THE CASE FOR MEDICAL CANNABIS IN NORTH CAROLINA

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Hemp. Marijuana. Pot. Mary Jane. Weed. The plant *Cannabis sativa L.* ("cannabis") goes by many names. An annual herbaceous plant native to Asia and now found worldwide,[1] cannabis is popularly known today—and outlawed in North Carolina—because of its psychoactive properties.[2] But, cannabis was not always illegal, and the use of cannabis fibers for clothing, rope, and other products dates back to the Middle Ages.[3] More recently, a growing body of scientific research has supported medicinal uses for cannabis, and many states have legalized the production and sale of cannabis for medical purposes.[4] North Carolina could be the next state to legalize medical cannabis with the proposed North Carolina Compassionate Care Act, also known as Senate Bill 711, which could be voted on this year.[5]

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1. Navdeep Kaur et al., *Uses of Raw Products Obtained from Hemp: Fiber, Seed, and Cannabinoids*, UNIV. OF FLA. INST. OF FOOD AND AGRIC. SERVS. EXTENSION 1 (Sept. 16, 2021), https://edis.ifas.ufl.edu/publication/AG459.

2. Elizabeth Thompson, *What Is the State of Medical Marijuana Legalization in North Carolina?*, N.C. HEALTH NEWS (Apr. 20, 2022), https://www.northcarolinahealthnews.org/2022/04/20/what-is-the-state-of-medical-marijuana-legalization-in-north-carolina (noting that North Carolina has outlawed marijuana despite still allowing the sale of THC products, which are comprised of less than .03% of "the substance most responsible for marijuana's impact on a person's mental state").

3. Kaur et al., *supra* note 1, at 1.

4. *State Medical Cannabis Laws*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last updated Feb. 3, 2022). Additionally, more than a dozen states have legalized marijuana for adult recreational use. *Id.*

5. S. 711, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021).

Section I of this comment briefly summarizes the history of cannabis law in the United States and describes the movement toward cannabis legalization specifically for medicinal purposes. Section II explains the current legal status of cannabis in North Carolina, and Section III analyzes the proposed medical cannabis bill. Finally, Section IV argues in favor of medical cannabis in North Carolina and examines the broader legal implications of a regulatory transition from an illicit substance to a legally prescribed medical treatment.

I. BACKGROUND: TREND IN LEGALIZING MEDICAL CANNABIS

Before describing the modern trend in legalization of medical cannabis, it is important to understand the history of cannabis law in the United States. Almost a century ago, Cannabis was legal and completely unregulated at the federal level.[6] The first national regulation of cannabis started with the Marihuana Tax Act of 1937.[7] Later, the Controlled Substances Act of 1970 completely outlawed cannabis.[8] While cannabis remains federally illegal, in the 21st century, many states passed legislation legalizing cannabis for medical or recreational purposes.[9]

A. Brief History of Cannabis Law in the United States

The presence of cannabis in the United States dates back to the early 1800s, when it was used as both a medicine and an industrial textile.[10] Cannabis was even listed as a legitimate medical compound in the United States Pharmacopeia in 1851.[11] With the

6. *See Did You Know…Marijuana Was Once a Legal Cross-Border Import?*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/about/history/did-you-know/marijuana (last modified Dec. 20, 2019) (discussing the history of federal cannabis regulation in the United States).

7. *Id.* (explaining the passage of the Marihuana Tax Act of 1937, which regulated the importation, cultivation, possession and/or distribution of marijuana in the United States for the first time).

8. Controlled Substances Act, 21 U.S.C. § 812.

9. NAT'L CONF. STATE LEGISLATURES, *supra* note 4.

10. Mark Tancig et al., *Industrial Hemp in the United States: Definition and History*, UNIV. OF FLA. INST. OF FOOD AND AGRIC. SERVS. EXTENSION 1–2 (Sept. 16, 2021) https://edis.ifas.ufl.edu/publication/AG458.

11. Peter J. Cohen, *Medical Marijuana: The Conflict Between Scientific Evidence and Political Ideology*, 23 J. PAIN & PALLIATIVE CARE PHARMACOTHERAPY 120, 121 (2009).

turn of the 20th century, opinions on cannabis began to change.[12] Stories in the popular press told frightening tales of a dangerous drug from Mexico that produced homicidal rages in some of its users, and politicians began speaking out against the substance.[13] The movement to criminalize cannabis was motivated at least in part by Americans' racial fears toward Mexicans.[14] Other powerful actors, such as the timber industry, had economic incentives to suppress hemp production.[15] By the 1930s, several state governments had banned the substance.[16]

The Marihuana Tax Act of 1937 was the first federal legislation on cannabis, under which the importation, cultivation, possession, and distribution of cannabis was regulated and taxed.[17] In theory, the Marijuana Tax Act only made the recreational possession and sale of cannabis illegal and imposed a tax on those who imported, prescribed, cultivated, or sold cannabis for medical or industrial purposes.[18] While medical and industrial uses of cannabis remained legal, the tax and accompanying paperwork made medical research and the use of cannabis for industrial fiber uneconomical.[19]

The Controlled Substances Act of 1970 ("CSA") outlawed cannabis entirely.[20] Controlled substances are drugs that are considered easily abusable, and under the CSA, drugs are categorized into five schedules depending on both the level of abuse potential and the recognized medical uses for the drug.[21]

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12. *See* U.S. CUSTOMS & BORDER PROT., *supra* note 6 (contrasting marijuana regulation in the early 20th century from the modern marijuana regulation in the United States at the federal level).

