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COMMENT — THE IMPOSSIBLE CONFLICT BETWEEN MEDICAL CANNABIS, WORKERS' COMPENSATION, AND THE FEDERAL CONTROLLED SUBSTANCES ACT

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Abstract

State medical cannabis laws indicate that a majority of the general public accepts cannabis use as a legitimate therapeutic treatment. The federal Controlled Substances Act maintains the exact opposite position. This statute categorizes cannabis as Schedule I, meaning, among other things, that cannabis is illegal to possess. These conflicting policies raise the specter of preemption when state courts or administrative agencies order workers' compensation insurers to reimburse injured employees for the cost of medical cannabis. This Comment will argue that impossibility preemption bars these orders because insurers cannot comply without risking federal criminal liability for aiding and abetting cannabis possession. Because cannabis is a less dangerous alternative to opioid medication or surgery, this Comment will further encourage Congress to reschedule cannabis so that the preemption doctrine no longer applies to medical cannabis reimbursement orders and injured workers can have one more chance to obtain pain relief.

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I. INTRODUCTION

Courts have described the current landscape of cannabis law in the United States as “mudd[y],”¹ “hazy,”² and “in a state of flux.”³ The cause of this turbulent situation is the disparate status of cannabis under state and federal law. Although a majority of states have enacted legislation allowing the use of medical cannabis under certain circumstances,⁴ the federal Controlled Substances Act (“CSA”) maintains that cannabis possession and use is illegal because it is not an accepted medical treatment in the United States.⁵ These conflicting policies have forced courts to consider whether the CSA preempts state law in a variety of contexts.⁶ Courts are sharply divided over whether the CSA preempts workers’ compensation laws to the extent that they require workers’ compensation insurers to reimburse injured employees for the expenses of medical cannabis.⁷

This Comment will argue that the CSA preempts medical cannabis reimbursement orders from state courts or administrative agencies. Section II will explore the origins and goals of workers’ compensation legislation,⁸ survey the historical treatment of cannabis under federal and state law,⁹ and review how courts applied the preemption doctrine to medical cannabis reimbursement orders.¹⁰ Section III will explain that medical cannabis reimbursement orders are subject to impossibility preemption because workers’ compensation insurers that comply with the orders expose themselves to criminal liability for federal aiding and abetting.¹¹ Section III will further argue that recent congressional and executive policies regarding the prosecution of cannabis possession do not effect this conclusion.¹² Finally, Section III will advocate for a solution that clarifies

1. Hager v. M&K Constr., 247 A.3d 864, 883 (N.J. 2021).

2. Wright’s Case, 156 N.E.3d 161, 165 (Mass. 2020).

3. Musta v. Mendota Heights Dental Ctr., 965 N.W.2d 312, 324 (Minn. 2021).

4. 8 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 94.06 (2023).

5. 21 U.S.C. § 812.

6. See, e.g., Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225, 1229–30 (D.N.M. 2016) (analyzing whether CSA preempts state law that prohibits discrimination on basis of disabilities); White Mountain Health Ctr., Inc. v. Maricopa County, 386 P.3d 416, 423 (Ariz. Ct. App. 2016) (considering whether CSA preempts provision of state medical cannabis law requiring County to zone specific land for medical cannabis dispensaries).

7. Compare Musta, 965 N.W.2d at 327–28 (holding that CSA preempts medical cannabis reimbursement orders), and Bourgoin v. Twin Rivers Paper Co., 187 A.3d 10, 22 (Me. 2018) (same), with Hager v. M&K Constr., 247 A.3d 864, 887 (N.J. 2021) (holding CSA does not preempt medical cannabis reimbursement orders), and Appeal of Panaggio, 260 A.3d 825, 835 (N.H. 2021) (same).

8. See *infra* Section II.A.

9. See *infra* Section II.B.

10. See *infra* Section II.C.

11. See *infra* Section III.A.

12. See *infra* Section III.B.

the way in which cannabis law and workers' compensation legislation should interact.¹³

II. BACKGROUND

A. *Origins, Goals, and Characteristics of Workers' Compensation Legislation*

Workers' compensation is a statutory scheme first implemented in the United States at the beginning of the twentieth century to address the onslaught of accidents that occurred as a result of industrialization.¹⁴ Infamous tragedies such as the Triangle Shirtwaist Factory fire demonstrate the dangerous conditions that inhered in factories during this period of American history.¹⁵ Moreover, “[t]he numbers of work-related injuries and deaths among railroad[] employees were simply staggering By the decade of the 1890s, approximately six-thousand people died annually from railroad accidents and an additional forty thousand were injured.”¹⁶ Unfortunately, the development of the negligence regime in American courts during the latter half of the nineteenth century allowed many employers to escape liability for workplace accidents.¹⁷

The negligence regime differed from the traditional strict liability standard in personal injury cases in that the former required the plaintiff to plead and prove that his employer's fault, or lack of due care, caused his injury.¹⁸ The negligence regime also ushered in three affirmative defenses that left plaintiffs remediless in eighty-three percent of cases.¹⁹ The first defense was the fellow servant rule, which applied when the tortious conduct of another employee injured the plaintiff.²⁰ The second was assumption of the risk, which applied if (1) the workplace posed dangers but conformed with a reasonable standard of care, typically defined as the custom of other employers in the same trade,²¹ or (2) the workplace did not conform with a reasonable standard of care, but the plaintiff

13. See *infra* Section III.C.

14. See FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 11.2 (3d ed. 2007) (stating workers' compensation legislation was originally enacted to “afford compensation to industrial workers for wage loss and medical expenses incurred as a result of accidental injuries”).

15. *The Triangle Shirtwaist Factory Fire*, OSHA, <https://www.osha.gov/aboutosha/40-years/trianglefactoryfire> (last visited Dec. 12, 2023).

16. Donald G. Gifford, *Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous Vehicles, and Accident Compensation*, 11 J. TORT L. 71, 87–88 (2018).

17. See *id.* at 97 (characterizing late nineteenth century tort law as “decidedly pro-defendant”).

18. *Id.* at 94.

19. Bennet Weaver, *The Grass is Always Greener: A Resolution of Conflicts Between Kentucky's Workers' Compensation Statutes and the Inevitable Medical Marijuana Bill*, 48 N. KY. L. REV. 355, 365 (2021).

20. Gifford, *supra* note 16, at 96–97.

21. *Id.* at 96.

