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12-20-2021

## A Trip Through Employment Law: Protecting Therapeutic Psilocybin Users in the Workplace

Benjamin Sheppard

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### Recommended Citation

Benjamin Sheppard, *A Trip Through Employment Law: Protecting Therapeutic Psilocybin Users in the Workplace*, 35 J.L. & Health 146 (2021)  
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# **A TRIP THROUGH EMPLOYMENT LAW: PROTECTING THERAPEUTIC PSILOCYBIN USERS IN THE WORKPLACE**

Ben Sheppard<sup>1</sup>

## **Abstract**

*In 2020, Oregon voters legalized therapeutic psilocybin. Oregon voters legalized therapeutic psilocybin in response to a plethora of scientific studies showing symptom reduction for depression, anxiety, substance use disorders, opioid addictions, migraines, and other mental illnesses, HIV/AIDS, and cancer. The legal rethinking regarding therapeutic psilocybin continues in both state legislatures and city councils. Yet, despite state and local legalization or decriminalization of therapeutic psilocybin it remains illegal under the federal Controlled Substances Act. This tension between local and federal law places therapeutic psilocybin users and their employers in a difficult position. Because all types of psilocybin use remain illegal under federal law, a zero-tolerance drug use workplace policy would discipline a state sanctioned psilocybin user for off-site or off-hours therapeutic psilocybin use. Therefore, this article proposes that as states and cities legalize therapeutic psilocybin, jurisdictions should adopt employment protections for therapeutic psilocybin users like states have adopted for medical cannabis users. The proposed statute in this article protects therapeutic psilocybin users from adverse action based solely on off-site and off-hours drug use and balances employers' rights.*

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## INTRODUCTION

Imagine losing your job because of medicine prescribed to you by your doctor. This is the situation Rojerio Garcia, who suffered from HIV/AIDS found himself in after he was hired at a new job.<sup>2</sup> Soon after his hiring, he was subjected to a random drug test and tested positive for psilocybin metabolites.<sup>3</sup> Garcia explained to his employer he used psilocybin to treat his HIV/AIDS.<sup>4</sup> Nonetheless, the employer discharged him anyways because the federal Controlled Substances Act (“CSA”) prohibits *all* forms of psilocybin use.<sup>5</sup>

In response, Garcia sued and argued his employer unlawfully terminated him for his state-sanctioned therapeutic<sup>6</sup> psilocybin use.<sup>7</sup> The US District Court for New Mexico held the employer did not engage in employment discrimination because the state mandated no statutory duty to accommodate psilocybin use and it did not fire Garcia on the basis of his disability but instead based on his federally illegal psilocybin use.<sup>8</sup>

Unfortunately, Mr. Garcia is not the only individual fired based on therapeutic or medical drug use. At least six different courts have held without a

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<sup>2</sup> See *Garcia v. Tractor Supply Co.*, 154 F.Supp.3d 1225, 1226-27 (D.N.M. 2016). A small-scale study showed psilocybin improves symptoms associated with HIV/AIDS. Brian T. Anderson, *Psilocybin-assisted group therapy for demoralized older long-term AIDS survivor men: An open-label safety and feasibility pilot study*, LANCET, [https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370\(20\)30282-0/fulltext?fbclid=IwAR0\\_lDjHcMzVmMqpGkzRVVDHsiOmDv7vYw7bXgMbWDpFBM0XSayVxbq7dI4](https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(20)30282-0/fulltext?fbclid=IwAR0_lDjHcMzVmMqpGkzRVVDHsiOmDv7vYw7bXgMbWDpFBM0XSayVxbq7dI4).

<sup>3</sup> I changed the drug (originally medical cannabis) to psilocybin to demonstrate employers often take adverse action against employees who use state sanctioned medical drugs that are federally illegal. See *Garcia*, 154 F.Supp.3d at 1227. A small 2002 urinalysis study detected psilocybin twenty-four hours after use. Felix Hasler et al., *Renal excretion profiles of psilocin following oral administration of psilocybin: a controlled study in man*, J. PHARM. BIOMED ANAL. (Sep. 2002), <https://pubmed.ncbi.nlm.nih.gov/12191719/> Tests of hair samples can detect psilocybin ninety days after use. Alan Carter & Adrienne Santos-Longhurst, *Will Mushrooms Show Up on a Drug Test?*, HEALTHLINE (Jan. 23, 2020), <https://www.healthline.com/health/do-shrooms-show-up-on-a-drug-test#urine-test>.

<sup>4</sup> *Garcia*, 154 F.Supp.3d at 1227.

<sup>5</sup> See generally *id.* at 1229-30.

<sup>6</sup> Therapeutic psilocybin differs from the term medical/medical psilocybin. Therapeutic means a drug can only be provided and administered in licensed facilities. Terry Nguyen, *How mushrooms took over food, wellness, and (of course) drugs*, VOX (Apr. 9, 2021), <https://www.vox.com/the-goods/22372504/mushrooms-food-wellness-drugs>; Robert A. Mikos, *We Need A Cole Memorandum for Magic Mushrooms*, 2021 U. ILL. L. REV. ONLINE 87, 91-92 (2021) (explaining Oregon policies concerning therapeutic psilocybin). By contrast, medical/medical means the drug may be bought at a facility and consumed/ingested/smoked off-site. See David J. Cohen, *Medical Marijuana in Pennsylvania*, DAVID J. COHEN LAW FIRM, LLC, <https://www.davidcohenlawfirm.com/medical-marijuana#>.