13. *See generally* Matt Thompson, *The Mysterious History of "Marijuana"*, NAT'L PUB. RADIO (July 22, 2013, 11:46 AM), https://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana (discussing the racial dimension of the anti-cannabis animus that caused the drug to be viewed with "a whole new identity" in the United States).

14. *Id.*

15. *See* Jared L. Hausmann, *Sex, Drugs, and Due Process: Justice Kennedy's New Federalism As A Framework for Marijuana Liberalization*, 53 U. LOUISVILLE L. REV. 271, 277 (2015) (indicating that, because the paper industry regarded hemp as better than wood pulp for paper production, the timber industry stood to benefit from the Marihuana Tax Act of 1937).

16. U.S. CUSTOMS & BORDER PROT., *supra* note 6.

17. *See* Marihuana Tax Act of 1937, ch. 553, § 2(a), 50 Stat. 551, 551–552 (1937).

18. *Id.*

19. U.S. CUSTOMS & BORDER PROT., *supra* note 6.

20. *See* Controlled Substances Act, 21 U.S.C. § 812.

21. *Id.*

Schedule I drugs are defined as drugs that have the highest abuse potential and no accepted medical use, and they may never be prescribed, dispensed, or administered.[22] Meanwhile, drugs that are categorized as Schedule II or lower have recognized medical uses and may be prescribed under certain conditions, even though there is still potential for abuse.[23] Cannabis is classified as a Schedule I drug, which puts it in the same category as heroin and a schedule higher than other drugs such as morphine, fentanyl, and codeine.[24]

Lasty, it is important to note that under the Agricultural Act of 2014, growing industrial hemp became federally legal on a trial basis for the first time since 1970.[25] Industrial hemp is defined as the plant *Cannabis sativa L.* with a tetrahydrocannabinol ("THC") level below 0.3% on a dry-weight basis.[26] Four years later in the 2018 Farm Bill, industrial hemp was removed from the definition of marijuana in the CSA.[27] Thus, growing hemp for industrial purposes like fiber, CBD products, or food products is now legal, though only with a license.[28]

B. The Movement to Medical Legalization

In 1996, California became the first state to legalize cannabis for medicinal purposes.[29] The California Legislature twice passed a bill legalizing the medical use of cannabis prior to 1996, but both bills were vetoed by the governor.[30] This led political activists to bring the issue directly to the people of California through a ballot initiative.[31] The California Compassionate Use Act gives California citizens the right under state law to obtain and use cannabis when

22. *See generally* Michael Gabay, *The Federal Controlled Substances Act: Schedules and Pharmacy Registration*, 48 HOSP. PHARMACY 473, 474 tbl.1 (2013) (identifying the qualities of scheduled controlled substances and providing examples that fall within each classification).

23. *Id.*

24. *Id.*

25. Agricultural Act of 2014, Pub. L. No. 113-79, § 7606, 128 Stat. 912, 912–13.

26. 7 U.S.C. § 1639o(1).

27. Agriculture Improvement Act of 2018, Pub. L. 115-334, § 12619, 132 Stat. 5018 (codified as amended at 21 U.S.C. § 802).

28. 7 U.S.C. § 1639q(b).

29. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2022).

30. Lewis A. Grossman, *Life, Liberty, [and the Pursuit of Happiness]: Medical Marijuana Regulation in Historical Context*, 74 FOOD & DRUG L.J. 280, 280 (2019).

31. *Id.*

recommended by a physician for the treatment of "cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief."[32] State prohibitions on possession and cultivation of cannabis no longer applied to such patients, their primary caregivers, or their prescribing physicians.[33]

California's legalization of medical cannabis preceded much of the scientific research on the efficacy of cannabis as a pharmaceutical.[34] Instead, arguments in support of medical cannabis relied more on anecdotal evidence from medical professionals.[35] For example, a 1991 survey found that 44% of American oncologists had recommended smoking cannabis to at least one of their chemotherapy patients.[36] Such anecdotal evidence was enough to sway public opinion, and the California Compassionate Use Act passed with the support of 55.6% of California voters.[37]

California's legalization of medical cannabis started a wave of legislation across the country. Only two years after California passed its act, Alaska, Nevada, Oregon, Washington, and Arizona had legalized medical cannabis.[38] Some states passed medical cannabis laws like California, by ballot initiative.[39] Other states legalized medical cannabis through legislation, and one state, Florida, passed medical cannabis through a constitutional amendment.[40] As of this comment, thirty-seven states and the District of Columbia have legalized medical cannabis; more than a dozen of those states have gone one step further and legalized cannabis for recreational use as well.[41] Nevertheless, under federal law, cannabis remains an illicit substance with "no recognized medical use," creating legal uncertainty on the validity of state laws,

32. § 11362.5(b)(1)(A).

33. § 11362.5.

34. Grossman, *supra* note 30, at 303.

35. *Id.* at 304.

36. *44% of Cancer Specialists in Survey have Advised Patients to Smoke Pot*, DESERET NEWS (May 1, 1991, 2:00 AM), https://www.deseret.com/1991/5/1/18918400/44-of-cancer-specialists-in-survey-have-advised-patients-to-smoke-pot.

