

WILSON V. LYNCH: MEDICAL MARIJUANA AND THE SECOND AMENDMENT COMING TO A CIRCUIT NEAR YOU

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I. INTRODUCTION

With the recent surge of legalizing medical marijuana throughout the states, growing pains were inevitable.¹ In the early years of the medical marijuana effort, conflicts between federal laws outlawing marijuana and state laws legalizing marijuana were common.² These conflicts centered on whether the federal government's prohibition of marijuana and classification of the substance as a Schedule 1 drug would preempt the states' ability to allow consumption of marijuana for medical purposes.³ In *Gonzales v. Raich*, the Supreme Court of the United States held that enforcing the Controlled Substances Act⁴ against California's medicinal

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¹ Fifteen state legislatures have passed medical marijuana laws, including Connecticut, Delaware, Hawaii, Illinois, Maryland, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, and Vermont. 29 *Legal Medical Marijuana States and DC*, PROCON.ORG, https://medicalmarijuana.procon.org/view_resource.php?resourceID=000881 [<https://perma.cc/MH4Q-ZBAU>] (last updated Nov. 30, 2017, 4:16 PM). Washington, D.C. has also passed a medical marijuana law through its legislative body. *Id.*

Fourteen states have passed ballot measures legalizing medical marijuana laws, including Alaska, Arizona, Arkansas, California, Colorado, Florida, Maine, Massachusetts, Michigan, Montana, Nevada, North Dakota, Oregon, and Washington. *Id.*

² See *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (holding that Congress, under the Commerce Clause, may criminalize the production and use of homegrown marijuana despite California's passage of an act allowing the use of medical marijuana).

³ *Id.* at 5.

⁴ 21 U.S.C. §§ 801–971 (2012).

marijuana producers and distributors was a proper exercise of power granted to Congress by the Commerce Clause.⁵

However, *Raich* never explicitly struck down California's medical marijuana statute, even though the statute at issue conflicted with federal law.⁶ This unstable situation gave rise to the possibility of the federal government preempting state medical marijuana laws by enforcing the federal prohibition of marijuana.⁷

Through a memorandum from Deputy Attorney General David Ogden (the Ogden Memorandum), the Department of Justice (DOJ) attempted to resolve this contradiction by limiting when United States Attorneys should prosecute key players in the medical marijuana industry.⁸ The Ogden Memorandum stated that, in pursuit of Agency objectives, federal resources should not be focused "on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."⁹ This memo stopped all prosecution of medical marijuana business owners who complied with state law.¹⁰ This stopgap measure did not resolve the tension between the legalization of medical marijuana on a state level and the ever-present danger of the DOJ reversing course and cracking down on producers and patients who consume medical marijuana. Attorney General Jeff Sessions enflamed this tension by rescinding the Ogden Memo through his own memorandum issued on January 4, 2018.¹¹ The Session's Memorandum reinstated the pre-Ogden

⁵ *Raich*, 545 U.S. at 19.

⁶ *See id.* at 9.

⁷ *Id.* at 41 (Scalia, J., concurring).

⁸ U.S. Dep't of Justice, Office of the Deputy Attorney Gen., Memorandum to Selected United States Attorneys re Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 1 (2009) [hereinafter Deputy Attorney Gen. Memorandum], <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [<https://perma.cc/773K-B9V7>].

⁹ *Id.* at 1–2.

¹⁰ *Id.* at 2.

¹¹ U.S. Dep't of Justice, Office of the Attorney Gen., Memorandum to Selected United States Attorneys re Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/T6EZ-KWTF>].

principles of marijuana enforcement that jeopardize the fragile balance between federal and state law.¹²

Despite the Attorney General's rescission, it is unlikely that the federal government will crack down on the medical marijuana industry under the Trump Administration because of the sheer number of patients who consume medicinal marijuana¹³ and the improving perception of marijuana in the public sphere.¹⁴ Given that perception, members of Congress have started discussing efforts to stymie Attorney General Sessions's actions by decriminalizing marijuana and possibly removing marijuana from Schedule 1 status.¹⁵ But that is unlikely to happen soon, which means controversies surrounding medical marijuana will continue to arise frequently over the coming years.

One such controversy arose on September 21, 2011, between the Second Amendment and medical marijuana. On that date, the Bureau of

¹² *Id.*

¹³ Approximately 2,354,403 Americans have a prescription for medical marijuana. *Medical Marijuana Patient Numbers*, MEDICAL MARIJUANA POL'Y PROJECT, <https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/medical-marijuana-patient-numbers/> [<https://perma.cc/7WLZ-58YC>].

¹⁴ Juliet Lapidos, Editorial, *The Public Lightens Up About Weed*, N.Y. TIMES (July 26, 2014), <https://www.nytimes.com/2014/07/27/opinion/sunday/high-time-the-public-lightens-up-about-weed.html> [<https://perma.cc/4UJU-745C>].

¹⁵ Emily Goodin, *Lawmakers Become More Vocal About Legalizing Marijuana as Public Support Grows*, ABC NEWS (Apr. 20, 2018, 7:40 PM), <http://abcnews.go.com/Politics/lawmakers-vocal-legalizing-marijuana-public-support-grows/story?id=54608899> [<https://perma.cc/55WN-2NHR>]; Rebecca Shabad, *Democratic Senate Leader Announces Plans to Introduce Bill to 'Decriminalize' Marijuana*, NBC NEWS (Apr. 20, 2018, 1:42 PM), <https://www.nbcnews.com/politics/congress/democratic-senate-leader-announces-plans-introduce-bill-decriminalize-marijuana-n867781> [<https://perma.cc/2QBJ-VM8S>]; Tom Angell, *Congress Protects Medical Marijuana from Jeff Sessions in New Federal Spending Bill*, FORBES (Mar. 21, 2018, 8:02 PM), <https://www.forbes.com/sites/tomangell/2018/03/21/congress-protects-medical-marijuana-from-jeff-sessions-in-new-federal-spending-bill/#6d75e55c3575>; Andrew Blake, *Bipartisan Bill Would Reclassify Marijuana as Schedule 3 Substance*, WASH. TIMES (Apr. 8, 2017), <https://www.washingtontimes.com/news/2017/apr/8/bipartisan-bill-would-rescheduled-marijuana-schedu/> [<https://perma.cc/S2ML-ELFV>].

Alcohol, Tobacco, Firearms and Explosives (ATF) issued an open letter¹⁶ to federal firearm licensees based upon the ATF's interpretation of the following statutes and regulation: 18 U.S.C. § 922(g)(3); 18 U.S.C. § 922(d)(3); and 27 C.F.R. § 478.11 (the Firearm Provisions).¹⁷ The open letter instructed firearms dealers not to transfer firearms or ammunition to individuals who have a prescription for medical marijuana.¹⁸ Less than a month passed before S. Rowan Wilson challenged the open letter on October 4, 2011.¹⁹ Wilson obtained a medicinal marijuana card in the fall of 2010 as treatment for severe dysmenorrhea.²⁰ Subsequently, as a result of the open letter, a federally licensed firearms dealer did not allow her to purchase a firearm.²¹ As a result, Wilson then challenged the Firearm Provisions and open letter in federal court.²²

The Nevada District Court dismissed Wilson's challenge to the Firearm Provisions and the open letter, reasoning that they did not unduly limit Wilson's Second Amendment right to keep and bear arms.²³ Wilson's appeal is the subject of this Note.

