Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (applying a "plain statement rule" requiring a federal statute to contain a plain statement in order to preempt state law).
125. Pinney v. Nokia, Inc., 402 F.3d 430, 457 (4th Cir. 2005) (quoting Hillsborough Cty v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985)).
126. *See, e.g.*, *Beasley*, 71 F. Supp. 3d at 726–27 (holding that the CSA did "not contain an express preemption provision" and Congress did not intend to leave no room for state involvement, and thus conflict preemption applied).

presumption against preemption.[127] A court "starts with the assumption that the historic police powers of the States are not to be superseded by federal act unless that is the clear and manifest purpose of Congress."[128] Thus, courts must first consider the congressional intent of the federal statute when determining whether it should preempt state law in these areas.[129]

In regard to the general body of marijuana laws, it is clear that courts have not viewed federal law as completely preempting state law in this arena.[130] This is evident by the fact that states have been permitted to enact laws legalizing marijuana with little interference by the federal government.[131] In fact, the federal government has adopted an informal policy of non-enforcement for individuals utilizing marijuana legally under state law.[132] Furthermore, once legalized on a state level, the federal government cannot mandate a state to use its own resources to enforce federal law.[133]

The language of the CSA itself suggests that Congress did not intend for it to replace all state drug laws.[134] No provision of the CSA is intended "to occupy the field in which that provision operates . . . to the exclusion of any State law . . . unless there is a *positive conflict* between [the CSA provision] and that State law so that the

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127. Chateau Foghorn LP v. Hosford, 168 A.3d 824, 827, 838 (Md. 2017). "[A] court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, preemption will not lie unless it is 'the clear and manifest purpose of Congress.'" CSX Transp. v. Easterwood, 507 U.S. 659, 664 (1993) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

128. *Cipollone*, 505 U.S. at 516 (quoting *Rice*, 331 U.S. at 230).

129. Michael A. Cole, Jr., *Function Preemption: An Explanation of How State Medicinal Marijuana Laws Can Coexist with the Controlled Substances Act*, 16 MICH. ST. U.J. MED. & L. 557, 561 (2012).

130. TODD GARVEY, CONG. RESEARCH SERV., R42398, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS 7–8 (2012).

131. *Id.* States have generally had the freedom to do so under a non-enforcement policy enacted under the Obama administration in 2009 and codified in the Rohrabacher-Farr Amendment in 2014, in which the Department of Justice has declined to federally prosecute individuals utilizing marijuana legally under state law. Cole, *supra* note 129, at 563; *see also* Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, § 542, 129 Stat. 2322, 2332–33 (2015).

132. GARVEY, *supra* note 130, at 3; Memoranda from David W. Odgen, Dep. Att'y Gen., to Selected U.S. Att'ys (Oct. 19, 2009), http://www.scc4.us/Portals/20/pdfs/legislation/DOJ%20Odgen%20Memo%20and%20Subsequent%20DOJ%20Clarifications.pdf.

133. GARVEY, *supra* note 130, at 3; *see* Printz v. United States, 521 U.S. 898, 935 (1997) (establishing that the federal government is prohibited from compelling states to enact or enforce federal law).

134. GARVEY, *supra* note 130, at 8–9.

two cannot consistently stand together."[135] This "positive conflict" language, although drawing little attention at the time the CSA was adopted, has frequently been litigated with little consensus on its exact meaning.[136] However, it does suggest that Congress did not intend to preempt state drug laws in all circumstances.[137] Moreover, it should be noted that while federal law can preempt state laws that regulate the drug, it cannot preempt laws that legalize it, such as state criminal laws regarding possession.[138]

Despite the long leash state marijuana laws that have been allowed, this analysis shifts when discussing marijuana laws in the area of subsidized housing because the system is administered by the federal government through HUD, and tenants are thus subject to their regulations.[139] More specifically, the Quality Housing and Work Responsibility Act of 1998 (QHWRA) becomes the controlling authority in this context, which requires owners of federally assisted housing to place restrictions on medical marijuana use.[140]

A. *Arguments Overcoming Federal Preemption*

1. A Presumption Against Preemption Applies in Areas of Law Traditionally Governed by State Law and Where Congress Lacks Intent to Preempt

The strongest argument overcoming the federal preemption issue focuses on the presumption against preemption and the congressional intent in areas of law traditionally regulated by the states.[141] Most states have specific housing statutes providing protections against

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135. 21 U.S.C. § 903 (2012) (emphasis added).

136. Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 11–15 (2013). Effective state marijuana laws bear these concerns in mind and are generally crafted to avoid a physical impossibility in complying with both state and federal law. *State Medical Cannabis Laws Are Not Preempted by Federal Law*, MARIJUANA POL'Y PROJECT, https://www.mpp.org/issues/medical-marijuana/state-medical-cannabis-laws-are-not-preempted-by-federal-law/ (last visited Nov. 10, 2018).

137. GARVEY, *supra* note 130, at 8.

138. Mikos, *supra* note 136, at 15–16.

139. HUD Memo 2014, *supra* note 79. "HUD provides PHAs with funds to administer [housing programs]; PHAs are in turn required to comply with HUD Regulations and requirements in order to continue receiving funding." Renteria, *supra* note 87.

140. 42 U.S.C § 13662(a)(1) (2012) ("[PHA] shall establish standards or lease provisions . . . that allow the agency or owner to terminate the tenancy or assistance for any household with a member who the [PHA] determines is illegally using a controlled substance.").

141. *See* discussion *infra* Section VI.A.1.

unjust evictions.[142] The presumption against preemption applies to these statutes because landlord-tenant law is traditionally governed by state law.[143] An analysis of the congressional intent, in combination with this presumption, demonstrates that these statutes are not meant to be preempted by HUD mandates regarding drug use in public housing.[144] Hence, a case-by-case evaluation of whether the eviction is legal under state law is not precluded in the public housing context.[145]

An emerging body of law supports this notion.[146] In 2017, for instance, the Court of Appeals of Maryland held in *Chateau Foghorn LP v. Hosford* that the state housing statute requiring that a breach of a lease be "substantial and warrant[] an eviction" is "not preempted under the doctrine of conflict preemption by federal provision mandating lease terms for Section 8 project-based housing that provide that 'any drug-related criminal activity on or near such premises . . . shall be cause for termination of tenancy.'"[147] The court reached this conclusion by applying "a heightened presumption against federal preemption" because landlord-tenant law is an area squarely within state power.[148]

The question for the court then became whether the state statute requiring a housing violation to be "substantial" and to "warrant[] an eviction" conflicted with the congressional intent "behind the mandatory lease provisions at issue."[149] The court ultimately held that it did not conflict because "Congress intended that housing providers . . . would have substantial discretion to bring an eviction action . . . And Congress intended that such an eviction action would

142. *See, e.g.*, COLO. REV. STAT. ANN. § 13-40-107.5 (West 2018); N.J. STAT. ANN. § 2A:18-61.1 (West 2018); CONN. GEN. STAT. § 47a-23c (West 2018).

143. Chateau Foghorn LP v. Hosford, 168 A.3d 824, 841 (Md. 2017).

144. *See infra* Section VI.A.1; *Chateau Foghorn LP*, 168 A.3d at 856–57.

145. *See infra* Section VI.A.1; *Chateau Foghorn LP*, 168 A.3d at 856–57.

146. *See infra* Section VI.A.1.

147. *Chateau Foghorn LP*, 168 A.3d at 857 (quoting MD. CODE ANN., REAL PROP. § 8–402.1 (West 2018)); *id.* at 856 (quoting 42 U.S.C. § 1437(d)(1)(B)(iii) (2012)). The Respondent in *Chateau Foghorn*, Wesley Hosford, was a severely disabled man living in Section 8 housing and utilizing medical marijuana to treat "muscle spasms and sensations [that left] him in daily pain." *Id.* at 827.

148. *Id.* at 841; *see also* Powers v. United States Postal Serv., 671 F.2d 1041, 1045 (7th Cir. 1982) (holding that there is no federal common law in the area of landlord-tenant law).