37. Grossman, *supra* note 30, at 282.

38. *Id.* at 308.

39. *Id.*

40. *Id.*

41. NAT'L CONF. STATE LEGISLATURES, *supra* note 4.

federal preemption, and the proper balance of power between state and federal governments.[42]

II. CURRENT STATUS OF CANNABIS IN NORTH CAROLINA

North Carolina is in the minority of states that still criminalize the medicinal use of cannabis.[43] North Carolina has its own Controlled Substances Act and, similar to the federal CSA, categorizes different substances into schedules.[44] Unlike the federal CSA, North Carolina categorizes cannabis as a Schedule VI drug, defined as a drug that has "no currently accepted medical use…*or* a relatively low potential for abuse…*or* a need for further and continuing study to develop scientific evidence of its pharmacological effects."[45] Any person who manufactures, sells, delivers, or possesses with intent to sell or deliver cannabis is guilty of a felony, while any person who possesses cannabis is guilty of a misdemeanor.[46]

The North Carolina Controlled Substances Act does provide an explicit and narrowly tailored exemption for the use of hemp extract.[47] Under the Act, hemp extract is defined as an extract from the cannabis plant that has "less than nine-tenths of one percent tetrahydrocannabinol by weight."[48] However, the exemption is limited only to those who possess hemp extract to treat epilepsy, and the person must possess a certificate of analysis alongside the hemp extract that proves compliance with the THC threshold.[49] Furthermore, industrial hemp is grown as an agricultural commodity in North Carolina in accordance with the 2018 Farm Bill.[50] Hemp and hemp-derived products are a budding new

42. *See generally* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62(5) VAND. L. REV. 1421, 1422 (2009).

43. NAT'L CONF. STATE LEGISLATURES, *supra* note 4.

44. *See* N.C. GEN. STAT. § 90-94 (2022).

45. *Id.* (emphasis added).

46. § 90-95.

47. § 90-94.1.

48. § 90-94.1(a).

49. § 90-94.1(b)(1)–(2).

50. Farm Act of 2018, 113 N.C. Sess. Laws 1, 3–4 (codified at N.C. GEN. STAT. § 106-568.51 (2022)).

industry for the state, with approximately 1,500 licensed growers and 1,200 registered processors in North Carolina.[51]

III. NORTH CAROLINA'S PROPOSED MEDICAL CANNABIS LAW

Now, a bill before the North Carolina General Assembly proposes to legalize medical cannabis for certain conditions.[52] Titled the North Carolina Compassionate Care Act, it would create a framework for prescribing and selling medical cannabis.[53] The primary sponsors of the bill are Democratic Senator Paul Lowe and two Republican Senators, and it has received bipartisan support from Senate committees on health care, judiciary, and finance.[54] The following section describes the proposed regulatory framework for North Carolina medical cannabis and then compares it to the laws of other states that have legalized medical cannabis.

A. Proposed Regulatory Framework

The North Carolina Compassionate Care Act is premised on legislative findings that "modern medical research has found that cannabis and cannabinoid compounds are effective at alleviating pain, nausea, and other symptoms,"[55] and that allowing the use of medical cannabis would "preserve and enhance the health and welfare of [North Carolina] citizens."[56] The bill would allow physicians to prescribe cannabis to patients with a "debilitating medical condition,"[57] which is defined as one of the following conditions:

(a) Cancer
(b) Epilepsy
(c) Human Immunodeficiency Virus (HIV)/Acquired Immune Deficiency Syndrome (AIDS)

51. Alice Manning Touchette, *Hemp: North Carolina's Budding Industry*, N.C. STATE UNIV. COLL. OF AGRIC. AND LIFE SCIS. (Dec. 2, 2021), https://cals.ncsu.edu/news/hemp-north-carolinas-budding-industry.

52. Charles Duncan, *Medical Marijuana Bill Could Be Back on Track in N.C. Legislature Next Year*, SPECTRUM NEWS 1 (Dec. 21, 2021, 12:10 PM), https://spectrumlocalnews.com/nc/charlotte/politics/2021/12/21/medical-marijuana-bill-could-be-back-on-track-in-n-c–legislature-next-year.

53. *Id.*

54. *Id.*

55. S. 711, 2021 Gen. Assemb., Reg. Sess. § 90-113.111(1) (N.C. 2021).

56. § 90-113.111(2).

57. § 90-113.112(7).

(d) Amyotrophic lateral sclerosis (ALS)
(e) Crohn's disease
(f) Sickle cell anemia
(g) Parkinson's disease
(h) PTSD (subject to evidence of a traumatic event, such as combat service or a violent assault)
(i) Multiple sclerosis
(j) Cachexia
(k) Severe or persistent nausea related to end-of-life care or bedridden condition
(l) Terminal illness with a life expectancy of less than six months
(m) Any condition requiring hospice care.[58]

In addition, the bill would establish a Compassionate Use Advisory Board under the Department of Health and Human Services.[59] The Board would have the authority to add "any other serious medical condition or its treatment"[60] to the list of conditions eligible to use medical cannabis. The Board would be comprised of eleven members: seven members appointed by the Governor, two by the House Speaker, and two by the Senate President.[61] Of the seven members appointed by the Governor, three must hold a medical doctorate, and one of the three must be board-certified in addiction medicine.[62] Other required members include a research scientist with expertise in cannabis, a pharmacist, a patient that would be eligible to use cannabis under the act, and the parent of a minor patient eligible to use cannabis.[63] The Board members would meet at least twice a year to review petitions to add debilitating medical conditions to the list, which would be done with a majority vote.[64]