This Note compares case law that led to the holding in *Wilson v. Lynch*²⁴ to case law from the United States Court of Appeals for the Sixth Circuit and shows that the Sixth Circuit would reach a different result. Part II briefly describes the background behind the government's stated objective for the Firearm Provisions: reduce gun violence and crimes committed with guns. This stated objective also served as the justification

¹⁶ U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, Open Letter to All Federal Firearms Licensees (Sept. 21, 2011) [hereinafter *Open Letter*], <https://www.atf.gov/file/60211/download> [<https://perma.cc/VJP2-6LL6>].

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Wilson v. Holder*, 7 F. Supp. 3d 1104, 1110 (D. Nev. 2014).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* The combination of these statutes and regulations criminalized possession or receipt of a firearm by anyone addicted to a controlled substance and the sale of a firearm when the seller knows or has reasonable cause to believe that the buyer is addicted to any controlled substance. 18 U.S.C. § 922(d)(3), (g)(3) (2012); 27 C.F.R. § 478.11; *Open Letter*, *supra* note 17.

²³ *Wilson*, 7 F. Supp. 3d at 1117–19.

²⁴ *Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016).

for upholding the constitutionality of § 922(g) in *United States v. Carter*²⁵ and all three of the Firearm Provisions in *Wilson*.²⁶ Next, Part III analyzes *Wilson v. Lynch* and the laws and policies underlying the decision. Part IV compares the case law pertaining to gun regulations in the Ninth and Sixth Circuits. This Note contends that the Firearm Provisions, as applied to medical marijuana patients, categorically fails to limit either drug violence or crime and, as such, it should be struck down as an overly broad infringement on the Second Amendment rights of medicinal marijuana prescription holders.

This argument has three prongs: (1) the science is no longer clear on whether drugs lead to violent behavior; (2) medical marijuana users are significantly different from average recreational drug users; and (3) the Supreme Court decision in *District of Columbia v. Heller*²⁷ likely requires the government to meet an extremely high standard to restrict a Second Amendment right, and the government cannot meet this standard.

II. THE INTERSECTION OF DRUGS, GUNS, AND LAW IN AMERICA

A. *The Statutory Framework*

The Federal Gun Control Act of 1968 (the Act) provides that “[i]t shall be unlawful for any person . . . who is an unlawful user of or addicted to any controlled substance . . . to . . . possess . . . any firearm or ammunition”²⁸ The Act further provides:

It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).²⁹

The ATF promulgated a regulation that describes an “unlawful [drug] user or [one addicted] to any controlled substance” as “[a] person who uses a controlled substance and has lost the power of self-control with reference

²⁵ 750 F.3d 462, 464–65 (4th Cir. 2014).

²⁶ *Wilson*, 835 F.3d at 1093.

²⁷ 554 U.S. 570 (2008).

²⁸ 18 U.S.C. § 922(g)(3) (2012).

²⁹ 18 U.S.C. § 922(d)(3).

to the use of controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician.”³⁰ This definition implies that a drug user has certain characteristics such as a tendency to be violent or a criminal.³¹ The characteristic that is important for this Note is “use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time.”³² The key sentence within the ATF regulation is “[a] person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm.”³³

B. The Evidence Regarding Drug Use and Propensity for Violence or Criminal Activity

1. Evidence Regarding General Drug Use

The government’s stated basis for the regulatory scheme at issue is the link between drug use and violent crime. This Section conducts a brief review of studies analyzing the link between drug use and violent crime.

Studies that purport a link between drug use and violence are outdated. The perception that such a link exists is going up in smoke.³⁴ Yet, in several ways, the government clings to studies supporting the connection.³⁵ The first study, a survey by the DOJ, focuses on prior drug use among individuals in the penal system.³⁶ The survey indicates that in 2004, 32%

³⁰ 27 C.F.R. § 478.11 (2017).

³¹ *Id.* (defining drug users to include those with “a conviction for use or possession of a controlled substance within the past year; multiple arrests for such offenses within the past 5 years if the most recent arrest occurred within the past year; or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year”).

³² *Id.*

³³ *Id.*

³⁴ *See, e.g.,* Robert Nash Parker & Kathleen Auerhahn, *Alcohol, Drugs, and Violence*, 24 ANN. REV. SOC. 291, 291 (1998).

³⁵ *See infra* notes 36–42 and accompanying text.

³⁶ U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STAT., NCJ 213530, SPECIAL REPORT: DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004 (Oct. 2006) [hereinafter DRUG USE AND DEPENDENCE STUDY], <https://www.bjs.gov/content/pub/pdf/dudsfp04.pdf> [<https://perma.cc/MU9F-M4ZK>].

of state and 26% of federal prisoners were under the influence of drugs at the time of the criminal act that led to their incarceration.³⁷ In the month prior to their criminal act, more than half of the individuals in prison used illegal drugs.³⁸ Of those incarcerated for committing violent offenses, 28% were under the influence of an illegal drug at the time of the crime.³⁹

Another study shows that the majority of probationers at the national and local level were on probation for drug-related offenses.⁴⁰ This study also shows that males who used drugs were significantly more prone to commit violent crimes in their lifetime than their non-drug-using peers.⁴¹ However, the only drugs involved were amphetamines and methamphetamines, not marijuana.⁴²

Recently, with a shift in cultural attitudes towards marijuana, there has been an influx of studies suggesting that the connection between drugs and violence is, at best, not clear and, at worst, nonexistent.⁴³ One paper summarizing various studies indicates “the relationship between the use of various illicit drugs and violence makes it clear that support for such linkages is absent.”⁴⁴

The best evidence linking drugs and violence involves cocaine use.⁴⁵ But, those conclusions were based on the social environment of the subjects and not on pharmacology.⁴⁶ According to this study, there is no compelling evidence supporting a link between amphetamines, Phencyclidine/Ketamine, or heroin, and violence.⁴⁷ Although the study found some evidence that these drugs cause psychosis due to the method of research, it was not possible to gauge the frequency of the psychosis

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Carrie B. Oser et al., *The Drugs-Violence Nexus Among Rural Felony Probationers*, 24 J. INTERPERSONAL VIOLENCE 1285, 1298 (2009).

⁴¹ *Id.*

⁴² *Id.*

⁴³ See, e.g., Parker & Auerhahn, *supra* note 34, at 298.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

experienced by the population at-large.⁴⁸ Other possible causes of the violence include the powerful influence one's social environment has on violent behavior.⁴⁹ Most importantly, the study indicated that when violent behavior is connected to a substance, it is most likely caused by alcohol,⁵⁰ which is legal and outside the purview of 18 U.S.C. § 922(g).

2. *Medical Marijuana Users and Violence*

While studies that focus on the connection between general drug use, violence, and crime are probative, medical marijuana users are distinguishable from recreational drug users.⁵¹ Medical marijuana users are typically middle-aged and often have debilitating illnesses, such as cancers, neurological disorders, musculoskeletal problems, or chronic infections.⁵² Medical marijuana users do not have the same profile as violent criminals.⁵³ Patients often purchase marijuana from a dispensary, thus mitigating concerns introduced by the black market.⁵⁴ When marijuana is legal in a state for medicinal purposes, dispensaries are less likely to be the focus for enforcement actions because they are highly regulated by the state.⁵⁵

⁴⁸ *Id.*

⁴⁹ *Id.* at 306.

⁵⁰ *Id.* at 291.