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had notice of the unreasonable risks posed and accepted them by continuing to work.²² The third was contributory negligence, which applied when the plaintiff's own conduct fell below a reasonable standard of care and causally contributed to his injury.²³

Against this backdrop, the New York State Legislature passed the country's first workers' compensation act in 1910.²⁴ In *Ives v. South Buffalo Railway Co.*,²⁵ the New York Court of Appeals controversially struck the act down as violative of the state constitutional right to due process of law.²⁶ Despite the rocky start, workers' compensation grew in popularity after New York amended its state constitution "for the express purpose of sanctioning" such legislation.²⁷ The New York state legislature then passed a new act that the Court of Appeals and the Supreme Court of the United States upheld under the federal Constitution.²⁸ These cases apparently dispelled any "fears of constitutional impediments" to the new statutory scheme, because all fifty states enacted workers' compensation legislation by 1963.²⁹

While each state's compensation act is jurisdictionally unique, all workers' compensation legislation reflects the same goals: (1) ensuring the "prov[ision] of financial support following an injury" and (2) balancing the competing interests of injured employees and employers.³⁰ Workers' compensation legislation accomplishes the first goal by applying a form of strict liability against employers.³¹ In most jurisdictions, an injured employee submits a claim for workers' compensation benefits to a state administrative agency.³² These benefits may include lost wages or the cost of any "reasonable and necessary" medical treatment.³³ To prevail, the employee need only prove that his injury occurred during the course and within the scope of his employment.³⁴ The employer is therefore held liable without fault and cannot avail itself of the

22. *Id.*

23. *Id.* at 96–97.

24. JOHN FABIEN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 11 (2004).

25. 94 N.E. 431 (N.Y. 1911).

26. *Id.* at 441.

27. Thomas Reed Powell, *The Workmen's Compensation Cases*, 32 POL. SCI. Q. 542, 548 (1917).

28. *Jensen v. S. Pac. Co.*, 109 N.E. 600, 600 (N.Y. 1915); *NY Cent. Ry. Co. v. White*, 243 U.S. 188, 208–09 (1917).

29. LARSON, *supra* note 4, at § 2.08.

30. 82 AM. JUR. 2D *Workers' Compensation* § 7 (2020).

31. *See supra* notes 18–19 and accompanying text.

32. Plaintiffs submit their claims directly to the courts in a handful of jurisdictions. HARPER ET AL., *supra* note 14, at 93.

33. Jacob P. LaFreniere, Comment, *A Bet Against Abetting: Why Medical Marijuana Reimbursement Under Workers' Compensation Is Not a Federal Crime*, 125 PENN. STATE L. REV. 223, 241, 241 n.164 (2020).

34. HARPER ET AL., *supra* note 14, at 82.

common law defenses discussed above.³⁵ Most statutes further ensure recovery by requiring the employer to obtain accident insurance or to self-insure.³⁶ Workers' compensation legislation accomplishes the second goal by forcing the employee to relinquish his right to bring a common law action, which shields the employer from a potentially high jury verdict.³⁷

Once the workers' compensation agency approves a claim, it orders the relevant insurer to reimburse the employee for the claimed benefits.³⁸ The insurer, however, may contest its obligation to pay.³⁹ This situation frequently occurs when a workers' compensation agency orders an insurer to reimburse an employee for cannabis obtained through a state medical cannabis program.⁴⁰ A historical survey of state and federal cannabis regulation will illustrate why insurers are hesitant to help injured employees gain access to this treatment.⁴¹

B. *History of Cannabis Regulation in the United States*

1. *Early State and Federal Regulation*

Prior to the twentieth century, neither federal nor state law prohibited the sale and utilization of cannabis varieties because they served important functions in the American economy.⁴² For example, hemp fibers were used to make the ropes and riggings of ships and the plant itself was “the nation’s third largest crop” by the mid-nineteenth century.⁴³ The economic role of cannabis began to change with the advent of new technologies, such as the cotton gin and steam ships.⁴⁴ These inventions decreased the importance of cannabis varieties in the industrial sector and consequently “prompted a shift . . . towards the use of the marijuana variety as a curative [for] . . . everything from venereal disease to menstrual cramps.”⁴⁵ Thus, cannabis, like other drugs such as cocaine and opium,

35. See *supra* notes 19–23 and accompanying text.

36. HARPER ET AL., *supra* note 14, at 92; Weaver, *supra* note 19, at 359.

37. LaFreniere, *supra* note 33, at 240.

38. *Id.* at 241. The term “insurer” is used throughout this Comment to refer interchangeably to third party insurers and employers who self-insure.

39. Many jurisdictions allow an appeal to another administrative tribunal, then to the state courts. *Id.* at 242.

40. *Id.* at 240.

41. See *infra* Section II.B.

42. George Fitting, Note, *Careless Conflicts: Medical Marijuana Implications for Employer Liability in the Wake of Vialpando v. Ben’s Automotive Services*, 102 IOWA L. REV. 259, 263 (2016).

43. *Id.*

44. *Id.*

45. Marijuana is a type of cannabis that typically has a tetrahydrocannabinol (“THC”) concentration between 5% and 20%. *Id.* at 262 n.12, 263. This Comment uses the term “cannabis” to refer to the marijuana variety.

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became regulated by state medical sale-of-poison laws, which primarily sought to ensure the quality of drugs dispensed by pharmacists.⁴⁶

Then, during the twentieth century, the public and legislators alike lumped cannabis into a category of narcotic drugs that caused widespread addiction amidst unregulated prescription practices.⁴⁷ In 1914, Congress passed the Harrison Narcotics Act to address the addiction crisis.⁴⁸ This statute enabled Congress to tax and proscribe the use of cocaine and opiates.⁴⁹ The practical effects of the Harrison Act were to “impose a stamp of legitimacy on most narcotic use” and to reinforce in the minds of the public an association between prescription drug use and “the degenerate dope fiend with immoral proclivities.”⁵⁰

The Harrison Act sparked a wave of state drug legislation that not only targeted the use of narcotics, but also the sale, cultivation, and possession of cannabis.⁵¹ Why the state laws reached cannabis while the preceding Harrison Act did not is explainable, in part, by: (1) racial bias toward Mexican immigrants, who first introduced the practice of smoking cannabis to the United States and were its “primary use[rs]” at the time,⁵² and, (2) fear that individuals would substitute cannabis for alcohol during Prohibition.⁵³ By 1931, twenty-two states restricted or outlawed the sale, cultivation, and possession of cannabis.⁵⁴ In 1942, the United States Pharmacopeia (“USP”), a not-for-profit institution that publishes “America’s official list of recognized drugs,” removed cannabis from that list.⁵⁵ By 1965, every state had adopted “in some form” the provisions of the Uniform Narcotic Drug Act, which outlawed the possession of “any narcotic drug,” including cannabis.⁵⁶

The first major federal cannabis regulation was the Marijuana Tax Act of 1937 (“MTA”).⁵⁷ The MTA essentially applied the Harrison Act’s taxing procedures and penalty scheme to cannabis use by requiring individuals to register and report any cannabis they were “importing, producing, selling, or

46. *Id.*

47. The unregulated prescription drugs included cocaine, opium, morphine, and heroin. *Id.* at 264.

48. *Gonzales v. Raich*, 545 U.S. 1, 10 (2005).