<sup>7</sup> *Garcia*, 154 F.Supp.3d at 1226.

<sup>8</sup> *Id.* at 1226-29.

statutory duty to accommodate drug use (e.g., cannabis<sup>9</sup> or psilocybin) an employer may take adverse action for off-site and off-hours federally illegal drug use despite legalization at the state level.<sup>10</sup> Courts are reluctant to enforce existing state employment protections for individuals who use drugs deemed unlawful by the CSA but legal under their state's law.<sup>11</sup> Additionally, many employees suffer adverse employment action for using federally illegal drugs each year despite

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<sup>9</sup> In this paper, I use the term “cannabis” as much as possible, both because of the racist origins of “marijuana” in prohibition campaigns and the more positive connotation “cannabis” has compared to marijuana. Alex Halperin, *Marijuana: Is It Time to Stop Using a Word with Racist Roots?*, THE GUARDIAN (Jan. 29, 2018), <https://www.theguardian.com/society/2018/jan/29/marijuana-name-cannabis-racism>; Daniel G. Orenstein & Stanton; A. Glantz, *Cannabis Legalization in State Legislatures: Public Health Opportunity and Risk*, 103 MARQ. L. REV. 1313, 1315 n.1 (2020); Sean M. O'Connor & Erika Leitzan, *The Surprising Reach of FDA Regulation of Cannabis, Even After Descheduling*, 68 AM. U. L. REV. 823, 834 (2019). Where context requires, I use the terms “marijuana” and it should be considered synonymous with “cannabis.” Other commentators have written about racist “marijuana” prohibition campaigns. E.g. Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 791-809 (2019).

<sup>10</sup> See Brian P. Sharkey & David L. Disler, *Are New Jersey Law Firms Prepared for the Legalization of Marijuana?*, N.J. LAW., 32, 33 n.5 (October 2018) (collecting cases); *Garcia*, 154 F.Supp.3d 1125; *Coats v. Dish Network, LLC*, 350 P.3d 849, 853 (Colo. 2015); *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d. 914, 924 (W.D. Mich. 2011) (“Michigan voters could not have intended to enact private employment regulation implicitly, through a negative inference, when the rights of employees are never mentioned anywhere else in the statute.”), *aff'd*, 695 F.3d 428 (6th Cir. 2012); *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC.*, 257 P.3d 586 (Wash. 2011) (“The language of the law is unambiguous it does not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use.”); *Emerald Steel Fabricators Inc. v. Bureau of Lab. and Indus.*, 230 P.3d 518, 536 (Or. 2010); *Johnson v. Columbia Falls Aluminum Co., LLC*, 350 Mont. 562 (2009); *Ross v. Raging Wire Telecommunications Inc.*, 174 P.3d 200 (Cal. 2008); Judge Mary A. Celeste & Melia Thompson-Dudiak, *Has the Marijuana Classification Under the Controlled Substances Act Outlived Its Definition?*, 20 CONN. PUB. INT. L.J. 18, 29 (2020) (“Thus, absent a veil of a statutory or other legal nuance, such as anti-discrimination provisions, courts pressed to decide issues directly involving marijuana seem to adhere to the federal government’s fixed stance.”); Adam J. Agostini, *Marijuana Legalization and Employee-Employer Rights: An All-Time High for Non-Uniformity*, 35 ABA J. LAB. & EMP. L. 183, 193 (2020) (“[C]ourts will generally defer to federal law and the CSA’s classification of marijuana to find in favor of employers where the state legislature has remained statutorily silent as to off-duty marijuana usage.”). American employment is generally employment-at-will and therefore an employer does not need a reason to terminate. Kelcey Phillips, *Employees Getting Lost in the Trees: Tameny Claims and the Public Policy Behind Preventing Termination on the Basis of Medical Marijuana Use*, 52 U.S.F. L. REV. 115, 124 (2018); E.g. *Gibbs v. Allen’s Fam. Foods, No. CIV.A. S11A-06-004*, 2012 WL 5830697 \* at 3 (Del. Super. Ct. Apr. 25, 2012) (firing at-will-employee for cannabis use).