⁵¹ See Alice Robb, *This Is What the Average Medical Marijuana User Looks Like*, NEW REPUBLIC (Jan. 9, 2014), <https://newrepublic.com/article/116156/medical-marijuana-users-typical-profile> [<https://perma.cc/6AK5-6P9L>].

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Elias Funez, *Nevada City Talks Medical Marijuana*, UNION (Feb. 22, 2017), <http://www.theunion.com/news/local-news/nevada-city-talks-medical-marijuana/> [<https://perma.cc/M7JC-CKWE>].

⁵⁵ Karen O'Keefe, *State Medical Marijuana Implementation and Federal Policy*, 16 J. HEALTH CARE L. & POL'Y 39, 51 (2013).

C. *The Case Law Surrounding the Decision in Wilson v. Lynch*

1. *District of Columbia v. Heller*⁵⁶: *The Test for Second Amendment Challenges*

Throughout much of its history, the Supreme Court of the United States dodged a big Second Amendment question: whether it protected the personal right to own a firearm.⁵⁷ In 2008, the Court decided to tackle this legal question because the District of Columbia effectively prohibited firearms within its jurisdiction through various city codes.⁵⁸ A person within the jurisdiction could only carry a registered handgun, but the District of Columbia prohibited the registration of handguns.⁵⁹ Further, if a person were to carry a handgun, that individual needed to possess a license, which would only be granted for a year.⁶⁰ If a person wanted to own a long gun, the firearm needed to be registered and stored “‘unloaded and disassembled or bound by a trigger lock or similar device’ unless” it was “‘located in a business or . . . used for lawful recreational activities.’”⁶¹

After regurgitating the long history of guns in the United States, a brief grammar class, and some case law, Justice Scalia, writing for the majority, concluded that the original meaning of the Second Amendment should prevail.⁶² By that he meant that the Second Amendment “secure[s] an individual right to bear arms for defensive purposes.”⁶³ However, like most rights, the rights guaranteed by the Second Amendment are not boundless.⁶⁴ Laws may limit rights, but effectively preventing an individual from owning firearms goes entirely too far.⁶⁵

⁵⁶ 554 U.S. 570 (2008).

⁵⁷ Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 249 (2008) (discussing how *Heller* was a case of first impression for the Supreme Court of the United States).

⁵⁸ *Heller*, 554 U.S. at 574–75.

⁵⁹ *Id.* at 575.

⁶⁰ *Id.*

⁶¹ *Id.* (quoting D.C. CODE § 7-2507.02 (2001)).

⁶² *Id.* at 625.

⁶³ *Id.* at 602.

⁶⁴ *Id.* at 626.

⁶⁵ *Id.* at 636.

While Justice Scalia did not set forth a point-by-point test of what sort of regulatory limits would pass Second Amendment muster, he left enough substance for a coherent test to be formed.⁶⁶ At the outset of his analysis, Justice Scalia categorically rejected a freestanding “interest-balancing” approach.⁶⁷ He bluntly stated that the constitutional enumeration of the right to bear arms took the power to decide on a case-by-case basis out of the government’s hands, “whether . . . future legislatures or (yes) even future judges think that scope too broad.”⁶⁸ He stated that, much like the First Amendment, the Second Amendment was already the product of an interest-balancing test performed by the people.⁶⁹ Therefore, the Second Amendment does not allow for judicial attempts to limit the core protection to defend hearth and home via an interest-balancing test.⁷⁰

Scalia noted that this constitutional right protected by the Second Amendment is elevated above all other interests, regardless of what the future holds, so long as the amendment stands.⁷¹ Consequently, this right is elevated even above the health and safety of those threatened by the epidemic of handgun violence that occurred in the District and throughout the United States.⁷²

2. *Challenges to 18 U.S.C. § 922*

Courts have routinely held that the Firearm Provisions are constitutional.⁷³ This is partly due to the low burden that the government was required to meet: that the provisions were reasonably related to an important government interest.⁷⁴

The first post-*Heller* case that delved deeply into the area of marijuana and firearms was *United States v. Carter* in the Fourth Circuit.⁷⁵ The Fourth Circuit heard this case twice before making a decision. It was

⁶⁶ *Id.* at 634–35.

⁶⁷ *Id.* at 634.

⁶⁸ *Id.* at 634–35.

⁶⁹ *Id.* at 635.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 636.

⁷³ *E.g.*, *United States v. Carter (Carter I)*, 669 F.3d 411, 421 (4th Cir. 2012).

⁷⁴ *See id.* at 417.

⁷⁵ *Id.* at 413.

initially remanded to collect more empirical evidence of the correlation between drugs and violence.⁷⁶ In *Carter I*, the Fourth Circuit reviewed a Second Amendment claim made by a marijuana user.⁷⁷ The claim arose out of a police investigation of suspected drug activity.⁷⁸ During the course of the investigation, the officers recovered “12 grams of loose marijuana, 15 grams of partially smoked blunts, a digital scale, \$1,000 in larger bills, and \$122 in smaller denominations.”⁷⁹ Carter also informed the police of two firearms in his closet: a semi-automatic pistol and a revolver, both purchased second-hand for his protection.⁸⁰ Carter consumed marijuana recreationally and did not have any ailments according to the record.⁸¹ The court quickly determined that, because of these facts, intermediate scrutiny was appropriate because Carter was not a law-abiding citizen.⁸²

The Fourth Circuit applied a two-step approach: First, the court determined whether the statute burdens protected conduct; second, if the statute burdened protected conduct, the court applied intermediate scrutiny.⁸³ Upon determining in the first step that the statute burdened the core right of self-defense, the court, in reviewing *Heller*, distinguished the facts. The court stated that the “core right is only enjoyed, as *Heller* made clear, by ‘law-abiding, responsible citizens,’” and a marijuana user is not a law-abiding citizen.⁸⁴ Further, in § 922(g), the burden of the statute only

⁷⁶ *Id.* at 421; *United States v. Carter (Carter II)*, 750 F.3d 462, 463 (4th Cir. 2014).

⁷⁷ *Carter I*, 669 F.3d at 413.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 420.

⁸² *Id.* at 416–17 (“But Carter cannot claim to be a law-abiding citizen, and therefore his asserted Second Amendment right cannot be a core right, as we held in *Chester*, where we concluded that the defendant’s status as a domestic violence misdemeanor rendered his claim ‘not within the core right identified in *Heller*.’ Accordingly, as we did in *Chester*, we will apply intermediate scrutiny in evaluating Carter’s claim.”) (quoting *United States v. Chester*, 628 F.3d 673, 682–83 (4th Cir.2010)).

⁸³ *Id.* at 416.

⁸⁴ *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

exists so long as the person is currently addicted to illegal drugs.⁸⁵ Thus, the burden that § 922(g) places upon rights granted by the Second Amendment is only that of “limited temporal reach” and is distinguishable from an outright ban of purchasing firearms.⁸⁶ The code section imposed a small burden on Carter’s Second Amendment right, thus, the court reasoned, the government’s burden was lower than suggested in *Heller*.⁸⁷ Therefore, the court did not apply strict scrutiny.⁸⁸

In arguing that § 922(g) survived intermediate scrutiny, the government claimed the statute served the compelling interest of limiting violence caused by drug users.⁸⁹ Ultimately, the court determined the government could not meet this burden with the empirical evidence available to the court at the time, and it sent the case back to the trial court so the government could present additional empirical evidence.⁹⁰

In *Carter II*, the court held that the government proved a strong link between violent crime and drug use via empirical evidence.⁹¹ The government pointed to six studies, all of which showed a significant correlation between drug use and violent crime.⁹² A survey of inmates found that 50% of all violent felons in state and federal prisons were drug abusers or addicts in the year before their arrest, as compared to only 2% of the general population.⁹³ The government also argued that its position was supported by “commonsense”: “due to the illegal nature of their

⁸⁵ *Id.* at 419 (“By contrast, § 922(g)(3) does not permanently disarm all persons who, at any point in their lives, were unlawful drug users or addicts. Instead, it only applies to persons who are *currently* unlawful users or addicts.”).