49. *Id.*

50. Fitting, *supra* note 42, at 264 (quotations omitted).

51. *Id.*

52. LaFreniere, *supra* note 33, at 231.

53. Allison M. Busby, Comment, *Seeking a Second Opinion: How to Cure Maryland’s Medical Marijuana Law*, 40 UNIV. BALT. L. REV. 139, 143 (2010).

54. Fitting, *supra* note 42, at 264.

55. Busby, *supra* note 53, at 141; *see also What Is the U.S. Pharmacopeia?*, U.S. PHARMACOPEIA (Aug. 4, 2015), <https://qualitymatters.usp.org/what-us-pharmacopeia> (explaining USP’s mission).

56. *Leary v. United States*, 395 U.S. 6, 16 n.15 (1969).

57. *Gonzales v. Raich*, 545 U.S. 1, 11 (2005).

dealing” for annual taxes.⁵⁸ If the drug changed hands during a sale, the government levied an additional transfer tax.⁵⁹ However, over time, the MTA operated less like a tax on a tradeable product and more like a “criminal law imposing sanctions” on those who sold, acquired, or possessed cannabis.⁶⁰

The facts in *Leary v. United States*⁶¹ demonstrate this trend. In *Leary*, a customs inspector found undeclared cannabis seeds and cannabis cigarettes in the petitioner’s car at the Texas-Mexico border.⁶² The lower court convicted the petitioner of violating the MTA because he transferred cannabis into the United States without paying the requisite tax.⁶³ On appeal, the Supreme Court held that the transfer tax provisions of the MTA violated the petitioner’s Fifth Amendment privilege against self-incrimination.⁶⁴ Because cannabis possession was illegal in Texas at the time of the trafficking, the Court reasoned that the petitioner would expose himself to criminal liability if he reported the cannabis so that it could be assessed in compliance with the MTA.⁶⁵

2. Modern Federal Regulation: The Controlled Substances Act

Because *Leary* coincided with President Nixon’s national policy declaration of the “war on drugs,” Congress quickly sought to fill the regulatory gap created by that decision.⁶⁶ Within months of the opinion, the Senate Judiciary Committee issued a controlled substances proposal based on Congress’s treaty and Commerce Clause powers.⁶⁷ Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, known commonly as the CSA, codified many aspects of this proposal.⁶⁸ As its title name suggests, the CSA embodies a “comprehensive regime” intended “to strengthen, rather than to weaken the prior drug laws.”⁶⁹

The CSA authorizes the United States Attorney General to categorize a controlled substance into one of five schedules.⁷⁰ A controlled substance is “a

58. *Id.*; see also TODD GARVEY ET AL., CONG. RSCH. SERV., R43435, MARIJUANA: MEDICAL AND RETAIL – SELECTED LEGAL ISSUES 2 (2015) (stating that MTA “replicated the Harrison Act’s procedures in large measure”).

59. *Gonzales*, 545 U.S. at 11.

60. GARVEY ET AL., *supra* note 58, at 2.

61. 395 U.S. 6 (1969).

62. *Id.* at 10.

63. *Id.* at 10–11.

64. *Id.* at 18.

65. *Id.* at 16–18.

66. *Gonzales v. Raich*, 545 U.S. 1, 11–12 (2005).

67. GARVEY ET AL., *supra* note 58, at 2–3.

68. 21 U.S.C. §§ 801–971.

69. *Hager v. M&K Constr.*, 247 A.3d 864, 881 (N.J. 2021) (quoting *Gonzales*, 545 U.S. at 12; *United States v. Moore*, 423 U.S. 122, 132 (1975)).

70. 21 U.S.C. § 811.

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drug[,] . . . other substance, or immediate precursor” listed in 21 U.S.C. § 812.⁷¹ The Drug Enforcement Administration (“DEA”), by delegation of the Attorney General, determines a drug’s schedule after considering the following factors:

(1) Its actual or relative potential for abuse; (2) Scientific evidence of its pharmacological effect, if known; (3) The state of current scientific knowledge regarding the drug or other substance; (4) Its history and current pattern of abuse; (5) The scope, duration, and significance of abuse; (6) What, if any, risk there is to the public health; (7) Its psychic or physiological dependence liability; (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.⁷²

Additionally, the DEA may initiate an administrative proceeding to add, reschedule, or remove a substance from the CSA.⁷³ Alternatively, interest groups, state and local governments, or private individuals may petition the DEA to initiate such a proceeding.⁷⁴ The DEA must make any final decision regarding the schedule of a controlled substance in conjunction with the Federal Food and Drug Administration, which has been delegated authority by the Secretary of Health and Human Services to recommend appropriate scheduling.⁷⁵

Cannabis has been in Schedule I since Congress first enacted the CSA.⁷⁶ This status means that the drug has a high potential for abuse, has no currently accepted medical treatment in the United States, and is unsafe even when used under medical supervision.⁷⁷ Furthermore, it is a federal crime to manufacture, distribute, dispense, or to “knowingly or intentionally” possess cannabis.⁷⁸ By contrast, Schedule II drugs, which also have a high potential for abuse, have currently accepted medical uses “with severe restrictions” in the United States.⁷⁹ Thus, there is no risk of CSA liability for individuals who possess Schedule II drugs according to a “valid prescription.”⁸⁰ Finally, drugs in Schedules III–V have currently accepted medical uses in the United States and a decreasing potential for abuse.⁸¹

71. *Id.* § 802.

72. *Id.* § 811; *The Controlled Substances Act*, DEA, <https://www.dea.gov/drug-information/drug-policy> (last visited Dec. 12, 2023).

73. DEA, *supra* note 72.

74. *Id.*

75. LISA N. SACCO & HASSAN Z. SHEIKH, CONG. RSCH. SERV., IN12240, DEPARTMENT OF HEALTH AND HUMAN SERVICES RECOMMENDATION TO RESCHEDULE MARIJUANA: IMPLICATIONS FOR FEDERAL POLICY 1 (2023).

76. *Gonzales v. Raich*, 545 U.S. 1, 14 (2005); *see also* 21 U.S.C. § 812.