Patients with a medical cannabis prescription would receive a registry card similar to the identification cards used in other states, and the state would maintain a registry of all medical cannabis patients.[65] The bill also includes requirements and restrictions for

58. § 90-113.112(7)(a)–(n).
59. § 90-113.113.
60. § 90-113.112(7)(o).
61. § 90-113.113(a)(1)–(3).
62. § 90-113.113(a)(1)(a)–(c).
63. § 90-113.113(a)(1)(d)–(g).
64. § 90-113.113(e)–(f).
65. Duncan, *supra* note 52.

physicians who would be eligible to prescribe medical cannabis.[66] Such restrictions include a limit on the number of prescriptions a physician can write at one time and a ban on on-site advertising at a medical cannabis center.[67] Physicians must also complete continuing medical education courses on prescribing medical cannabis.[68] Outside of the initial physician visit during which a patient is diagnosed with a debilitating medical condition, health insurance would not be required to reimburse the cost of medical cannabis.[69]

Physicians, patients, and primary caregivers would be exempted from criminal liability for the possession of cannabis.[70] However, patients and caregivers may not possess any more cannabis than an "adequate supply,"[71] defined in the bill as a thirty-day supply based on the prescribed amount.[72] The proposed bill would not affect North Carolina law relating to the nonmedical use and possession of cannabis.[73] Furthermore, the bill explicitly states that it "shall not be construed"[74] to require any accommodation of medical cannabis use in a correctional facility, place of education, or place of employment, nor would the smoking or vaping of cannabis be allowed in a public place.[75]

Finally, to oversee the growth and processing of cannabis for medical use, the North Carolina Compassionate Use Act would establish a Medical Cannabis Production Commission.[76] Also composed of eleven members, the Commission would include representatives from the cannabis industry and law enforcement.[77] The Commission would oversee the issuance of medical cannabis supplier licenses and have the power to make rules regarding the qualifications and requirements for licensure.[78] For example, to obtain a supplier license, an applicant must have been a resident of

66. S. 711, 2021 Gen. Assemb., Reg. Sess. § 90-113.114 (N.C. 2021).
67. § 90-113.114(c), (l).
68. § 90-113.114(a).
69. § 90-113.141(7).
70. *See* § 90-113.111(3) (intending to change existing North Carolina laws to shield patients and their doctors from criminal and civil penalties).
71. § 90-113.127(c)(3).
72. § 90-113.112(1).
73. § 90-113.141(2).
74. § 90-113.141.
75. § 90-113.141(6).
76. § 90-113.118(a), (k)(1)–(2).
77. § 90-113.118(a).
78. *Id.* § 90-113.118(h), (k).

North Carolina for at least two years prior to the date of the application and have documented expertise in producing cannabis.[79] Further, a supplier license would not come cheap: a supplier would have to pay a $50,000 license fee, $10,000 each year to renew the license, and 10% of their annual proceeds to the North Carolina Department of Health and Human Services.[80]

The Commission could approve no more than ten supplier licenses, and each supplier would be limited to no more than four dispensing centers.[81] The bill strictly limits both where and when dispensaries could operate.[82] Additionally, suppliers would be strictly prohibited from advertising cannabis in public or making claims about the health benefits related to cannabis use.[83] Finally, medical cannabis products would have to be third-party tested at independent laboratories licensed through the state before they could be sold to consumers.[84]

B. Comparing North Carolina's Proposal to Other State Laws

Eighteen states have legalized cannabis for medicinal purposes but have not legalized it for adult recreational use.[85] These state laws provide a useful comparison to assess the propriety of North Carolina's proposed regulatory framework, including the medical conditions that would be covered under the act and the protections from discrimination provided to patients who use medical cannabis.

i. Medical Conditions Eligible for Cannabis Use

North Carolina's medical cannabis bill has been described by one of the senators backing it as one of the tightest in the nation.[86] Notably missing from the list of debilitating medical

79. *Id.* § 90-113.120(c)(3)(a), (c)(9).

80. *Id.* §§ 90-113.120(c)(7)–(8), 113.122(b).

81. *Id.* § 90-113.118(h).

82. *See Id.* § 90-113.129(a)–(b) (prohibiting a licensed medical cannabis center from being located near a school or church and limiting its hours of operation to between 7:00 a.m. and 7:00 p.m.).

83. *Id.* § 90-113.131(c).

84. *Id.* § 90-113.130(a).