⁸⁶ *Id.*

⁸⁷ *Id.* at 416–17.

⁸⁸ *Id.* at 417.

⁸⁹ *Id.* at 419.

⁹⁰ *Id.* at 421 (“At bottom, we conclude that Congress had an important objective for enacting § 922(g)(3) to reduce gun violence and that disarming drug users and addicts might reasonably serve that objective. But the burden of demonstrating the fit rests on the government. Because the government did not present sufficient evidence to substantiate the fit, we vacate the judgment and remand the case to allow it to do so and to allow Carter to respond.”).

⁹¹ *Carter II*, 750 F.3d at 467.

⁹² *Id.*

⁹³ *Id.*

activities, drug users and addicts would be more likely than other citizens to have hostile run-ins with law enforcement officers, which would threaten the safety of the law enforcement officers when guns are involved.⁹⁴ Ultimately, the court deemed this evidence sufficient to justify the burden imposed by § 922(g).⁹⁵

This history of courts' treatment of guns provided the context upon which the *Wilson* decision rested.

III. THE DECISION: *WILSON V. LYNCH*⁹⁶

An analysis of *Wilson* should begin with the method of appeal and the issues of standing decided in the case. These initial steps are important because they are needed to determine the exact factual scenario ruled upon by the Ninth Circuit panel and to avoid conflating two distinct issues: use of medical marijuana and mere possession of a medical marijuana prescription.

The district court granted the government's motion to dismiss.⁹⁷ Because Wilson appealed the decision, the Ninth Circuit was required to take Wilson's factual allegations as true.⁹⁸ For the purpose of this decision, therefore, Wilson did not consume medical marijuana; she merely possessed the medical marijuana prescription to make a political statement.⁹⁹ This distinction was relevant in deciding standing.¹⁰⁰

The Ninth Circuit decided that Wilson had standing to challenge the constitutionality of the regulatory scheme involving 18 U.S.C. § 922(d)(3), 27 C.F.R. § 478.11, and the open letter.¹⁰¹ However, the court ruled that Wilson did not have standing to challenge the constitutionality of 18 U.S.C. § 922(g)(3), which banned the sale of firearms to unlawful drug users or to drug addicts.¹⁰² The rationale behind the court's ruling rested

⁹⁴ *Id.* at 466, 469 (quoting *Carter I*, 669 F.3d at 419).

⁹⁵ *Id.* at 470.

⁹⁶ 835 F.3d 1083 (9th Cir. 2016).

⁹⁷ *Id.* at 1090.

⁹⁸ *Id.* at 1091.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1090–91.

primarily on the factual grounds mentioned above.¹⁰³ As Wilson alleged that she merely possessed a prescription for medical marijuana that she does not use, she did not have standing to challenge 18 U.S.C. § 922(g)(3).¹⁰⁴ Therefore, the focus should remain on the regulatory scheme, including 18 U.S.C. § 922(d)(3), which bans the sale of firearms to persons whom firearm dealers have reasonable cause to believe are unlawful drug users.

The opinion began by distinguishing this case from the court's prior decision in *United States v. Dugan*.¹⁰⁵ *Dugan* held that the Second Amendment did not protect the rights of unlawful drug users.¹⁰⁶ If Wilson had claimed she was a consumer of medical marijuana, it is likely that her claim would have been barred entirely.¹⁰⁷ However, under the facts presented to the court, she could proceed.¹⁰⁸

A. *The Ninth Circuit's Two-Step Test for Second Amendment Challenges*

In *United States v. Chovan*, the Ninth Circuit adopted a two-step test in determining whether a statute or regulation violates the Second Amendment: (1) determine whether the challenged law "burdens conduct protected by the Second Amendment," and (2) if so, "apply an appropriate level of scrutiny."¹⁰⁹

The *Wilson* court quickly resolved the first step of the test.¹¹⁰ It determined that she was not a person who had been historically disallowed

¹⁰³ *Id.* at 1090.

¹⁰⁴ *Id.* at 1090–91.

¹⁰⁵ *Id.* at 1091 ("Regardless of her motivations, we agree that Wilson's claims do not fall under the direct scope of *Dugan*.").

¹⁰⁶ *United States v. Dugan*, 657 F.3d 998, 999–1000 (9th Cir. 2011).

¹⁰⁷ *Wilson*, 835 F.3d at 1091 ("Therefore, were Wilson an unlawful drug user, she would be beyond the reach of the Second Amendment, and her claims would fail categorically.").

¹⁰⁸ *Id.*

¹⁰⁹ *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013).

¹¹⁰ *Wilson*, 835 F.3d at 1092 ("With respect to Wilson, this inquiry is straightforward: because Wilson insists that she is not an unlawful drug user, a convicted felon, or a mentally-ill person, she is not a person historically prohibited from possessing firearms under the Second Amendment. Accordingly, by preventing Wilson from purchasing a firearm, 18 U.S.C. § 922(d)(3), 27 C.F.R. § 478.11, and the Open Letter directly burden her

(continued)

from possessing firearms, the regulatory scheme “directly burden[ed] her core Second Amendment right.”¹¹¹ Consequently, the court applied the second step—determining the level of scrutiny that applies.¹¹²

The Ninth Circuit determined which level of scrutiny applies to laws that directly burden core Second Amendment rights by determining: “(1) ‘how close the law comes to the core of the Second Amendment right,’ and (2) ‘the severity of the law’s burden on the right.’”¹¹³

Like *Chovan*, the *Wilson* court dealt with this first step quickly.¹¹⁴ Using the *Heller* decision, the court determined that the regulatory scheme impeded Wilson’s right to use firearms to defend her home because the inability to purchase a firearm necessarily impedes that right.¹¹⁵

Next, the court determined the severity of the burden.¹¹⁶ In making this determination, the Ninth Circuit laid out various standards for firearms regulations:

[L]aws which regulate only the *manner* in which persons may exercise their Second Amendment rights are less burdensome than those which bar firearm possession completely. Similarly, firearm regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right than those which do not.¹¹⁷

With that standard in mind, the court concluded that the burden was not severe.¹¹⁸ The reason that the regulatory scheme did not impose a severe

core Second Amendment right to possess a firearm, and we proceed to *Chovan*’s second step.”).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Chovan*, 735 F.3d at 1138 (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)).

¹¹⁴ *Wilson*, 835 F.3d at 1093 (“Wilson concedes that the Government had a substantial interest in enacting § 922(d)(3) to prevent gun violence.”).

¹¹⁵ *Id.* at 1092.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1092–93 (quoting *Jackson v. City and County of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014)).