149. *Chateau Foghorn LP*, 168 A.3d at 835; REAL PROP. § 8-402.1(b)(1) (permitting eviction only where (1) a tenant breaches the lease, (2) the breach is substantial, and (3) the breach warrants eviction).

proceed in accordance with state landlord-tenant law provisions and procedures."[150]

Furthermore, the court interpreted the core congressional intent behind the mandatory leasing provision as being a desire to deter "drug-related criminal activity that threatened the health or safety of residents, or threatened to do significant damage to housing properties."[151] This supports the argument against preemption because state courts can easily identify "equitable considerations that may merit leniency," as opposed to situations where there is a threat to "the safety of others . . . and the integrity of the housing project."[152] Thus, the congressional intent of these statutorily required provisions was not frustrated by the state statute and the challenge did not overcome the presumption against preemption.[153]

Applying the Maryland state housing statute without constraints by federal law, marijuana use would then need to be substantial and warrant eviction in order to terminate the tenancy.[154] This type of analysis mandates that state courts "weigh equitable factors before evicting a tenant and granting possession to a landlord."[155] Thus, the court would be able to identify when someone is peacefully using prescribed medicine in the home versus a situation that poses a threat to person or property.[156]

Although the court in *Chateau Foghorn* declined to go beyond the preemption conclusion, the use of marijuana to treat medical ailments by itself is likely insufficient to constitute a substantial breach of the lease and should not per se warrant eviction.[157] A substantial breach is an extremely high standard and generally requires actions that endanger the property or a person.[158] Where there is no damage to property, no distribution to unauthorized users, and the tenant behaves respectfully towards neighbors with regard to use, it is unlikely a court would find a substantial breach that warrants

150. *Chateau Foghorn LP*, 168 A.3d at 848.
151. *Id.* at 849.
152. *Id.*
153. *Id.* at 857.
154. *See* REAL PROP. § 8-402.1(b)(1). The *Chateau Foghorn* court explicitly declined to reach this issue. *Chateau Foghorn LP*, 168 A.3d at 834 n.13.
155. *Chateau Foghorn LP*, 168 A.3d at 842.
156. *Id*.
157. *Cf. id.* (emphasis omitted).
158. *Breach of Lease in Marylan*d, THE PENDERGRAFT FIRM, L.L.C., https://tpf.legal/breach-of-lease/ (last visited Nov. 10, 2018); *see* COLO. REV. STAT. § 13-40-107.5(3) (West 2018) (defining substantial violation as an act which "substantially endangers the property of the landlord, any co-tenant, or any person living on or near the premises").

eviction.[159] Even if a neighbor or landlord were to have an issue with the marijuana use, for instance because of the smell,[160] the landlord, at his discretion, could likely take alternate steps to resolve the issue before leaping to eviction.[161] Although the language of eviction protection statutes vary by state, it is unlikely medical marijuana use on its own would violate the standards set by these laws.[162]

The Court of Appeals of Maryland was not the first to adopt the idea that federal drug law should not preempt certain state housing laws.[163] For example, in *Eastern Carolina Regional Housing Authority v. Lofton*, the Court of Appeals of North Carolina held in 2014 that federal marijuana law does not preempt state summary judgment common law, which requires equitable consideration when the effects of the eviction would be unconscionable.[164] The *Lofton* court followed a similar analysis to the court in *Chateau Foghorn*.[165] It applied a heightened presumption against preemption under a conflict presumption analysis, and determined that this unconscionability requirement was not preempted by federal law.[166] The Court held that the requirement does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[167]

Since most states have similar statutory requirements that necessitate a certain equitable standard be met prior to initiating eviction proceedings, the rationale applied in *Foghorn* and *Lofton* should be considered by other states courts when assessing this

159. *Cf. Landlords, Leases, and Marijuana*, TENANT VERIFICATION SERV., INC. (Jan. 16, 2017), http://www.landlordtalking.com/tips/tenant-screening/landlords-leases-and-marijuana/ (noting that state laws differ, indicating that it is unclear whether a court would determine there is a substantial violation of rights).

160. Schuman v. Greenbelt Homes, Inc., 69 A.3d 512, 520 (Md. Ct. Spec. App. 2013) (citation omitted) (holding that smoking does not, per se, rise to the level of a common law public nuisance).