77. Other examples of Schedule I drugs include heroin, LSD (lysergic acid diethylamide), and ecstasy (3,4-methylenedioxymethamphetamine). 21 U.S.C. § 812.

78. *Id.* §§ 841, 844.

79. Examples of Schedule II drugs include oxycodone, methadone, and fentanyl. *Id.* § 812.

80. *Id.* §§ 844, 829.

81. *Id.* § 812.

3. *Modern State Regulation: The Legalization of Medical Cannabis*

Despite continuing federal prohibitions, California became the first state to legalize the sale and consumption of cannabis for medical purposes in 1996.⁸² By April 24, 2023, thirty-eight states, the District of Columbia, and the territories of Guam, Puerto Rico, and the U.S. Virgin Islands, followed suit.⁸³ An example of this type of legislation is New Jersey's Compassionate Use Medical Marijuana Act, which exempts from civil or criminal prosecution "those patients who use cannabis to alleviate suffering from qualifying medical conditions, as well as their health care practitioners, designated caregivers, institutional caregivers, and those . . . authorized to produce cannabis for medical purposes."⁸⁴ The Compassionate Use Act and similar statutes provide an affirmative defense to civil or criminal liability under state, but not federal, law.⁸⁵

Although this trend in state cannabis legislation indicates a growing acceptance of cannabis use among the general public,⁸⁶ the ongoing tension between state and federal law creates negative consequences for various parties within the cannabis industry. For example, medical cannabis providers struggle to secure business loans⁸⁷ and state antidiscrimination laws that prohibit the termination of employees for disabilities do not necessarily protect medical cannabis users.⁸⁸ Workers' compensation is one field in which the effects of this ongoing tension are still relatively uncertain.

On one hand, some state workers' compensation agencies recognize medical cannabis as a "reasonable or necessary" medical expense for which insurers must provide reimbursement.⁸⁹ On the other hand, insurers often contest this obligation by arguing that financing an employee's cannabis possession exposes them to federal aiding and abetting liability.⁹⁰ Therefore, the insurers claim, the CSA preempts medical cannabis reimbursement orders because they cannot simultaneously comply with the requirements of both federal and state law.⁹¹ The next Section fleshes out this argument by reviewing the basic

82. Fitting, *supra* note 42, at 266.

83. *State Medical Cannabis Laws*, Nat'l Conf. State Legislatures, <https://www.ncsl.org/health/state-medical-cannabis-laws> (last updated June 22, 2023).

84. *Hager v. M&K Constr.*, 247 A.3d 864, 874 (N.J. 2021) (quotations omitted).

85. *Id.* at 875.

86. See Fitting, *supra* note 42, at 267–68 (quotations omitted) (stating that legalization of medical cannabis suggests some states find "marijuana provides a legitimate therapeutic remedy").

87. GARVEY ET AL., *supra* note 58, at 24–25.

88. See *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225 (D.N.M. 2016); *Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus.*, 230 P.3d 518 (Or. 2010).

89. See *supra* notes 38–40 and accompanying text.

90. LaFreniere, *supra* note 33, at 242–43.

91. *Id.*

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principles of preemption doctrine and summarizing how state courts have responded to it.⁹²

C. The Impossible Conflict Between Medical Cannabis, Workers' Compensation Legislation, and the CSA

Preemption doctrine derives from the Supremacy Clause of the United States Constitution⁹³ and refers to the idea that a law of higher authority will trump one of lower authority when the two conflict.⁹⁴ There are three types of preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption. The first occurs when Congress “expressly states that federal law preempts state law.”⁹⁵ The second occurs when Congress enacts such comprehensive legislation in a particular area that it “explicitly or implicitly leaves ‘no room’ for state law.”⁹⁶ The third occurs when state law “actually conflicts with the federal law.”⁹⁷

The CSA contains the following saving clause that suggests Congress intended the principles of conflict preemption to govern issues that arise under the CSA.⁹⁸

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.⁹⁹

There are two subtypes of conflict preemption. The first, obstacle preemption, occurs when a state law presents an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁰⁰ The second, impossibility preemption, occurs when it is “physically impossible” for a party to comply with both state and federal law.¹⁰¹

92. *See infra* Section II.C.

93. *See* U.S. CONST. art. IV, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . ; shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

94. *Preemption*, LEGAL INFO. INST., CORNELL UNIV. SCH. OF L., <https://www.law.cornell.edu/wex/preemption> (last visited Dec. 12, 2023).

95. *Bourgoin v. Twin Rivers Paper Co.*, 187 A.3d 10, 14 (Me. 2018).

96. *Id.* (citation omitted).

97. *Id.* (citation omitted).

98. *See* *Appeal of Panaggio*, 260 A.3d 825, 831 (N.H. 2021) (citation omitted) (“[The CSA savings clause] ‘is an express invocation of conflict preemption.’”).

99. 21 U.S.C. § 903.

100. *GARVEY ET AL.*, *supra* note 58, at 19 (citation omitted).

101. *Id.*

Insurers contesting their obligation to reimburse employees for medical cannabis often rely on impossibility preemption.¹⁰² Arguments based on obstacle preemption would likely be unavailing because reimbursing adult employees does not undermine the two primary goals of the CSA: (1) managing the trafficking of controlled substances; and (2) preventing minors from gaining access to controlled substances.¹⁰³ Furthermore, reimbursement orders “do[] not interfere with the government’s ability to enforce the CSA,” because an individual employee may be prosecuted for cannabis possession regardless of whether or not he is reimbursed for his purchase.¹⁰⁴

The Supreme Judicial Court of Massachusetts avoided the question of impossibility preemption by holding that a provision in the state medical cannabis act “protects” workers’ compensation insurers “from being compelled to pay for the use of a federally proscribed substance.”¹⁰⁵ The provision read, “[n]othing in this law requires any health insurance provider, or any government agency or authority, to reimburse any person for the expenses of the medical use of marijuana.”¹⁰⁶ The Court rejected the argument that the term “health insurance provider” did not encompass workers’ compensation insurers because the medical cannabis act “was drafted to avoid [f]ederal prosecution.”¹⁰⁷ In light of the “current hazy regulatory environment and shifting winds of [f]ederal enforcement,” the Court reasoned, “it would make little sense to protect insurance companies in one scenario and not the other.”¹⁰⁸

The state courts of last resort to reach the issue of impossibility preemption have split. The Minnesota Supreme Court and the Supreme Judicial Court of Maine held that the CSA preempts medical cannabis reimbursement orders from state courts or workers’ compensation agencies.¹⁰⁹ The New Jersey Supreme Court and the New Hampshire Supreme Court, by contrast, held that the CSA does not preempt these orders.¹¹⁰ The next Section explains why the former two courts reached the correct conclusion and explores one way to remedy the impossible conflict.¹¹¹

102. *See supra* notes 89–91 and accompanying text.