85. NAT'L CONF. STATE LEGISLATURES, *supra* note 4.

86. Duncan, *supra* note 52.

conditions eligible for a cannabis prescription in North Carolina is chronic pain.[87] Chronic pain is enumerated in many other states' medical cannabis laws as a condition eligible for a cannabis prescription, including West Virginia, Pennsylvania, Florida, and Ohio.[88] Additional conditions included in other state medical cannabis laws but absent from North Carolina's include seizure disorder (more general than epilepsy), chronic traumatic encephalopathy, glaucoma, traumatic brain injury, Tourette's syndrome, and inflammatory bowel disease.[89]

The North Carolina bill is "targeted to various medical conditions"[90] and attempts to avoid "legalization in a more profound sense."[91] However, the bill leaves out many medical conditions that could be considered debilitating, and patients with such conditions may benefit from access to medical cannabis.[92] Physicians, rather than legislators, are better positioned to determine when a patient has a medical condition and symptoms that could be alleviated from cannabis.[93] Now that the medicinal benefits of cannabis are being recognized, physicians should be able to prescribe it to all patients in need of its therapeutic effects without undue interference from the legislature. A broader list of conditions, like those in other state medical cannabis laws, is more equitable and provides North Carolina citizens with greater access to a full range of medical care options.

87. *See* S. 711, 2021 Gen. Assemb., Reg. Sess. § 90-113.112(7) (N.C. 2021) (providing a list of debilitating medical conditions not including chronic pain as a standalone condition).

88. W. VA. CODE § 16A-2-1(a)(30)(N) (2022); 35 PA. STAT. AND CONS. STAT. ANN. § 10231.103 (West 2021); FLA. STAT. § 381.986(2)(m) (2022); OHIO REV. CODE ANN. § 3796.01(A)(6)(m) (West 2020).

89. *E.g.*, OHIO REV. CODE ANN. § 3796.01(A)(6) (West 2020).

90. Duncan, *supra* note 52 (quoting Sen. Paul Lowe, "Anybody can't just go out and get medical marijuana. It's not legalization in a more profound sense at all. But it's targeted to various medical conditions.").

91. *Id.*

92. *See* S. 711, 2021 Gen. Assemb., Reg. Sess. § 90-113.112(7) (N.C. 2021) (providing a list of qualifying debilitating medical conditions but leaving out many others that could be considered as debilitating as well).

93. *See generally* Steven E. Weinberger et al., *Legislative Interference with the Patient-Physician Relationship*, 367 NEW ENG. J. MED. 1557, 1557 (2012) (finding that the American legislators should not overstep the proper limits of their role in health care by dictating patients' interactions with their health care providers and should follow the principles of putting patients' best interests first).

ii. Protection from Discrimination

While public opinion on cannabis use has shifted dramatically in the past decade, there is still a stigma associated with cannabis that is absent from other forms of medical treatment.[94] This leaves medical cannabis patients vulnerable to discrimination because of their status as a cannabis user. As a result, some state medical cannabis laws provide explicit protections from discrimination for cannabis patients.[95] For example, Ohio's medical cannabis law explicitly provides that a person's status as a registered medical cannabis user "shall not be used as the sole or primary basis"[96] for rejecting the person as a tenant, disqualifying a patient for medical care (such as placement on an organ transplant list), or the determination of parental rights.[97] However, Ohio law does not provide cannabis patients with protection from employment discrimination, such as an employer's decision to fire or refuse to hire someone because of their status as a medical cannabis user.[98]

In contrast, the Pennsylvania statute provides similar protections as the Ohio law and additionally provides protection against employment discrimination.[99] Under Pennsylvania law, no employer may "discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee"[100] solely based on such employee's status as a medical cannabis user.[101] This does not extend to any accommodation of cannabis use on the premises of the employer.[102] Protections against discrimination for medical cannabis users are discussed below under the broader implications of the legalization of medical cannabis.

94. *See, e.g.*, Semyon Melnikov et al., *The Effect of Attitudes, Subjective Norms and Stigma on Health-Care Providers' Intention to Recommend Medicinal Cannabis to Patients*, 27 INT'L J. NURSING PRAC., 2020, at 1, 3.

95. *See, e.g.*, OHIO REV. CODE ANN. § 3796.24(A)–(F) (West 2016); 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103 (West 2016).

96. OHIO REV. CODE ANN. § 3796.24(B) (West 2016).

97. § 3796.24(B)(2), (C), (F).

98. § 3796.28(A)(2).

99. 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103(b)–(c) (West 2016).

100. § 10231.2103(b)(1).

101. *Id.*

102. § 10231.2103(b)(2).

IV. North Carolina Medical Cannabis Legalization and Its Implications

Legalization of medical cannabis would "enhance the health and welfare of [North Carolina] citizens,"[103] as a growing body of medical research continues to show that cannabis does provide therapeutic benefits.[104] However, the transition from a regulatory scheme that treats cannabis as an illegal substance to one where cannabis is a legally prescribed medical substance is a complicated process. While North Carolina should legalize medical cannabis, it raises additional questions regarding how cannabis use is and ought to be treated in society. For example, cannabis patients may face discrimination in employment because of their status as medical cannabis users.[105] Other implications include whether cannabis use is permissible to consider in adjudications of parental rights and whether cannabis would be covered in driving under the influence ("DUI") laws.[106]

A. Medical Cannabis Should Be Legalized

While the medicinal effects of cannabis were uncertain in 1996 when California passed the nation's first medical cannabis law, California's legalization prompted more scientific research into cannabis and its compounds.[107] To date, the Food and Drug Administration ("FDA") has approved one drug, Epidiolex, that is derived from cannabis.[108] It is used for the treatment of childhood seizure disorders.[109] The FDA has also approved two other

103. S. 711, 2021 Gen. Assemb., Reg. Sess. § 90-113.111(2) (N.C. 2021).

104. *See, e.g.*, Cohen, *supra* note 11, at 122.