161. *Cf.* Koehler *supr*a note 59 (suggesting that, at the very least, the compromise of creating designated smoking areas is a viable option).

162. *See supra* note 142.

163. Respondent's Brief at 29–32, Chateau Foghorn LP v. Hosford, 168 A.3d 824 (Md. 2017) (No. 73).

164. E. Carolina Reg'l Hous. Auth. v. Lofton, 767 S.E.2d 63, 69–70 (N.C. Ct. App. 2014), *aff'd on other grounds*, 789 S.E.2d 449 (N.C. 2016).

165. *Compare E. Carolina Reg'l Hous. Auth.*, 767 S.E.2d at 69–71 *with Chateau Foghorn LP*, 168 A.3d at 841–57.

166. *Lofton*, 767 S.E.2d at 53.

167. *Id.* at 71 (quoting Guyton v. FM Lending Servs., 681 S.E.2d 465, 476 (N.C. Ct. App. 2009)).

conflict between state and federal law in order to accurately protect tenant rights.[168]

2. Courts Have Been Reluctant to Recognize Constitutional Arguments and Defenses to Medical Marijuana Use

There have been numerous other attempts to overcome federal preemption on the medical marijuana issue through the assertion of either affirmative defenses or constitutional rights.[169] For instance, there is a substantial body of law surrounding the common law medical necessity defense, as well as Fourteenth Amendment Due Process violations and privacy rights.[170] Although courts have largely rejected these arguments, some aspects still have merit and warrant discussion.[171]

First, the availability of the common law necessity defense in order to avoid civil or criminal liability related to marijuana remains somewhat of an open question.[172] The Ninth Circuit acknowledged in *Raich v. Gonzales* that the common law necessity defense in the medical marijuana context may be utilized to prevent criminal liability under narrow circumstances.[173] In order to prove a common law necessity defense in this context, the patient would have to show that marijuana use was the lesser of two evils,[174] acute chronic pain would occur if the defendant stopped using marijuana, a reasonable causal connection,[175] and there was no legal alternative rather than to violate the law.[176] While this is an extremely high bar to meet, the relevant case law does not expressly foreclose it.[177]

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168. *See supra* notes 121–22, 127–47 and accompanying text.
169. *See supra* Section VI.A.1.
170. *See infra* notes 172–91 and accompanying text.
171. *See infra* notes 172–91 and accompanying text.
172. United States v. Scarmazzo, 554 F. Supp. 2d 1102, 1105–06 (E.D. Cal. 2008); *see also* United States v. Oakland Cannabis Buyer's Coop., 532 U.S. 483, 499–503 (2001) (Stevens, J., concurring).
173. Raich v. Gonzales, 500 F.3d 850, 858–61 (9th Cir. 2007); *but see* Oakland Cannabis Buyer's Coop., 532 U.S. at 489–91.
174. *Scarmazzo*, 554 F. Supp. 2d at 1106 ("[A] doctor's testimony that cannabis, as medicine, is absolutely necessary or precipitous medical deterioration or death would result to a patient-user for whom C/MT had been prescribed.").
175. *Id.* ("[I].e., a doctor testifies that the . . . medical condition can only be alleviated by the need to use marijuana.").
176. *Id.* ("[A] doctor must testify that the Defendant has used all other medications and there is no alternative medicine that will work to alleviate intolerable conditions or effects.").
177. *Id.*

Additionally, the U.S. Supreme Court in *United States v. Oakland Cannabis Buyers' Coop.* held that the medical necessity defense is not available for the manufacturing and distribution of marijuana because it is at odds with the CSA.[178] However, in his concurrence, Justice Stevens explicitly highlights that the majority holding fails to answer the question of whether the defense would be available for a "seriously ill patient for whom there is no alternative means of avoiding . . . extraordinary suffering."[179]

Although the Supreme Court has not directly opined on the availability for the common law necessity defense for civil liability related to marijuana use, it stands to reason that the same standards would apply.[180] Thus, if tenants could prove the elements, they may be able to utilize the necessity defense to challenge their eviction and overcome the preemption issue.[181]