¹¹⁸ *Id.* at 1093.

burden was that it only limited the purchase of a firearm, not the possession of one.¹¹⁹ Further, the scheme did not prevent Wilson from ever owning a gun, but merely prevented her from owning a gun while in possession of a medical marijuana registry card.¹²⁰ If Wilson wanted to purchase a firearm, the court stated that she should surrender her registry card, and then the reasonable cause that barred her from purchasing a firearm would disintegrate.¹²¹ As the court determined that the burden on Wilson's right was not severe, the court applied intermediate scrutiny to the regulatory scheme.¹²²

B. Applying Intermediate Scrutiny to the Regulatory Scheme

In applying intermediate scrutiny, the statute or regulation's objective must be "significant, substantial, or important," and it must be a "reasonable fit" with the objective.¹²³ In this case, the stated objective of 27 C.F.R. § 478.11 and the open letter was to curb or eliminate gun violence and crimes committed with guns.¹²⁴ Wilson challenged the fit between the DOJ statements and the goal of violence prevention.¹²⁵ Specifically, Wilson argued that the goal of violence prevention was not reasonably met by depriving nonviolent people of their Second Amendment Rights.¹²⁶ The government, however, argued that empirical evidence strongly supported a connection between drug use and violence.¹²⁷

The court found the evidence proffered by the government compelling enough to meet the intermediate scrutiny standard.¹²⁸ The usual line of

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* (quoting *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013)).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 1094 ("Wilson correctly points out that the degree of fit between these laws and the ultimate aim of preventing gun violence is not as tight as the fit with laws like 18 U.S.C. § 922(g)(3), which affect only illegal drug users. Nonetheless, the degree of fit between 18 U.S.C. § 922(d)(3), 27 C.F.R. § 478.11, and the Open Letter and the aim of
(continued)

thought behind the studies and surveys can be summed up as follows: unlawful drugs, by their very nature, are illicit and need to be purchased on the black market.¹²⁹ Involvement with the black market makes a person more likely to engage in criminal activity and to have negative interactions with police officers.¹³⁰ Naturally, adding a firearm to the mix only makes things worse.¹³¹

However, the court did hesitate when faced with a counter-argument to this evidence.¹³² None of the proffered evidence applied to medical marijuana users, let alone individuals like Wilson.¹³³ Medical marijuana *patients* are less likely than average citizens to be violent or to commit crimes, due in large part to the debilitating illnesses from which they usually suffer.¹³⁴ And since they only buy their drugs from heavily regulated dispensaries, they are less likely to be involved in the black market.¹³⁵ Nonetheless, the court determined that this was not enough to overcome the reasonable conclusion that drug users, even those who take medicinal marijuana, “are likely as a consequence of that use to experience altered or impaired mental states that affect their judgment and that can lead to irrational or unpredictable behavior.”¹³⁶

The court held that the connection between the studies and a regulatory scheme that allowed for reasonable suspicion was reasonable enough to

preventing gun violence is still reasonable, which is sufficient to survive intermediate scrutiny.”).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *See id.*

¹³² *Id.* (“Wilson correctly points out that the degree of fit between these laws and the ultimate aim of preventing gun violence is not as tight as the fit with laws like 18 U.S.C. § 922(g)(3), which affect only illegal drug users.”).

¹³³ *Id.*

¹³⁴ *Id.* (“It may be argued that medical marijuana users are less likely to commit violent crimes, as they often suffer from debilitating illnesses, for which marijuana may be an effective palliative.”).

¹³⁵ *Id.* (“They also may be less likely than other illegal drug users to interact with law enforcement officers or make purchases through illicit channels.”).

¹³⁶ *Id.*

survive intermediate scrutiny¹³⁷ because one only needs to take “one additional logical step: individuals who firearms dealers have reasonable cause to believe are illegal drug users are more likely actually to be illegal drug users”¹³⁸ Stated a different way, if you have a medical marijuana registry card, it is very probable that you consume marijuana.¹³⁹

The court recognized that this could burden the Second Amendment rights of individuals like *Wilson*, individuals who have a registry card but do not consume marijuana.¹⁴⁰ Nevertheless, the court held that the Constitution allows for these types of burdens.¹⁴¹ To provide an example, the Court used *Terry v. Ohio*¹⁴² and compared its “reason to believe” standard to the “reasonable cause to believe” standard of § 922(d).¹⁴³ Ultimately, the court affirmed the decision of the District Court of Nevada to dismiss the lawsuit.¹⁴⁴

IV. COMPARING THE LAW IN *WILSON* TO SIXTH CIRCUIT CASE LAW

A. Differences in Sixth Circuit Case Law.

With the goal of importing *Wilson* into the Sixth Circuit, the first step must be to find the equivalent of *Chovan* in the Sixth Circuit—that is, to find a post-*Heller* decision determining the test for whether a statute

¹³⁷ *Id.* at 1094–95 (“Because the degree of fit between 18 U.S.C. § 922(d)(3), 27 C.F.R. § 478.11, and the Open Letter and their purpose of preventing gun violence is reasonable but not airtight, these laws will sometimes burden—albeit minimally and only incidentally—the Second Amendment rights of individuals who are reasonably, but erroneously, suspected of being unlawful drug users.”).

¹³⁸ *Id.* at 1094.

¹³⁹ *Id.*

¹⁴⁰ *Id.* (“With respect to marijuana registry cards, there may be some small population of individuals who—although obtaining a marijuana registry card for medicinal purposes—instead hold marijuana registry cards only for expressive purposes.”).

¹⁴¹ *Id.* at 1095 (“However, the Constitution tolerates these modest collateral burdens in various contexts, and does so here as well.”).

¹⁴² 392 U.S. 1 (1968).

¹⁴³ *Id.* (“For instance, the Fourth Amendment allows an officer to burden an individual’s right to be free from searches when the officer has ‘reason to believe’ the person is armed and dangerous, a standard comparable to the ‘reasonable cause to believe’ standard of § 922(d).”) (citation omitted) (quoting *Terry*, 392 U.S. at 27).

¹⁴⁴ *Id.* at 1100.

unduly burdens a person's Second Amendment right. *United States v. Greeno*, decided in 2012, gave us that test.¹⁴⁵

Greeno used a two-step test to decide whether a law improperly burdened a Second Amendment right.¹⁴⁶ The first prong was "whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood."¹⁴⁷ Under this step, the court must determine the appropriate level of scrutiny.¹⁴⁸ The second prong was to determine "the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights."¹⁴⁹ It was under this step that the court applied the appropriate level of scrutiny.¹⁵⁰ While *Greeno* established the test for the Sixth Circuit, it failed to establish how the appropriate level of scrutiny should be determined.¹⁵¹ This determination was left for *Tyler v. Hillsdale County Sheriff's Department*.¹⁵²

In *Tyler*, the Sixth Circuit, sitting *en banc*, determined the appropriate level of scrutiny for an individual with a history of mental health issues, while taking *Heller* into consideration.¹⁵³ The plaintiff (Mr. Tyler) was a seventy-four-year-old man living with mental health issues in Michigan.¹⁵⁴ His mental health issue occurred approximately thirty years prior to the case.¹⁵⁵ In 1985, Mr. Tyler's wife of twenty-three years left him in financial ruin after she left him for another man.¹⁵⁶ Emotionally distraught, Mr. Tyler battled depression, which culminated in him being civilly committed "for a period not to exceed 30 days."¹⁵⁷ Because of that event,

¹⁴⁵ 679 F.3d 510 (6th Cir. 2012).