105. *See* Iris Hentze, *Cannabis & Employment Laws*, NAT'L CONF. STATE LEGISLATURE (Nov. 1, 2021), https://www.ncsl.org/research/labor-and-employment/cannabis-employment-laws.aspx.

106. *See* H.R. 576, 2021 Gen. Assemb., Reg. Sess. § 90-730.1(l)–(m) (N.C. 2021); *Drugged Driving: Marijuana–Impaired Driving*, NAT'L CONF. STATE LEGISLATURES (Sept. 8, 2022), https://www.ncsl.org/research/transportation/drugged-driving-overview.aspx.

107. *See* Grossman, *supra* note 30, at 303–04 (stating that when California's medical cannabis law passed, "scientific evidence for the medical effectiveness of smoked cannabis remained preliminary, at best" and the available studies paled in comparison to the size and scale required for FDA approval).

108. Kaur et al., *supra* note 1, at 3.

109. *Id.*

therapeutic drugs, Marinol and Syndros, that include a synthetic form of THC as an active ingredient.[110]

Multiple peer-reviewed, published studies have found that smoking cannabis "effectively relieved chronic neuropathic pain"[111] associated with HIV.[112] Another study found that smoking cannabis significantly ameliorated the symptoms associated with hepatitis C chemotherapy—extreme fatigue, nausea, muscle aches, loss of appetite, and depression—and enabled 42% more patients to complete their course of chemotherapy compared to patients who did not use cannabis.[113] Furthermore, medical cannabis can also serve as an alternative to highly addictive opioids for the treatment of pain.[114] This is one of the reasons cited by House Majority Whip Representative John Hardister in support of the bill: "I think that doctors ought to have the ability to prescribe it. I think that in many ways . . . medical marijuana is less addictive and harmful than some of the opioids that are currently legal."[115]

With a growing body of scientific evidence demonstrating the therapeutic effects of cannabis,[116] it is outdated for a state or federal government to deny people with debilitating medical conditions access to cannabis. Criminal punishment for the use of cannabis, particularly when used to alleviate medical symptoms, does not serve the public interest and in fact, harms public health.[117] For example, cannabis is responsible for half of all U.S. drug arrests, and such arrests disproportionately impact people of

110. *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, FOOD & DRUG ADMIN., https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd (last visited Sept. 2, 2022).

111. Cohen, *supra* note 11, at 122–23.

112. *Id.*

113. *Id.* at 123.

114. Babasola O. Okusanya et al., *Medical Cannabis for the Reduction of Opioid Dosage in the Treatment of Non-Cancer Chronic Pain: A Systematic Review*, 9 SYSTEMATIC REVS. 167, 172 (2020).

115. Duncan, *supra* note 52.

116. *See, e.g.*, COMM. ON HEALTH EFFECTS OF MARIJUANA, THE NAT'L ACADS. OF SCI. ENG'G AND MED., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH 85 (2017) (listing the therapeutic benefits for patients with chemotherapy-induced nausea, chronic pain, and multiple sclerosis).

117. *See* Tamar Todd, *The Benefits of Marijuana Legalization and Regulation*, 23 BERKELEY J. CRIM. L. 99, 111 (2018) (stating that the prohibition of access to marijuana by pain patients is "exacerbating a public health crisis").

color.[118] Legal or illegal, people are using cannabis, and many are using it for its medicinal effects.[119]

State legalization of medical cannabis will offer North Carolina citizens safer access to cannabis products. State regulation and testing of cannabis products will provide consumer protection and safety benefits for those who use cannabis products. As opposed to purchasing cannabis on the black market, North Carolinians with registry cards will be able to purchase cannabis from licensed suppliers and have a guarantee on the products they receive.[120] Likewise, consumers will be able to choose from a variety of cannabis products tailored to their needs. Moreover, legalization of cannabis has broad public support in North Carolina, with 73% of North Carolina adults supporting legalization for medical use and 54% supporting legalization for both medical and adult recreational use.[121]

B. Broader Implications of Cannabis Legalization

If medical cannabis is legalized in North Carolina, it will create broader implications regarding how medical cannabis use is treated in society compared to other prescription drugs. As argued above, the use of cannabis for medicinal purposes should no longer be criminalized; rather, it should be legalized and regulated. While public opinion on cannabis has shifted significantly in the past decade, it still carries the stigma of being a federally illicit drug. The legalization of cannabis raises the question of whether employers can or should continue to enforce "drug-free workplace" policies that would penalize an employee for their use of medical cannabis.[122] Other questions include whether courts should properly consider cannabis use in adjudications of parental rights and the use of cannabis prior to operating a motor vehicle.

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118. AM. C.L. UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 4 (2013).

119. *See generally Marijuana and Public Health*, CTR. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/marijuana/data-statistics.htm (last updated June 8, 2021) (stating that cannabis is the most used federally illegal drug with about 18% of Americans having used it at least once in 2019).

120. *See* S. 711, 2021 Gen. Assemb., Reg. Sess. §§ 90-113.115(a), 113.120(c)(3), 113.130(a) (N.C. 2021).

121. ELON UNIV. POLL, NORTH CAROLINA OPINIONS ABOUT MARIJUANA 3 (2021), https://www.elon.edu/u/elon-poll/wp-content/uploads/sites/819/2021/02/Elon-Poll-Report-021121.pdf.