The *Raich* court also rejected the substantive due process argument by holding that the asserted right to use medical marijuana is not fundamental enough to warrant protection under the Fourteenth Amendment Due Process Clause.[182] However, the court did not entirely close the door on this argument.[183] In dicta, the court stated, based on the history of medical marijuana legalization, that a day may come when it is considered to be a fundamental right.[184] Thus, as medical marijuana becomes increasingly accepted by society and becomes "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," a substantive due process argument may indeed become viable.[185]

Similarly positioned under the umbrella of due process, courts have largely rejected the "right to privacy" argument.[186] Unlike the right to have an abortion[187] or same-sex marriage,[188] "no court has acceded to the notion that the right to privacy encompasses an affirmative

178. United States v. Oakland Cannabis Buyer's Coop., 532 U.S. 483, 494–95 (2001).
179. *Id.* at 500–01 (Stevens, J., concurring).
180. *See supra* notes 174–77 and accompanying text.
181. *See supra* notes 174–77 and accompanying text.
182. Raich v. Gonzales, 500 F.3d 850, 861–86 (9th Cir. 2007); U.S. CONST. amend. XIV, § 1.
183. *Id.* at 866.
184. *Id.*
185. *Id.* at 862–66.
186. *See, e.g.*, Montana Cannabis Indus. Ass'n v. State, 286 P.3d 1161, 1167–68 (Mont. 2012) (discussing various courts that rejected a right to privacy argument in the context of drug possession).
187. *See* Roe v. Wade, 410 U.S. 113, 164–65 (1973).
188. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015).

right to access a particular drug or treatment."[189] In a rare exception, the Supreme Court of Alaska held "no adequate justification for the state's intrusion into the citizen's right to privacy" exists to prohibit the possession of marijuana by an adult for personal use in the home.[190] Unfortunately, most courts have declined to adopt this same rationale.[191]

3. Allowing Medical Marijuana Use in Subsidized Housing Should Be Recognized as a Reasonable Accommodation Under the Fair Housing Act and Section 504 of the Rehabilitation Act

Another avenue around federal preemption is recognizing medical marijuana use as a reasonable accommodation for reasons of disability under both the Fair Housing Act (FHA) and Section 504 of the Rehabilitation Act (Section 504).[192]

Under the FHA, it is discriminatory to refuse to "make reasonable accommodations in rules, policies, practices, or services when such accommodations are necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling."[193] In order to claim a reasonable accommodation under the FHA, a "plaintiff must establish that the proposed modification is both reasonable and necessary."[194] An accommodation is considered reasonable "when it imposes 'no fundamental alteration in the nature of the program' or 'undue financial and administrative burdens.'"[195] The

189. *Mont. Cannabis Indus. Ass'n*, 286 P.3d at 1167.

190. Ravin v. State, 537 P.2d 494, 511 (Alaska 1975).

191. *See* State v. Mallan, 950 P.2d 178, 188 (Haw. 1998); Hennessey v. Coastal Eagle Point Oil Co., 589 A.2d 170, 176 (N.J. 1991); State v. Anderson, 558 P.2d 307, 309 (Wash. 1976).

192. Civil Rights Act of 1968 [hereinafter FHA], 42 U.S.C. § 3604(f) (2012); *see also Disability Rights in Housing*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/disabilities/inhousing (last visited Nov. 10, 2018); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504 [hereinafter Section 504]; *Section 504: Frequently Asked Questions*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/disabilities/sect504faq#anchor252576 (last visited Nov. 10, 2018).

193. *Reasonable Accommodations Under the Fair Housing Act*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/ReasonableAccommodations15 (last visited Nov. 10, 2018); *see also* Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. § 3604(f) (2012).

194. Forest City Residential Mgmt. v. Beasley, 71 F. Supp. 3d 715, 728 (E.D. Mich. 2015) (citing Hollins v. Chestnut Bend Homeowners Ass'n, 760 F.3d 531, 542 (6th Cir. 2014)).