¹⁴⁶ *Id.* at 518.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)).

¹⁵⁰ *Id.*

¹⁵¹ *See id.* at 518–20.

¹⁵² 837 F.3d 678 (6th Cir. 2016).

¹⁵³ *Id.* at 681.

¹⁵⁴ *Id.* at 683.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

Mr. Tyler was barred from purchasing a handgun in 2011 despite showing no signs of mental illness for over twenty-five years.¹⁵⁸

The court adopted the two-prong test used in *Chovan*.¹⁵⁹ The court quickly ruled out rational basis as the standard because that standard would go directly against the *Heller* holding.¹⁶⁰ The court then considered Tyler's position that the standard should be strict scrutiny because the statute completely barred him from possessing a firearm.¹⁶¹ While the court seemed concerned about Tyler's rights, it cautioned against placing the bar so high as to prevent the government from reaching it at all.¹⁶² On that basis, the court decided strict scrutiny could not be the standard, even though the statute likely "permanently prohibit[ed] Tyler from possessing all types of firearms, even in his home."¹⁶³ The court's reasoning rested on the narrowness of § 922(g)¹⁶⁴ when it found that although the rule imposed a severe burden, the burdened individuals comprised a narrow class that had already been "adjudicated mentally defective or previously involuntarily committed."¹⁶⁵ If that was not enough, the court hung its hat on one more point: permanent bans of firearms have been reviewed under intermediate scrutiny in other jurisdictions.¹⁶⁶ With strict scrutiny effectively eliminated, the court applied intermediate scrutiny.¹⁶⁷

In explaining how to apply intermediate scrutiny to the Second Amendment, the Sixth Circuit favored the vocabulary put forth in *Chovan*: "[T]he standard require[s] (1) the government's stated objective to be

¹⁵⁸ *Id.* at 684.

¹⁵⁹ *Chovan*, 735 F.3d at 1138 ((1) how close does the law come to the core Second Amendment right, and (2) the severity of the law's burden on the right).

¹⁶⁰ *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 690 (6th Cir. 2016) ("Because *Heller* rules out rational basis, the choice is between intermediate and strict scrutiny.").

¹⁶¹ *Id.* at 690–91.

¹⁶² *Id.* at 691 ("In light of this cogent difference, we should caution against imposing too high a burden on the government to justify its gun safety regulations, particularly where Congress has chosen to rely on prior judicial determinations that individuals pose a risk of danger to themselves or others.").

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 692.

significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective.”¹⁶⁸ Further, “[a]ll that is required is ‘a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.’”¹⁶⁹ Finally, the court unequivocally stated that the “government need not prove that there is ‘no burden whatsoever on [the claimant’s] . . . right under the Second Amendment.’”¹⁷⁰

In determining the “fit” between the statute and the stated objective, “[t]he burden of justification is demanding and it rests entirely on the State.”¹⁷¹ “In discharging this burden, the government can rely on . . . legislative history, empirical evidence, case law, and even common sense, but it may not ‘rely upon mere “anecdote and supposition.”’”¹⁷² The quality and quantity of the sources required will vary based on “the novelty and plausibility of the justification raised.”¹⁷³ However, the government was not required to use a specific method contained within the list above.¹⁷⁴

Applying the same tests as the Ninth Circuit, the Sixth Circuit came to a different conclusion.¹⁷⁵ The Sixth Circuit held¹⁷⁶ that Tyler had a viable

¹⁶⁸ *Id.* at 693 (quoting *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013)).

¹⁶⁹ *Id.* (quoting *Neinast v. Bd. of Trs. of Columbus Metro. Library*, 346 F.3d 585, 594 (6th Cir. 2003)).

¹⁷⁰ *Id.* (alteration in original) (quoting *United States v. Chapman*, 666 F.3d 220, 228 (4th Cir. 2012)).

¹⁷¹ *Id.* at 693–94 (alteration in original) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

¹⁷² *Id.* at 694 (quoting *Carter I*, 669 F.3d 411, 418 (4th Cir. 2012)).

¹⁷³ *Id.* (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000)).

¹⁷⁴ *Id.* (“While the Constitution may not require a specific method of proof, the Fourth Circuit’s experience with §§ 922(g)(3) and (9) illustrates that some reference to legislative findings, academic studies, or other empirical data is necessary to support the categorical disarmament of citizens, regardless of whether that disarmament is permanent or temporary.”).

¹⁷⁵ *Compare id.* at 699 (holding that the government did not meet its burden under intermediate scrutiny) with *Wilson v. Lynch*, 835 F.3d 1083, 1095 (9th Cir. 2016) (holding that the government met its burden under intermediate scrutiny).

Second Amendment claim, due largely to the government's failure to justify imposing a lifetime ban on possessing a gun by anyone "adjudicated as a mental defective" or "committed to a mental institution."¹⁷⁷

The court held that, despite large amounts of evidence proffered by the government,¹⁷⁸ the government's evidence was primarily focused on preventing individuals currently suffering from a mental illness or recently recovered from a mental illness, rather than evidence about individuals like Tyler.¹⁷⁹ There were many years between Tyler's prior mental illness and the current case,¹⁸⁰ which shows the Sixth Circuit was willing to distinguish between current and past maladies.¹⁸¹ The court acknowledged justifications for imposing restrictions on the former but determined that restrictions upon the latter are not similarly justified.¹⁸²

B. Applying Sixth Circuit Law to the Facts in Wilson v. Lynch

In applying the Sixth Circuit law to the *Wilson* facts, the beginning steps should not be grossly different than those used in *Wilson*. Both jurisdictions have tests that are remarkably similar, if not the same.¹⁸³ Both rely on a similar two-step test: (1) whether the conduct burdened is

¹⁷⁶ In the opinion, Justice Gibbons noted that ten of the sixteen Justices would reverse the district court's decision (Tyler did have a viable Second Amendment claim). Twelve of the Justices agreed with the decision that intermediate scrutiny should be the standard. *Tyler*, 837 F.3d at 699.

¹⁷⁷ *Id.* (quoting 18 U.S.C. § 922(g)(4) (2012)).

¹⁷⁸ *See id.* at 694–97.

¹⁷⁹ *Id.* at 697 ("None of the government's evidence squarely answers the key question at the heart of this case: Is it reasonably necessary to forever bar all previously institutionalized persons from owning a firearm?").

¹⁸⁰ *Id.* at 683.

¹⁸¹ *Id.* at 699 ("We cannot conclude, based on the current record, that the government has carried its burden to establish a reasonable fit between the important goals of reducing crime and suicides and § 922(g)(4)'s permanent disarmament of all persons with a prior commitment. There is no indication of the *continued* risk presented by people who were involuntarily committed many years ago and who have no history of intervening mental illness, criminal activity, or substance abuse.").