122. *See, e.g.*, Jay M. Zitter, Annotation, *Propriety of Employer's Discharge of or Failure to Hire Employee Due to Employee's Use of Medical Marijuana*, 57 A.L.R.6th 285 (2010).

i. Employment Policies Around Cannabis Use

It is not uncommon for employers to have "drug-free workplace" and "zero-tolerance" policies and to drug test prospective and current employees.[123] These policies would not ordinarily extend to an employee's use of a prescription drug to treat a medical condition.[124] Now that cannabis is viewed in many states as a medical treatment, and if North Carolina passes the Compassionate Use Act, should cannabis be treated differently than other prescription drugs by employers? Should an employer be able to fire, refuse to hire, or discipline an employee because of their status as a registered cannabis user?

There may certainly be valid reasons for an employer to prohibit the use of cannabis on employer property or prohibit an employee to be under the influence at work, and North Carolina's proposed bill explicitly excludes any construction of the bill that would require an employer to accommodate medical cannabis use at work.[125] However, the drug testing methods employers utilize will only determine if an employee uses cannabis at all, not whether an employee was under the influence while on the job.[126] Individuals can test positive for cannabis weeks or even months after use, and medical cannabis use outside of work hours has little to no demonstrated effect on work performance.[127]

Pennsylvania's medical cannabis statute provides employees who use medical cannabis with certain protections.[128] Specifically, an employer may not fire, refuse to hire, or institute other disciplinary actions against an employee solely because of their

123. *See, e.g., Changing Laws, Attitudes Pushing Employers to Explore Alternatives to Drug Tests*, 29 No. 10 N.C. EMP. L. LETTER 7 (Womble Bond Dickinson LLP) Nov. 2019.

124. Such employer drug policies focus on the use of *illegal* drugs, and cannabis has become a hybrid: illegal at the federal level but legal at the state level. *See Now's the Time to Consider Marijuana Policy*, 29 No. 1. N.C. EMP. L. LETTER 4 (Womble Bond Dickinson LLP) Feb. 2019 (explaining the "legal and practical implications" that this complexity brings to the workplace).

125. S. 711, 2021 Gen. Assemb., Reg. Sess. § 90-113.141(6) (N.C. 2021).

126. *Changing Laws, Attitudes Pushing Employers to Explore Alternatives to Drug Tests*, *supra* note 123.

127. *Cannabinoid Screen and Confirmation (Urine)*, UNIV. OF ROCHESTER MED. CTR., https://www.urmc.rochester.edu/encyclopedia/content.aspx?contenttypeid=167&contentid=cannabinoid_screen_urine (last visited Sept. 15, 2022) (stating that THC can be detected on average ten days after casual use and two to four weeks after frequent use); *SDSU Professor Finds After-Hours Cannabis Use Has No Impact on Workplace Performance*, SAN DIEGO STATE UNIV. (2022), https://business.sdsu.edu/about/news/articles/2020/07/sdsu-professor-cannabis-research-on-workplace-performance.

128. 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103(b)(1) (West 2016).

cannabis use.[129] Other methods for assessing impairment at work may be as or more effective as drug tests to protect employers from employees who may come to work impaired.[130] Such "impairment tests" have existed since the 1990s and use methods to measure alertness or impairment from a variety of causes including drug and alcohol use, illness, or fatigue.[131] Furthermore, employers can train supervisors to recognize signs of impairment in employees at work.[132] After all, an employee can be just as impaired at work because of alcohol use rather than cannabis use, but employees remain free to consume alcohol outside of work hours.

Some examples of alternative drug policies employers could adopt that are more equitable than "zero tolerance" include: prohibiting the use of cannabis at the workplace, although employers could allow employees to take breaks to use cannabis as an accommodation of a disability under the American with Disabilities Act ("ADA"); prohibiting employees from any cannabis use unless they have a valid prescription; disciplining employees who test positive for cannabis unless they have a prescription; or barring employees who use cannabis only from certain safety-sensitive positions (e.g., a position that requires operation of heavy machinery).[133] Unless an employer is subject to the federal Drug-Free Workplace Act, it will be up to employers to develop or modify their drug policies in reaction to state legalization of cannabis use.[134]

Public policy, including the right to privacy, the right to decide one's own medical care, and the right to a reasonable accommodation of a disability, disfavors allowing an employer to fire an employee simply for their use of medical cannabis.[135] As cannabis law further develops, employees may have a statutory or common law cause of action against an employer who discharges them for their status as a legal cannabis user.[136] For example, a

129. *Id.*

130. *Changing Laws, Attitudes Pushing Employers to Explore Alternatives to Drug Tests*, *supra* note 123.

131. *Id.*

132. *Id.*

133. *Now's the Time to Consider Marijuana Policy*, *supra* note 124.

134. *Id.*

135. *See generally* Zitter, *supra* note 122 (noting cases that have been brought under these provisions, though not always successfully).