195. *Id.* (quoting Smith & Lee Assocs., Inc. v. City of Taylor, 102 F.3d 781, 795 (6th Cir. 1996)).

accommodation is necessary when, "but for the requested accommodation or modification, [plaintiffs] 'likely will be denied an equal opportunity to enjoy the housing of [their] choice.'"[196] By these definitions, it is clear that medical marijuana use is a reasonable accommodation because the use does not present a burden and, without such accommodation, the patient will likely be denied his choice of housing.

Despite this, a Sixth Circuit federal district court in *Forest City Residential Mgmt. v. Beasley* examined whether medical marijuana qualified as a reasonable accommodation under the FHA and determined it did not.[197] The court held that allowing the accommodation would "fundamentally alter the nature" of the landlord's operations "by thwarting Congress's mission to provide drug-free federally assisted housing."[198] This line of reasoning is flawed because it is grounded in the notion that medical marijuana inherently poses a threat to property or the safety of other renters.[199] Thus, it ignores those individuals who are prescribed medical marijuana and use their medicine peacefully in their homes without threatening property or other tenants.[200]

Furthermore, the court in *Forest City Residential Mgmt.* reasoned that recognizing this accommodation would require the landlord to violate federal law and that such a requirement would change the nature of his operations.[201] However, this logic is circular because if the reasonable accommodation was permissible or an exception was created, there would be no violation of federal law.[202] Similarly, if the federal government continues its policy of declining to prosecute individuals using marijuana legally under state law, there would be no practical alteration of landlord operations since they would remain secure under the current non-enforcement policies.[203] Thus, courts should decline to find accommodations for marijuana to be per se

196. *Hollis*, 760 F.3d at 541 (quoting Bronk v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995)).
197. *Forest City Residential Mgmt.*, 71 F. Supp. 3d at 727–28, 732.
198. *Id.* at 730. Although this court determined that a reasonable accommodation under FHA or Section 504 was not appropriate, they declined to decide whether a landlord may actually evict a tenant on this basis and left that question to the state courts. *Id.* at 732.
199. *Id.* at 724.
200. *See supra* Section VI.A.1.
201. *Forest City Residential Mgmt.*, 71 F. Supp.3d at 730.
202. *Cf. id.*
203. *See* Lisa Rough, *The Cole Memo: What Is It and What Does It Mean?*, LEAFLY (Sept. 14, 2017), https://www.leafly.com/news/cannabis-101/what-is-the-cole-memo.

unreasonable.[204] Instead, they should weigh equitable factors on a case-by-case basis when determining whether an accommodation is warranted.[205]

Similar to the FHA, Section 504 of the Rehabilitation Act also encompasses the concept of a reasonable accommodation, but in regard to accessing programs receiving federal funding.[206] In short, an individual with a disability cannot be excluded from participating in a HUD-funded program solely on the basis of their disability.[207] Under this provision, "[a] reasonable accommodation is a change, adaptation or modification to a policy, program, service, or workplace which will allow a qualified person with a disability to participate fully in a program, take advantage of a service, or perform a job."[208] For a reasonable accommodation to be deemed necessary, "there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability."[209] Reasonableness is then "determined on a case-by-case basis."[210]

The common argument against applying Section 504 to medical marijuana users is that the discrimination is not based on the disability but instead based on the drug use.[211] This reasoning still ignores the underlying factors at issue and is rooted in an ignorance of medical marijuana use. The need to use medical marijuana to treat the symptoms of a disability or disease has an "identifiable relationship" or "nexus" to that disability in the same way an entrance ramp is linked to being wheelchair-bound.[212] Having established the necessity, courts should then determine the

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204. Barbuto v. Advantage Sales and Mktg., L.L.C., 78 N.E.3d 37, 46 (Mass. 2017) ("To declare an accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of [state] voters, shared by the legislatures or voters in the vast majority of States, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions.").
205. Steinberg, *supra* note 107, at 3.
206. *Section 504: Frequently Asked Questions*, *supra* note 192.
207. *Section 504: Frequently Asked Questions*, *supra* note 192. Note that in this context, Section 504 is in effect the federal counter-part to Title II of the Americans with Disabilities Act (ADA), which mandates similar protections from state and local entities. 42 U.S.C. § 12131 (2012).
208. *Section 504: Frequently Asked Questions*, *supra* note 192.
209. *Id.*
210. *Id.*
211. *See Forest City Residential Mgmt.*, 71 F. Supp. 3d at 731.
212. *Cf. Section 504: Frequently Asked Questions*, *supra* note 192. A wheelchair-accessible entrance ramp is recognized as a reasonable accommodation. *See id.*

reasonableness of the accommodation on a case-by-case basis as opposed to a blanket prohibition.[213]