¹⁸² *Id.*

¹⁸³ *Compare id.* at 685–86, with *Wilson v. Lynch*, 835 F.3d 1083, 1092 (9th Cir. 2016).

typically protected by the Second Amendment, and (2) the strength of the justification for the challenged law while applying intermediate scrutiny.¹⁸⁴

It should be noted that the standards, while the same in name, were applied differently in practice. In *Wilson*, the court relied on outdated studies¹⁸⁵ and government supposition that drugs are intrinsically bad in upholding the regulatory framework that restricted Wilson from purchasing a firearm.¹⁸⁶ In *Tyler*, the court refused to rely on the supposition that people who have been civilly committed with mental health issues are presently dangerous with a gun because they are unstable.¹⁸⁷ The *Tyler* court held that the government required more empirical evidence than mere anecdote and supposition to establish that the restriction was justified.¹⁸⁸ Thus, the Sixth Circuit set a higher standard for the government to reach in *Tyler* than the Ninth Circuit did in *Wilson*.¹⁸⁹

When applying the Sixth Circuit case law from *Tyler* to the facts in *Wilson*—possession of a medical marijuana prescription prohibited the purchase of a handgun¹⁹⁰—it is likely the Sixth Circuit would reject the government’s argument. First, the intermediate scrutiny standard used in *Tyler* requires: “(1) the government’s stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged law and the asserted objective.”¹⁹¹ The recognized interest of the government in relation to § 922(g) “was to keep firearms out of the hands of presumptively risky people,”¹⁹² and to “cut down or eliminate firearms deaths caused by persons who are not criminals, but who commit sudden, unpremeditated crimes with firearms as a result of mental disturbances.”¹⁹³ In *Tyler*, the Sixth Circuit recognized these objectives as compelling.¹⁹⁴ It is not a stretch to suggest that the Sixth Circuit would consider suspected

¹⁸⁴ *Tyler*, 837 F.3d at 685–86; *Wilson*, 835 F.3d at 1092.

¹⁸⁵ See *supra* Part II.

¹⁸⁶ *Wilson*, 835 F.3d at 1093–94.

¹⁸⁷ *Tyler*, 837 F.3d at 697.

¹⁸⁸ *Id.*

¹⁸⁹ See *supra* note 152 and accompanying text.

¹⁹⁰ *Wilson*, 835 F.3d at 1089–90.

¹⁹¹ *Tyler*, 837 F.3d at 693.

¹⁹² *Id.* (quoting *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 112 n.6 (1983)).

¹⁹³ *Id.* (quoting 114 CONG. REC. 21,829 (1968) (statement of Rep. Bingham)).

¹⁹⁴ *Id.*

drug users as falling within the class of presumptively risky individuals. In doing so, the court would likely find the government interest in *Wilson* to be equally compelling. Thus, applying intermediate scrutiny would likely bear no different result in the Sixth Circuit than in *Wilson*.

However, the result of the second prong of the analysis would differ. Although the standard is the same in name, the Sixth Circuit has used a more rigorous application than the Ninth Circuit, going so far as to hold that the state's justification cannot rest upon mere "anecdote and supposition."¹⁹⁵ This requirement is significant because the evidence of the link between drugs and violence in *Wilson* is just that: anecdotes and supposition.

The counterargument to this claim will inevitably be that, in *Wilson*, the state did offer more than anecdote and supposition; they offered scientific studies that showed a connection between drugs and violence, as well as between drugs and crime.¹⁹⁶ As those studies are more than just mere supposition, the argument goes, the state will have met its burden of showing the fit between the policy and goal via hard evidence.

The problem with this reasoning is the scientific studies upon which the Ninth Circuit relied heavily are currently being reconsidered, and the causal connections they purport to show are disappearing in a puff of smoke.¹⁹⁷ Recent studies have shown that the connection between drugs and violence is much cloudier than previously thought.¹⁹⁸ It is no longer clear that drugs are the determinative factor in producing violent outcomes.¹⁹⁹ It is now suggested that societal factors are much more likely than drug use to explain violence and criminal activity.²⁰⁰ These new findings debunk the evidence upon which the government relied, leaving no more than mere supposition to support its conclusion. The Sixth Circuit would likely reject the state's argument and find that the fit between the policy goals and the policy is not tight enough to survive intermediate scrutiny because the remainder of the government's evidence is the baseless contention that drugs are inherently bad.

¹⁹⁵ *Id.* at 694 (quoting *Carter I*, 669 F.3d 411, 418 (4th Cir. 2012)).

¹⁹⁶ *Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016).

¹⁹⁷ *See supra* Section II.B.1.

¹⁹⁸ *See supra* Section II.B.1.

¹⁹⁹ *See supra* Section II.B.1.

²⁰⁰ *See supra* Section II.B.1.

Even if the court were to find the government's evidence compelling, the Sixth Circuit would distinguish medical marijuana cardholders from drug users because Wilson was not a drug user at all.²⁰¹ She merely held a medical marijuana license and did not avail herself of it.²⁰² Consequently, the goals of the policy cannot be furthered by restricting her right to own a firearm for defense of hearth and home. Therefore, because the fit between purpose and effect is poor, the Firearm Provisions, as applied to people in her situation, cannot withstand intermediate scrutiny.

V. SHOULD THE FIREARM PROVISIONS APPLY TO MEDICAL MARIJUANA USERS?

The Sixth Circuit should declare the Firearm Provisions unconstitutional as applied to licensed medical marijuana users for two reasons: (1) the courts are mistaken in applying intermediate scrutiny; and (2) even under intermediate scrutiny, the purported fit between the policy objective of the Firearm Provisions and the effects of their implementation is not tight enough to survive.

A. *Heller's Strict Scrutiny Requirement*

In *Heller*, Justice Scalia stated unequivocally that “the right of law-abiding, responsible citizens to use arms in defense of hearth and home” is elevated above all other interests, regardless of whatever the future should hold.²⁰³ The key phrase is “law-abiding, responsible citizen.” This language reads more like strict scrutiny than intermediate scrutiny because no other interest can touch the Second Amendment right, according to Justice Scalia. Any circuit applying anything less than strict scrutiny to regulations that infringe on the right to own a gun is not holding true to *Heller*.

If a court imposed intermediate scrutiny in a situation involving a medical marijuana patient while remaining consistent with *Heller*, that court would necessarily have to find that person is not a law-abiding citizen. However, that is simply a mischaracterization of medical marijuana patients.

²⁰¹ *Wilson*, 835 F.3d at 1100.

²⁰² *Id.* at 1098.

²⁰³ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

If a person has a prescription for medical marijuana, there is no reason to believe he is not obeying the laws of the state in which he lives. The license requires that the person go through numerous steps required by the government to have the option of legally consuming marijuana for medical use.²⁰⁴ If the person has a medical marijuana license, this shows the person complies with state law and is therefore a law-abiding citizen, at least by state standards. Therefore, compliance with the laws of the state should be the relevant indicator for medical marijuana because the federal government is in flux over this issue.²⁰⁵

Even if compliance with state law is insufficient to create a presumption of law-abiding character, there are additional reasons to grant special consideration to medical marijuana patients. It should be noted that medical marijuana patients often have debilitating illnesses and can seek the prescription for a variety of symptoms.²⁰⁶ These individuals could seek the path of least resistance and purchase marijuana on the black market, but they choose to comply with requirements set forth by their state government, which shows tremendous respect for the law. Because they are law-abiding citizens, their Second Amendment rights should be “held above all other interests,” and strict scrutiny should be applied.

B. Constitutionality of the Firearm Provisions Under Intermediate Scrutiny

Even if the applicable standard is intermediate scrutiny, the Firearm Provisions, as applied to medical marijuana patients, will fail to pass muster. In order to survive intermediate scrutiny, “(1) the government’s stated objective [must] be significant, substantial, or important; and (2) [there must be] a reasonable fit between the challenged regulation and the asserted objective.”²⁰⁷ The government could likely establish that it has an important interest in public safety via keeping firearms out of the hands of presumptively risky people. The Sixth Circuit has already determined that

²⁰⁴ See OHIO ADMIN. CODE 3796:7-2-01 (2017).