103. *See Hager v. M&K Constr.*, 247 A.3d 864, 882 (N.J. 2021) (characterizing the “concern[] among legislators . . . about the increasing prevalence of cannabis . . . among young people” as one motivating factor behind cannabis’ Schedule I placement).

104. *Appeal of Panaggio*, 260 A.3d 825, 837 (N.H. 2021).

105. *Wright’s Case*, 156 N.E.3d 161, 173, 176 (Mass. 2020).

106. The medical cannabis acts of twenty-two other jurisdictions contain similar language. *Id.* at 165, 168–69 (citation omitted) (alteration in original).

107. *Id.* at 176.

108. *Id.* at 173, 176.

109. *Musta v. Mendota Heights Dental Ctr.*, 965 N.W.2d 312, 327–28 (Minn. 2021); *Bourgoin v. Twin Rivers Paper Co.*, 187 A.3d 10, 22 (Me. 2018).

110. *Hager v. M&K Constr.*, 247 A.3d 864, 887 (N.J. 2021); *Appeal of Panaggio*, 260 A.3d 825, 835 (N.H. 2021); *see also Lewis v. Am. Gen. Media*, 355 P.3d 850, 858 (N.M. Ct. App. 2015).

111. *See infra* Part III.

III. ANALYSIS

Although the CSA does not explicitly regulate insurance practices,¹¹² medical cannabis reimbursement orders are subject to impossibility preemption because reimbursing an employee's purchase of medical cannabis satisfies both the actus reus¹¹³ and the mens rea¹¹⁴ for federal aiding and abetting liability. Furthermore, Congress's decision to maintain cannabis's Schedule I status for over fifty years suggests that recent congressional and executive policies regarding the prosecution of cannabis possession do not mitigate this conflict between state and federal law.¹¹⁵ Because, in this context, preemption forecloses a beneficial treatment option for injured workers and disrupts the underlying goals of workers' compensation legislation, Congress should move cannabis to Schedule II to avoid this impossible conflict.¹¹⁶

A. Insurers' Exposure to Federal Aiding and Abetting Liability

The relevant part of the federal aiding and abetting statute reads, "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."¹¹⁷ The term "principal" refers to the individual who "physically commits" an offense.¹¹⁸ A person may be liable for aiding and abetting a criminal offense when he (1) takes an affirmative act in furtherance of that offense; (2) with the intent of facilitating that offense's commission.¹¹⁹ Because insurers who reimburse employees for medical cannabis purchases satisfy both elements, medical cannabis reimbursement orders create an impossible conflict with federal law.

1. Reimbursement Satisfies the Actus Reus of Federal Aiding and Abetting

The actus reus of federal aiding and abetting is an affirmative act in furtherance of a criminal offense. The affirmative act "may be relatively minimal

112. *Panaggio*, 260 A.3d at 837.

113. *See infra* Section III.A.1.

114. *See infra* Section III.A.2.

115. *See infra* Section III.B.

116. On August 29, 2023, the Department of Health and Human Services recommended that the DEA place cannabis in Schedule III. SACCO & SHEIKH, *supra* note 75, at 1. The reasons this Comment suggests Schedule II are discussed below. *See infra* Section III.C.

117. 18 U.S.C. § 2(a).

118. Section 2(b) is not relevant to the present issue because it addresses "an individual who acts through an innocent instrumentality and is thus a principal." Adam Kurland, *To Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense: A Critique to Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85, 89 n.11 (2005).

119. *Rosemond v. United States*, 572 U.S. 65, 71 (2014).

and need not advance every element of the crime.”¹²⁰ Although one cannot aid and abet a completed crime, one may aid and abet the crime of drug possession through actions taken after the principal no longer possesses the illegal substance.¹²¹

For example, in *United States v. Perez*,¹²² the defendant was convicted of aiding and abetting possession with intent to distribute cocaine, even though his involvement with various drug sales occurred after undercover officers seized the cocaine.¹²³ After each seizure, the defendant surveilled or coerced witnesses to determine who stole the cocaine.¹²⁴ The court determined the defendant offered these services “to ensure the success of the planned cocaine transactions.”¹²⁵ Therefore, reasoned the court, the defendant aided and abetted possession with intent to distribute cocaine because the actions he took after the principal no longer possessed the cocaine demonstrated the defendant (1) “associated himself with [the principal’s] efforts to possess and distribute cocaine” and (2) “intended to bring about the successful completion” of cocaine sales.¹²⁶

As in *Perez*, the act of reimbursement satisfies the actus reus for federal aiding and abetting even though the reimbursement occurs after the employee’s possession of cannabis.¹²⁷ An injured employee who submits one claim for medical cannabis is likely to possess cannabis again in the future because individuals often choose this treatment after failing to obtain relief through more traditional methods, such as opioid medication or surgery.¹²⁸ Therefore, in the same way that the defendant in *Perez* associated himself with cocaine possession and distribution by repeatedly surveilling and intimidating witnesses to drug

120. CHARLES DOYLE, CONG. RSCH. SERV., R43769, ACCOMPLICES, AIDING AND ABETTING, AND THE LIKE: AN OVERVIEW OF 18 U.S.C. § 2 at 3 (2020).

121. *Musta v. Mendota Heights Dental Ctr.*, 965 N.W.2d 312, 326 (Minn. 2021).

122. 922 F.2d 782 (11th Cir. 1991).

123. *Id.* at 783–84.

124. *Id.*

125. *Id.* at 786.

126. *Id.*

127. *But see* *Musta v. Mendota Heights Dental Ctr.*, 965 N.W.2d 312, 331 (Minn. 2021) (Chutich, J., concurring in part and dissenting in part) (“[The insurer] is not participating in the transaction between [the employee] and the cannabis dispensary nor in [the employee’s] related possession of the cannabis. Any reimbursement would be paid after the purchase and possession are already complete, and any ongoing possession of that cannabis would be unaffected by the reimbursement.”).

128. *See id.* at 327 n.13 (concluding employee would possess medical cannabis on more than one occasion because she began using cannabis after undergoing “extensive, unsuccessful medical intervention”); *Hager v. M&K Constr.*, 247 A.3d 864, 870 (N.J. 2021) (noting employee enrolled in state medical cannabis program after treating chronic pain with opioids and surgery “to no avail”); *Bourgoin v. Twin Rivers Paper Co.*, 187 A.3d 10, 13 (Me. 2018) (stating employee started treating chronic pain with cannabis after experiencing “adverse side effects” from prolonged opioid use).