VII. RECOMMENDATIONS

No one should be forced to choose between their medicine and home.[214] There are a multitude of options available to prevent this tragedy from occurring.[215] The most drastic solution would be to make the issue moot by legalizing marijuana use altogether.[216] Another option would be to reschedule marijuana under the CSA through congressional or administrative action.[217] While these changes would certainly eliminate the problem, the tug of war seen thus far in the marijuana legalization movement does not bode well for the implementation of radical solutions such as these any time soon.[218] The debate over marijuana remains contentious and will almost certainly not be solved overnight.[219]

A more realistic solution in the short term would be to encourage states to adopt eviction control laws requiring broad protections and standards be met to warrant an eviction (*e.g.*, "substantial" and "warrants eviction").[220] Courts should then exercise their judicial discretion to weigh equitable factors when deciding whether a person actually poses a threat to property or others and recognize that federal law does not preempt these landlord-tenant statutes.[221]

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213. *See Forest City Residential Mgmt.*, 71 F. Supp. 3d at 728.
214. *See supra* notes 1–17 and accompanying text.
215. *See infra* Part VI.
216. *Cf.* Summer Meza, *Legalizing Marijuana Nationwide Would Create One Million Jobs, Study Says*, NEWSWEEK (Jan. 11, 2018, 6:29 PM), http://www.newsweek.com/legal-marijuana-create-one-million-jobs-decade-778960 (citing the economic benefits that legalizing marijuana would have on the U.S. economy).
217. John Hudak & Grace Wallack, *How to Reschedule Marijuana, and Why It's Unlikely Anytime* Soon, BROOKINGS INST. (Feb. 13, 2015), https://www.brookings.edu/blog/fixgov/2015/02/13/how-to-reschedule-marijuana-and-why-its-unlikely-anytime-soon/. Many bills to this end have been proposed in Congress only to die in committee. *Id.*
218. Avantika Chilkoti, *States Keep Saying Yes to Marijuana Use. Now Comes the Federal No*, N.Y. TIMES (July 15, 2017), https://www.nytimes.com/2017/07/15/us/politics/marijuana-laws-state-federal.html.
219. *See id.*; Patrick Kennedy & Kevin Sabet, *This Is No Time to Go to Pot*, WALL ST. J. (June 14, 2018, 7:13 PM), https://www.wsj.com/articles/this-is-no-time-to-go-to-pot-1529018027.
220. *See supra* Section VI.A.1; *see also* Nicole Gon Ochi, *The California Tenant Stability Act: A Solution for Renters Affected by the Foreclosure Crisis*, 17 GEO. J. POVERTY L. & POL'Y 51, 65 (2010).
221. *See supra* Section VI.A.1.

Another valid solution would be to recognize medical marijuana use in subsidized housing as a reasonable accommodation under the FHA and Section 504.[222] This would eliminate liability on the part of landlords and assuage any fear they may have about allowing the use of medical marijuana in their units.[223] Forcing people to choose between their home and medicine is a precise denial of "an equal opportunity to enjoy the housing of [their] choice."[224] Thus, it is necessary to recognize medical marijuana use as a reasonable accommodation under the FHA and Section 504.[225] Similarly, recognizing medical marijuana use as a valid treatment option would complement the emerging state legislative trend in the employment context that prohibits employers from discriminating against medical marijuana users.[226]

Furthermore, HUD should rescind or revise the HUD Memos that take a hard line position on the issue and provide for exceptions in cases where sick or disabled patients need to use medical marijuana in their subsidized homes.[227] Rather than providing vague discretion to landlords, who are often wary about potentially violating federal law for fear of losing their contracts, the exceptions should be overt and instead provide protections from predatory landlords.[228]