²⁰⁵ Jennifer Bendery, *Congress Gives Jeff Sessions \$0 to Go After Medical Marijuana Laws*, HUFFINGTON POST (May 2, 2017), https://www.huffingtonpost.com/entry/jeff-sessions-state-marijuana-laws_us_59077dcde4b0bb2d087023df [<https://perma.cc/859Y-XUM2>].

²⁰⁶ Robb, *supra* note 51.

²⁰⁷ *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 693 (6th Cir. 2016).

this interest is important,²⁰⁸ and there is little reason to challenge the government on this front.

Although the government interest may be important, the policy must also be a “reasonable fit between the challenged regulation and the asserted objective.”²⁰⁹ Further, more than mere “anecdote and supposition” must prove that relationship.²¹⁰ The problem for the government is that its argument rests solely upon mere anecdote and supposition for two reasons: (1) the evidence no longer clearly establishes that drugs cause violence or crime, and (2) medical marijuana users are substantially different than recreational users of drugs because they do not share risk factors for violent behavior common to recreational drug users.

The recent trend in the study of the purported relationship between drugs and violence has been to contextualize the problem.²¹¹ By contextualizing the correlation between drugs and violence, it is no longer clear to the scientific community that a causal connection between drugs and violence exists.²¹² The more frequent finding is that violence is much more likely an outcome of societal and environmental factors than of the ill effects of drugs.²¹³

A recent article in the University of Southern California Law Review examined this finding.²¹⁴ The author concluded that empirical evidence showed “the drug-violence link is at the very least over-exaggerated and lacks reliable empirical support.”²¹⁵ The article cited studies that suggested violence was systemic,²¹⁶ that drug users exhibited less violent criminal behavior while under the influence,²¹⁷ and, at the very least, that an outright prohibition of drugs does not reduce violence.²¹⁸ The author, in her own study examining over 100,000 pretrial records of defendants,

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 694.

²¹¹ *See supra* Section II.B.

²¹² *See supra* Section II.B.

²¹³ *See supra* Section II.B.

²¹⁴ Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227 (2015).

²¹⁵ *Id.* at 281.

²¹⁶ *Id.* at 280.

²¹⁷ *Id.*

²¹⁸ *Id.* at 280–81.

found that defendants charged with drug crimes were less likely to be arrested for violent crimes than other defendants.²¹⁹ In sum, the connection between drug use and propensity towards violent crime is, at the very least, not clear, and can often be attributed to other causes, including societal and environmental factors.²²⁰

The studies of marijuana use, when contextualized with other factors, show no connection between marijuana use and violent crime.²²¹ Further distinguishing recreational marijuana from black market marijuana, states that have enacted medical marijuana laws have shown that criminal activities have not increased.²²² In fact, there may have been a decrease in certain violent crimes in these states,²²³ militating against the charge that medical marijuana and crime have a positive correlation.

With the empirical evidence flawed at best, and conflicting with the stated policy at worst, the evidence the government puts forward is not sufficient to reach the standard required by intermediate scrutiny. Its task gets harder when the characteristics of medical marijuana users are incorporated into the analysis.

Medical marijuana users are inherently different than other drug users.²²⁴ They likely have debilitating illnesses, such as cancers, neurological disorders, musculoskeletal problems, and chronic infections, and they are typically middle-aged.²²⁵

In a survey comparing medical marijuana users to recreational users, the medical marijuana users were more likely to have a high-school diploma and some college education, more likely to have full-time employment (or to be retired or disabled), and more likely to have greater

²¹⁹ *Id.* at 290–91.

²²⁰ *Id.* at 284.

²²¹ Robert G. Morris et al., *The Effect of Medical Marijuana Laws on Crime: Evidence from State Panel Data, 1990-2006*, 9 PLOS ONE 1, 6 (2014), <http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0092816&type=printable> [<https://perma.cc/UWK5-3VK3>].

²²² *Id.*

²²³ *Id.*

²²⁴ See Robb, *supra* note 51.

²²⁵ *Id.*

income than average drug users.²²⁶ For medical marijuana users, the most common reason for using marijuana was to mitigate severe pain.²²⁷

Conceptually, there is a significant difference in the method of acquiring medical marijuana legally or illegally. In states where medical marijuana is legal, users obtain marijuana from a doctor who writes a prescription, and then users purchase the marijuana from state-licensed dispensaries.²²⁸ This method of exchange significantly militates against the state policy concerns by removing the black market entirely. Every step to obtain medical marijuana is sanctioned by state law.²²⁹ The same cannot be said for recreational users, who get their marijuana entirely through illegal means. Participating in the black market introduces criminal elements into the exchange that the state-sanctioned acquisition of medical marijuana does not.

The differences between medical and recreational marijuana users, combined with the empirical evidence disassociating drug use and violence, raises the bar too high for the government to reach. For the regulatory framework to survive, it must be reasonably related to its policy objective of keeping guns out of the hands of presumptively risky people, and evidence demonstrating this relationship must be more than mere anecdotes and supposition.²³⁰ As this Note has shown, it fails on both counts. It is not at all clear whether drug users are inherently risky because of their drug use.²³¹ In fact, some studies have shown the opposite, and even more have suggested that environmental factors are to blame.²³²

²²⁶ Peter Roy-Byrne et al., *Are Medical Marijuana Users Different from Recreational Users? The View from Primary Care*, 24 AM. J. ADDICTIONS 599, 602 tbl.1 (2015), <http://onlinelibrary.wiley.com/doi/10.1111/ajad.12270/epdf>. [https://perma.cc/26VZ-8RSK].

²²⁷ Kevin Loria, *Evidence Shows that Marijuana Works for Pain, the Medical Reason Most People Want It—but Doctors Still Have Questions*, BUS. INSIDER (Jan. 29, 2017, 1:00 PM), <http://www.businessinsider.com/medical-marijuana-effective-treatment-chronic-pain-2017-1> [https://perma.cc/KXH2-NGDQ].

²²⁸ Dina Titus, *Puff, Puff, Pass . . . That Law: The Changing Legislative Environment of Medical Marijuana Policy*, 53 HARV. J. LEGIS. 39, 41 (2016).

²²⁹ *Id.*

²³⁰ *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 693–94 (6th Cir. 2016).

²³¹ *See supra* Section II.B.

²³² *See supra* Section II.B.

Further, the characteristics of medical marijuana patients further combat the notion that medical marijuana users are presumptively risky.²³³ Based upon the above, medical marijuana users are not presumptively risky enough to justify the restriction of their Second Amendment rights. Therefore, the regulatory framework must be limited in its application to medical marijuana patients.

VI. CONCLUSION

This Note contends that the fit between the Firearm Provisions and the government's stated objectives must be reasonably close, but the fit here is not—not for Wilson, when she did not utilize her prescription card, nor for individuals who consume marijuana for medicinal purposes.

The government's case relies on outdated studies and a single supposition: drugs are bad. Based on *Tyler*, this simply will not satisfy even intermediate scrutiny in the Sixth Circuit²³⁴ because the Firearm Provisions prohibit medical marijuana users from purchasing firearms when there is no basis for doing so. In an ode to Johnny Cochran, if it does not fit, you must narrow a bit.

²³³ See *supra* Section II.B.2.

²³⁴ *Tyler*, 837 F.3d at 695.