136. *See, e.g.*, Palmiter v. Commonwealth Health Sys., Inc., 260 A.3d 967, 977 (Pa. Super. Ct. 2021) (holding that plaintiff could plausibly bring a private statutory action under the

Pennsylvania court held that the state's medical marijuana statute provided a private right of action to an employee alleging wrongful discharge because of cannabis use.[137] The common law tort of wrongful discharge in violation of public policy may be another form of redress for an aggrieved ex-employee.[138]

ii. Parental Custody

Another implication of medical cannabis legalization is the proper role, if any, cannabis use should play in adjudications of parental rights. As previously stated, cannabis, once considered an illicit and dangerous substance, is now treated by many state laws as a valid medical treatment.[139] However, in at least one North Carolina case, a mother's prescription for and use of medical cannabis in another state was a factor the court considered in awarding primary custody to the child's father.[140] In *Atkinson*, the mother of a middle-school-aged child used medical cannabis in the evenings while at home with her child.[141] The court relied on the mother's cannabis use to support its conclusion that there had been a "substantial change in circumstances affecting the welfare [of the child]."[142] The North Carolina Court of Appeals affirmed the lower court's findings and awarded primary custody to the child's father.[143]

Some state medical cannabis statutes provide protection for registered cannabis users against such parental rights adjudications.[144] For example, Ohio law provides that the use, possession, or administration of medical cannabis "shall not be the sole or primary basis for . . . an allocation of parental rights."[145] North Carolina's proposed medical cannabis bill does not provide any explicit protections for parents who obtain prescriptions for

Medical Marijuana Act and a wrongful discharge action against her employer for termination based on her use of medical marijuana).

137. *Id.*

138. *See* RESTATEMENT (THIRD) OF EMP. L. § 5.01 (AM. L. INST. 2015).

139. *See* NAT'L CONF. STATE LEGISLATURES, *supra* note 4.

140. Atkinson v. Chamberlin-Spencer, No. COA17-941, 2018 WL 1386607, at *1–*4 (N.C. Ct. App. Mar. 20, 2018).

141. *Id.* at *1, *3.

142. *Id.* at *3.

143. *Id.* at *1, *5.

144. *See, e.g.,* OHIO REV. CODE ANN. § 3796.24(B) (West 2016); 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103(c) (West 2016).

145. OHIO REV. CODE ANN. § 3796.24(B)(2) (West 2016).

cannabis.[146] The North Carolina Legislature should consider adopting language in the bill similar to that included in Ohio's law. Parents should not fear a loss of parental rights because they obtain a medical cannabis prescription to treat debilitating medical conditions.

iii. Driving Under the Influence

Cannabis, specifically THC, is an intoxicating substance that can impair motor skills and other cognitive abilities needed to operate a motor vehicle, similar to alcohol.[147] Because of this, the legalization of cannabis for either medical or adult recreational use raises the question of what level of cannabis intoxication would be deemed "under the influence" and thus prohibit operation of a motor vehicle. However, there is little data available on the relationship between cannabis dose and level of impairment, and available technology is still developing the ability to perform accurate roadside sobriety tests for cannabis use, such as a breathalyzer for alcohol.[148]

Some states that have legalized cannabis use have set per se legal limits for the level of cannabis in an individual's system that constitutes driving under the influence.[149] For example, West Virginia sets the impairment limit at three "nanograms of active tetrahydrocannabis per millimeter of blood in serum"[150] above which a cannabis patient may not operate a vehicle, other heavy equipment, or perform other employment tasks considered a safety risk.[151] While North Carolina's proposed medical cannabis bill does not "permit the operation of any vehicle, aircraft, train, or boat while under the influence of cannabis,"[152] the state will have to decide what level of cannabis intoxication constitutes 'under the influence' for enforcement of DUI laws. This issue is not unique to

146. *See* S. 711, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021).

147. Aviv Weinstein et al., *A Study Investigating the Acute Dose-Response Effects of 13 mg and 17 mg 9-tetrahydrocannabinol on Cognitive-Motor Skills, Subjective and Autonomic Measures in Regular Users of Marijuana*, 22 J. PSYCHOPHARMACOLOGY 441, 442 (2008).

148. *See* Franjo Grotenhermen et al., *Developing Limits for Driving Under Cannabis*, 102 ADDICTION 1910, 1915 (2007).

149. Kristin Wong et al., *Establishing Legal Limits for Driving Under the Influence of Marijuana*, 1 INJURY EPIDEMIOLOGY, no. 26, 2014, at 1, 4–5.

150. W. VA. CODE § 16A-5-10(1) (2022).

151. § 16A-5-10(1)(C), (4).

152. S. 711, 2021 Gen. Assemb., Reg. Sess. § 90-113.141(4) (N.C. 2021).

cannabis, however, and such decisions can be made using the best available social and biological scientific evidence.

V. CONCLUSION

With a bill proposed in the senate, North Carolina may join the majority of states that have legalized cannabis for medicinal use. Changing public and professional opinions and a growing body of scientific evidence justify the legalization of cannabis for medicinal purposes, and such a measure has popular support in North Carolina.[153] Across the country and in North Carolina, however, legalization creates broader implications regarding the regulatory transition from cannabis as an illicit, criminally sanctioned substance to a legal medical treatment. While this transition presents challenges that must be analyzed and addressed under a new regulatory framework for medical cannabis, ultimately, legalization of medical cannabis in North Carolina will "preserve and enhance the health and welfare of [North Carolina] citizens."[154] The bill should be enacted.

153. *North Carolina Opinions about Marijuana*, *supra* note 121, at 3.
154. S. 711, 2021 Gen. Assemb., Reg. Sess. § 90-113.111(2) (N.C. 2021).