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transactions, an insurer associates itself with cannabis possession by repeatedly providing the funds that an employee will likely use to obtain cannabis.¹²⁹

Furthermore, like the defendant's actions in *Perez* indicated that he intended to bring about the successful completion of cocaine sales, the act of reimbursement provides objective evidence that an insurer intends to bring about the successful completion of an employee's cannabis possession. One can infer this intent from the insurer's knowledge that the money paid pursuant to a medical cannabis reimbursement order goes "explicitly and exclusively" toward a purchase of cannabis.¹³⁰ The reality that many employees could not afford medical cannabis without reimbursement further supports this inference.¹³¹ Thus, under the reasoning of *Perez*, insurers satisfy the actus reus of federal aiding and abetting when they comply with state reimbursement orders for medical cannabis.

2. *Reimbursement Satisfies the Mens Rea of Federal Aiding and Abetting*

Aiding and abetting is a specific intent crime, meaning that an individual must "participate in [the crime] as in something that he wishes to bring about."¹³² In *Rosemond v. United States*, the Supreme Court clarified this standard by stating, "for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission."¹³³ Critically, the defendant must know the extent and character of the principal's offense "at a time the accomplice can . . . opt to walk away."¹³⁴ For example, the Court explained, a defendant could be convicted of aiding and abetting the use of a firearm during a drug sale if the defendant learned his affiliate would use a gun at a point where the defendant could "attempt to alter that plan, or . . . withdraw from the enterprise."¹³⁵

129. *See Musta*, 965 N.W.2d at 326–27 ("We also reject [the employee's] argument and the dissent's conclusion that [the insurer] cannot aid and abet her possession because that possession has already occurred by the time [the insurer] reimburses her . . . [A]s long as medical cannabis remains 'reasonably . . . required' to treat and cure the effects of [the employee's] injury, the Workers' Compensation Act requires [the insurer] to fund [the employee's] ongoing use and possession that is illegal under federal law.").

130. *Id.* at 325 n.10.

131. *See Hager*, 247 A.3d at 871 (noting employee incurred more than \$600 per month in cannabis expenses); *Wright's Case*, 156 N.E.3d 161, 165 (Mass. 2020) (stating employee incurred \$24,267.86 in cannabis expenses over two years); *see also LaFreniere*, *supra* note 33, at 248 ("When employees are denied reimbursement for medical cannabis expenses, the drug may become nearly impossible for them to afford out-of-pocket.").

132. *Rosemond v. United States*, 572 U.S. 65, 76 (2014) (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)).

133. *Id.* at 77.

134. *Id.* at 77–78.

135. *Id.* at 78.

As explained above, an insurer that receives a medical cannabis reimbursement order knows the employee will obtain and possess medical cannabis in the future.¹³⁶ Because the insurer learns the employee will possess cannabis before the crime actually occurs, the insurer knows the extent and character of the employee's crime at a point when the insurer can "opt to walk away" by refusing to pay the next reimbursement order.¹³⁷ In this way, complying with the reimbursement order would satisfy the mens rea standard set forth in *Rosemond*.

Some courts escape this conclusion by finding that compliance with a judicial command does not make the insurer an "active participant" in the employee's crime of cannabis possession.¹³⁸ This is especially true when compliance occurs after the insurer lost an appeal contesting its obligation to reimburse the employee for his or her medical cannabis purchase.¹³⁹ However, this argument is inconsistent with the general rule that "compelling a person to act does not necessarily negate the actor's mens rea."¹⁴⁰ Rather, compulsion may allow the actor to assert an affirmative defense of necessity or duress.¹⁴¹

For the reasons discussed above, reimbursement for medical cannabis satisfies the actus reus for federal aiding and abetting because it demonstrates that an insurer (1) is associated with an employee's cannabis possession and (2) intends to ensure the employee's crime is successful.¹⁴² Reimbursement also satisfies the mens rea for federal aiding and abetting, even when reimbursement is required by a court order.¹⁴³ Because insurers meet every element of federal aiding and abetting when they comply with state medical cannabis reimbursement orders, those orders constitute "a sword that would require [an insurer] . . . to engage in conduct that would violate the CSA."¹⁴⁴ As such,

136. *See supra* Section III.A.1.

137. *Rosemond*, 572 U.S. at 78.

138. *See* Appeal of Panaggio, 260 A.3d 825, 835 (N.H. 2021) ("[I]f ordered to reimburse [an employee's] purchase of medical marijuana, [an insurer] would not be guilty of aiding and abetting [the employee's] violation of the CSA because the insurer would not be an active participant with the mens rea required by *Rosemond*."); *Bourgoin v. Twin Rivers Paper Co.*, 187 A.3d 10, 27 (Me. 2018) (Jabar, J., dissenting) (characterizing an insurer as "completely disinterested" in an employee's use or possession of marijuana, because the insurer is "only reimbursing [the employee] . . . as ordered by the [state workers' compensation agency]").

139. *See* Hager v. M&K Constr., 247 A.3d 864, 889 (N.J. 2021) ("By the very nature of its appeals to both the Appellate Division and this Court, [the insurer] has made it clear that it does not wish to 'participate' [in] . . . the federal offense in question here.").

140. *Musta v. Mendota Heights Dental Ctr.*, 965 N.W.2d 312, 324 (Minn. 2021) (citing *Dixon v. United States*, 548 U.S. 1, 6–7 (2006)).

141. *Id.*

142. *See supra* Section III.A.1.

143. *See supra* Section III.A.2.

144. *Bourgoin v. Twin Rivers Paper Co.*, 187 A.3d 10, 20 (Me. 2018).

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medical cannabis reimbursement orders are subject to impossibility preemption.¹⁴⁵

B. The Effect of Congressional and Executive Prosecution Policies on Preemption

Recently adopted federal prosecution policies did not eliminate the impossible conflict presented by medical cannabis reimbursement orders. In 2014, Congress passed the Consolidated and Further Appropriations Act of 2015 (“CFAA”), which prohibited the DOJ from using federal funds to prosecute individuals whose cannabis possession complied with state medical cannabis laws.¹⁴⁶ Congress renewed this appropriations rider seven times since 2015, most recently with the Rohrabacher-Farr Amendment in 2021.¹⁴⁷ Additionally, since 2009, the DOJ issued multiple guidance documents clarifying how federal prosecutors should approach cannabis-related CSA violations in light of state medical cannabis legislation.¹⁴⁸