At a minimum, HUD should allow landlords to include explicit exceptions for marijuana use in their individual leases if they wish.[229] Revising the HUD regulations and guidelines to create these exceptions would also provide the courts with more equitable latitude to ensure peaceful medical marijuana patients are not evicted for treating their ailments.[230]

Education can also play a large role. Although landlords are not allowed to adopt an exception to the federal mandate in a lease agreement under the current rules, they can choose to let medical

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222. *See supra* Section VI.A.3.
223. *See supra* Section VI.A.3.
224. Hollis v. Chestnut Bend Homeowners Ass'n, 760 F.3d 531, 541 (6th Cir. 2014) (alteration in original) (quoting Smith & Lee Assocs. v. City of Taylor, 102 F.3d 781, 795 (6th Cir. 1996)).
225. *See supra* Section VI.A.3.
226. *The Intersection of Medical Marijuana and Disability Laws in Maryland*, *supra* note 89.
227. HUD Memo 2011, *supra* note 79; HUD Memo 2014, *supra* note 79; *see also* Renteria, *supra* note 87.
228. *HUD Issues Memo on Use of Marijuana in Multifamily Properties*, *supra* note 66.
229. *Contra* HUD Memo 2014, *supra* note 79.
230. *See supra* notes 151–56 and accompanying text.

marijuana users remain in their homes rather than evicting them.[231] HUD permits landlords to use discretion on this point, which protects them from liability.[232] Landlords should be made explicitly aware of this discretion, as well as other possible solutions besides expending time and resources in court attempting to evict.[233] This would allow landlords to recognize situations where the user does not pose a threat to property or others and decline to evict these tenants unless extenuating circumstances necessitate it. Under the current discretionary scheme,[234] community education for landlords on this issue may lead to greater understanding on the issue and fewer evictions.

Contrary to the inflexible tone of 2011 and 2014 HUD Memos, a 2002 letter from HUD to public housing authorities urged landlords to exercise their discretion with "compassion and common sense," and also stated "[e]viction should be the last option explored, after all others have been exhausted."[235] This advice should be re-iterated as opposed to swept under the rug by an intolerant approach in the future.

VIII. CONCLUSION

Although current law often appears to favor federal preemption over state medical marijuana laws in the sphere of federally-subsidized housing, there are numerous avenues to overcome preemption that should be considered by courts and legislatures in order to achieve broad community benefits.[236] More specifically, state courts should recognize that housing law is traditionally governed by the state, and thus a presumption against preemption applies.[237] An examination of the congressional intent behind the CSA, combined with individual state statutory protections against unjust evictions, yields the conclusion that federal drug laws should not preempt state housing laws.[238] Thus, depending on the relevant

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231. *See* HUD Memo 2014, *supra* note 79.
232. *See supra* note 83 and accompanying text.
233. *See* Tara Renee Burd, *Can a Landlord Evict a Tenant For Smoking Pot?*, AVVO (June 27, 2012), https://www.avvo.com/legal-guides/ugc/can-a-landlord-evict-a-tenant-for-smoking-pot. Possible solutions include discussing alternative methods of consuming marijuana, finding alternative areas that smoking could be permitted, or other forms of dispute resolution. *Id.*
234. HUD Memo 2011, *supra* note 79; HUD Memo 2014, *supra* note 79.
235. Letter from Mel Martinez, Sec'y, Dep't of Hous. & Urb. Dev., to Pub. Hous. Dirs. (Apr. 16, 2002), http://www.nhlp.org/files/Martinez%204-16-02%20ltr.pdf.
236. *See supra* notes 120–33.
237. *See supra* Section VI.A.1.
238. *See supra* notes 134–38.

state housing statute, an individualized review of an eviction is often still warranted under state law.[239]

Regardless of the various options that could be used to circumvent federal preemption, both courts and legislatures should adopt concrete reforms that would allow for these low-income and disabled individuals to maintain both their doctor prescribed medicine and the roof above their heads.[240]

239. *See supra* Section VI.A.1.
240. *See supra* Part VII.