Taken together, these guidance documents occasionally “deprioritized,” but did “prohibit[,]” federal prosecution of cannabis violations.¹⁴⁹ Deputy Attorney General David Ogden issued the first of these documents in 2009 (“Ogden Memo”).¹⁵⁰ The Ogden Memo encouraged federal prosecutors to focus on “significant trackers” of cannabis instead of participants in state medical cannabis programs.¹⁵¹ In 2013, Deputy Attorney General James Cole issued another document (“Cole Memo”) in response to a common belief within the cannabis industry that the Ogden Memo “assur[ed] . . . the DOJ would not prosecute any marijuana . . . possession.”¹⁵² The Cole Memo “reiterated the DOJ’s commitment to enforcing the CSA”¹⁵³ and identified eight activities that

145. *See id.* at 19 (“Were [the insurer] to comply with the [administrative] order and knowingly reimburse [the employee] for the cost of the medical marijuana . . . , [the insurer] would necessarily engage in conduct made criminal by the CSA because Twin Rivers would be aiding and abetting [the employee]—in his purchase, possession, and use of marijuana Conversely, if [the insurer] complied with the CSA by not reimbursing [the employee] for the costs of medical marijuana, [the insurer] would necessarily violate the [state law]-based order.”).

146. LaFreniere, *supra* note 33, at 237–38; *see also* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014).

147. *Hager v. M&K Constr.*, 247 A.3d 864, 886 (N.J. 2021); *see also* *United States v. Bilodeau*, 24 F.4th 705, 709 (1st Cir. 2022) (discussing function of Rohrabacher-Farr Amendment).

148. GARVEY ET AL., *supra* note 58, at 15.

149. *Hager*, 247 A.3d at 882.

150. GARVEY ET AL., *supra* note 58, at 15.

151. Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Just., to Selected U.S. Att’ys 1 (Oct. 19, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

152. GARVEY ET AL., *supra* note 58, at 15, 17.

153. *Hager*, 247 A.3d at 882.

federal prosecutors should focus their resources on.¹⁵⁴ Attorney General Jefferson Sessions reversed this string of deferential policies in 2018 when he issued a document rescinding the previous guidance, which he claimed “undermine[d] the rule of law’ by second guessing the [CSA].”¹⁵⁵ Attorney General William Barr subsequently took a more lenient approach to cannabis-related violations of the CSA in 2019 by issuing a statement that he was “accepting the Cole Memo for now,” but largely entrusting federal prosecutors in each state to determine the best approach for that state.¹⁵⁶

Some courts find these congressional and executive policies nearly dispositive when considering whether the CSA preempts medical cannabis reimbursement orders. For example, in *Lewis v. American General Media*,¹⁵⁷ the New Mexico Court of Appeals rejected the insurer’s argument that the CSA preempts medical cannabis reimbursement orders because complying with such orders would expose the insurer to federal conspiracy or aiding and abetting liability.¹⁵⁸ Citing the CFAA and the Cole Memo, the governing DOJ policy at the time of the decision, the court concluded that any conflict between state and federal law was “speculat[ive]” and could not give rise to impossibility preemption.¹⁵⁹ Similarly, in *Hager v. M&K Construction*, the Court held that the CSA does not preempt medical cannabis reimbursement orders because the Rohrabacher-Farr Amendment and its preceding appropriations riders “‘changed’” federal cannabis law.¹⁶⁰ The Court found the Amendment exhibited clear congressional intent to suspend the CSA as it applied to state medical

154. The eight activities include:

Preventing the diversion of marijuana from states where it is legal under state law in some form to other states; [p]reventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; [p]reventing violence and the use of firearms in the cultivation and distribution of marijuana; [p]reventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; [p]reventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and [p]reventing marijuana possession or use on federal property.

Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Just., to All U.S. Att’ys 1–2 (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

155. Josh Gerstein & Cristiano Lima, *Sessions Announces End to Policy that Allowed Legal Pot to Flourish*, POLITICO (Jan. 4, 2018), <https://www.politico.com/story/2018/01/04/jeff-sessions-marijuana-policy-us-attorney-enforcement-324020>.

156. *Hager*, 247 A.3d at 882–83 (quoting Sara Brittany Somerset, *Attorney General Barr Favors a More Lenient Approach to Cannabis Prohibition*, FORBES (Apr. 15, 2019), <https://www.forbes.com/sites/sarabrittany Somerset/2019/04/15/attorney-general-barr-favors-a-more-lenient-approach-to-cannabis-legalization/>).

157. 355 P.3d 850 (N.M. Ct. App. 2015).

158. *Id.* at 858.

159. *Id.*

160. *Hager*, 247 A.3d at 886.

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cannabis laws, even though it had a “limited lifespan and [could] be repeated, removed, or changed within the year.”¹⁶¹

Other courts considering the interaction between medical cannabis, workers’ compensation legislation, and the CSA have not been so quick to dismiss the “manifest tension” between the Rohrabacher-Farr Amendment, the DOJ guidance documents, and the Schedule I designation of cannabis. For example, in *Musta v. Mendota Heights Dental Center*, the Court determined that a “real” conflict forms between state and federal law when the former forces insurers to finance the possession of a substance that remains illegal under the latter.¹⁶² The congressional appropriations riders stretching back to 2015 did not render this conflict speculative because each rider could be “rescinded at any time,” which would allow federal prosecution of individuals who committed cannabis violations “while the government lacked funding.”¹⁶³ Thus, the Court refused to interpret the riders “as implicit suspensions” of cannabis’s illegality.¹⁶⁴ Similarly, in *Bourgoin v. Twin Rivers Paper Co.*, the Court vacated a decision by the Appellate Division that “explicitly relied” on the Ogden Memo in holding that medical cannabis reimbursement orders are not barred by impossibility preemption.¹⁶⁵ The Court reasoned that this reliance was “entirely misplaced” because the policy the DOJ guidance document contained was “transitory [in] nature.”¹⁶⁶

Because “repeal by implication is heavily disfavored, especially when ‘the subsequent legislation is an appropriations measure,’” the Rohrabacher-Farr Amendment has not changed the illegal status of cannabis under federal law.¹⁶⁷ By contrast, Congress’s consistent rejection of petitions to reschedule cannabis, and its choice to let a bill that would essentially codify the Cole Memo die in committee,¹⁶⁸ convey an intent to maintain strict prohibitions on cannabis possession.¹⁶⁹ Furthermore, whether the DOJ chooses to prosecute or not, insurers are “forced to commit a federal crime” if they comply with medical

161. *Id.* at 888.

162. 965 N.W.2d 312, 324 (Minn. 2021).

163. *Id.* (emphasis omitted) (quoting *United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016)).

164. *Id.*

165. 187 A.3d 10, 20–21 (Me. 2018).

166. *Id.* at 21.

167. *Musta*, 965 N.W.2d at 324 (citation omitted).

168. John Hudak & Grace Wallack, *How to Reschedule Marijuana and Why It’s Unlikely to Happen Anytime Soon*, BROOKINGS INST. (Feb. 13, 2015), <https://www.brookings.edu/blog/fixgov/2015/02/13/how-to-reschedule-marijuana-and-why-its-unlikely-anytime-soon/>.

169. *Musta*, 965 N.W.2d at 324. Failing to codify the Cole Memo is significant because the prosecution of individuals engaged in cannabis activity that complied with state law was not one of the eight priorities the Cole Memo identified. See Memorandum from James M. Cole, *supra* note 154.

cannabis reimbursement orders.¹⁷⁰ For these reasons, recent congressional and executive prosecution policies do not mitigate the conclusion that the CSA preempts medical cannabis reimbursement orders.

C. The Solution: Why Congress Should Reschedule Cannabis to Avoid Preemption

As the foregoing discussion suggests, medical cannabis reimbursement orders are preempted by the CSA because they expose insurers to federal aiding and abetting liability. Congress should act to clarify the interaction of cannabis law and workers' compensation legislation because allowing courts to settle the preemption issue through piecemeal litigation undermines the latter statutory scheme.¹⁷¹ Although the primary purpose of workers' compensation is to "compensate injured employees," the statutory scheme accomplishes this through a *quid pro quo* system that simultaneously balances the interests of employers against those of their employees.¹⁷² For example, an employer gives up his common law defenses so that his employee may enjoy certainty of recovery.¹⁷³ The employee, meanwhile, gives up his common law claims and the possibility of a jury trial so that the employer is liable for a more predictable, typically smaller, amount of damages.¹⁷⁴ Both parties benefit from the statutory requirement of insurance and from the time and money saved by avoiding litigation.¹⁷⁵ The disparate status of cannabis under state and federal law disrupts this balance by delaying compensation as insurers contest reimbursement orders out of fear that they will be exposed to federal aiding and abetting liability.¹⁷⁶

Moving cannabis to Schedule II will avoid disrupting the workers' compensation schemes of those states that deem medical cannabis a reasonable and necessary medical expense eligible for reimbursement. Although the Department of Health and Human Services ("HHS") recently recommended that the DEA place cannabis in Schedule III,¹⁷⁷ Schedule II is more appropriate

170. *Bourgoin*, 187 A.3d at 21.

171. *See Wright's Case*, 156 N.E.3d 161, 176 (Mass. 2020) (citation omitted) ("Workers' compensation was designed to eliminate 'piecemeal tort litigation and tort claims by individual workers, which are time-consuming, expensive, and afford no guarantee of compensation.'").

172. HARPER ET AL., *supra* note 14; *see also supra* Section II.A.

173. *See supra* notes 35–36 and accompanying text.

174. HARPER ET AL., *supra* note 14.

175. *See supra* notes 37 and accompanying text. Employers benefit from insurance requirements because they allow employers to "shift liability" onto a third party. 82 AM. JUR. 2D Workers' Compensation § 13 (2020).

176. *See Wright's Case*, 156 at 177 ("Insurers who fear criminal exposure under existing [f]ederal law would not voluntarily agree to reimburse a claimant for medical marijuana expenses The resulting delays in settlement and potential litigation in every single case where a claimant seeks benefits that include reimbursement for medical marijuana would be entirely contrary to the underlying purpose of the workers' compensation scheme.").

177. *See supra* note 116.

because it conforms with the United States' treaty obligations.¹⁷⁸ Additionally, Schedule II status will loosen research restrictions on cannabis,¹⁷⁹ and provide injured employees a viable alternative to addictive opioids.¹⁸⁰ One potential drawback of rescheduling is that injured workers will lose access to cannabis while FDA approves the drug for safety and effectiveness.¹⁸¹ However, rescheduling will facilitate access to this treatment in the long run because it will eliminate insurers' fear of criminal liability under federal law, and prevent litigation over the validity of medical cannabis reimbursement orders.¹⁸² Because Schedule II status will restore the balance of interests that animates workers' compensation, Congress should act quickly to remedy the impossible conflict that currently exists between cannabis law, workers' compensation legislation, and the CSA.

IV. CONCLUSION

Medical cannabis reimbursement orders from state courts or workers' compensation agencies are subject to impossibility preemption because insurers cannot comply with those orders and with the federal Controlled Substances Act. Reimbursement satisfies all the elements of aiding and abetting cannabis possession.¹⁸³ Temporary congressional and executive policies regarding the prosecution of cannabis possession did not change the status of cannabis under federal law. Therefore, they do not affect how the preemption doctrine applies to medical cannabis reimbursement orders.¹⁸⁴ Congress should remedy this impossible conflict by formally placing cannabis in Schedule II.¹⁸⁵ Even if the DEA ends the preemption debate surrounding cannabis by accepting the HHS's August 2023 rescheduling recommendation, the legal principles discussed in this

178. See Denial of Petition To Initiate Proceedings To Reschedule Marijuana, 81 Fed. Reg. 53,688, 53,688 (Aug. 12, 2016) (“[I]n view of United States obligations under international drug control treaties, marijuana cannot be placed in a schedule less restrictive than [S]chedule II.”); see also 21 U.S.C. § 811(d)(1) (“If control is required by United States obligations under international treaties, conventions, or protocols . . . the Attorney General shall issue an order controlling such drugs under the schedule he deems most appropriate to carry out such obligations.”).

179. See Hudak & Wallack, *supra* note 168 (stating that Schedule I status “severely restricts” ability of scientists to conduct research into potential medical benefits of cannabis).

180. See generally Sydnee Sousa, *Connecticut Workers' Compensation Coverage for Medical Cannabis in the Age of the Opioid Crisis*, 53 CONN. L. REV. 945, 947–52 (2022) (reviewing history of opioid use in United States and surveying scientific studies involving medical cannabis).

181. Hudak & Wallack, *supra* note 168.

182. See Fitting, *supra* note 42, at 283 (citation omitted) (advocating rescheduling cannabis to Schedule II because “[t]he immediate effect of such a reclassification would be that, should courts continue to require employers to pay for medical marijuana under workers' compensation . . . there would no longer be a question of whether this would require the employer to violate federal law or federal public policy. Instead, employers could simply treat marijuana ‘like other prescription drugs.’”).

183. See *supra* Section III.A.

184. See *supra* Section III.B.

185. See *supra* Section III.C.

Comment will remain relevant because they can inform what the proper level of regulation is for other drugs that prove to have beneficial uses as science advances and societal attitudes change over time.