<sup>11</sup> Ruth Rauls, *Workplace Marijuana Accommodations: The Road Ahead*, LAW360 (May 19, 2017, 11:41 AM), <https://www.law360.com/articles/922194/workplace-marijuana-accommodations-the-road-ahead>; Joshua Weisenfeld, *Medical Marijuana Patients: Discrimination & the Search for Employment Protections*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 375, 397 (2021) (“[U]nless a state’s legislature had the foresight to include employment protections in their medical marijuana statutes, employment protections are still unavailable to medical marijuana patients for adverse employment decisions on the basis of their medical marijuana use.”).

states legalizing medical or therapeutic drug use.<sup>12</sup> Thirty-six states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have legalized medical cannabis<sup>13</sup> but only seventeen provide users statutory employment protections.<sup>14</sup>

But this legal rethinking continues with other drugs. In 2020, Oregon became the first US jurisdiction to legalize therapeutic psilocybin use.<sup>15</sup> Oregon law permits licensed providers to administer therapeutic psilocybin to individuals over twenty-one.<sup>16</sup> State regulators have two years to work out regulatory details regarding therapeutic psilocybin practices.<sup>17</sup> In addition, legislators in California, Connecticut, Florida, Hawaii, Iowa, Kansas, Missouri, New York, Washington, and Virginia are debating psilocybin reform bills during their current legislative

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<sup>12</sup> E.g. Jennifer McLogan, *Long Island Woman Sues Home Depot, Says She Was Denied Job Due to Having Medical Marijuana Card*, CBS NEW YORK (Apr. 22, 2021), <https://newyork.cbslocal.com/2021/04/22/medical-marijuana-card-lawsuit-home-depot-felita-dobbins/>; THE ASSOCIATED PRESS, *Florida city fires employee over legal medical marijuana use*, ABC NEWS (Mar. 26, 2021), <https://abcnews.go.com/Health/wireStory/florida-city-fires-employee-legal-medical-marijuana-76702772>; Jessica Kwong, *Teacher who tested positive for medical weed after being assaulted by student is fired*, METRO (Mar. 26, 2021), <https://metro.co.uk/2021/03/26/teacher-shoved-on-stairway-by-student-fired-for-medical-marijuana-use-14312450/>; Dan Hyman, *When the Law Says Using Marijuana Is O.K., but the Boss Disagrees*, N.Y. TIMES (Jul. 19, 2019), <https://www.nytimes.com/2019/07/19/business/marijuana-employer-drug-tests.html> (“I will tell [California] companies frankly and honestly that I will fail the [drug test for medical cannabis]... And that’s usually when the interview ends.”).

<sup>13</sup> Alex C. Carroll, *Weed, Dogs & Traffic Stops*, 21 WYO. L. REV. 1, 4 (2021). While not discussed in this article seventeen states and the District of Columbia have legalized recreational cannabis use. *State v. Junjie Li*, Nos. K2-2019-0513A, K2-2019-0513B, 2021 R.I. Super. LEXIS 41 \* at 1 (Super. Ct. May 10, 2021). Currently, a law to permit recreational cannabis use in South Dakota is being litigated in the state’s courts. Stephen Groves, *South Dakota Supreme Court weighs pot legalization battle*, ABC NEWS (Apr. 28, 2021), <https://abcnews.go.com/Health/wireStory/south-dakota-supreme-court-weighs-pot-legalization-battle-77375674>.

<sup>14</sup> See Sachi Barreiro, *State Laws on Off-Duty Marijuana Use*, NOLO (2021), <https://www.nolo.com/legal-encyclopedia/state-laws-on-off-duty-marijuana-use.html>; John I. Winn, *When the Going Gets Weird, the Weird Turn Pro: Management Best Practices in the Age of Medical Marijuana*, 25 ROGER WILLIAMS U. L. REV. 60, 61 n.5 (2020) (listing all states except recent Virginia and South Dakota legislation); V.A. Code § 54.1-3408.3 (2021); S.D. CODIFIED LAWS § 34-20G-22 (2021).

<sup>15</sup> Stephanie Zimmermann, *Successful Ballot Measures for Marijuana and Other Substances Create Opportunities for Lawyers*, ABA J. at 16 (Feb. 1, 2021, 1:30 AM). Additionally, Oregon voters reclassified the possession of cocaine, heroin, methamphetamine, or oxycodone from a Class A misdemeanor to a Class E violation, punishable by only a \$ 100 dollar fine. *Id.* Thomas Firestone, *The Future of Drug Decriminalization After Oregon*, LAW360 (Dec. 16, 2020, 3:52 PM), <https://www.law360.com/articles/1338128/the-future-of-drug-decriminalization-after-oregon>.

<sup>16</sup> Nicholas Ansel, *Advancing Criminal Reform Through Ballot Initiatives*, 53 ARIZ. ST. L.J. 273, 320 (2021).

<sup>17</sup> Lizzy Acker, *Oregon becomes first state to legalize psychedelic mushrooms*, THE OREGONIAN (Nov. 04 2020, 8:26 PM), <https://www.oregonlive.com/politics/2020/11/oregon-becomes-first-state-to-legalize-psychedelic-mushrooms.html>

sessions.<sup>18</sup> States are rethinking psilocybin regulation in response to scientific studies showing it is an effective treatment for depression, anxiety, substance use disorders, opioid addictions, migraines, and other mental illnesses.<sup>19</sup>

Despite psilocybin providing users with therapeutic benefits, individuals may fear discrimination from their employer based on their state sanctioned psilocybin use. Employers tend to fear what they do not understand,<sup>20</sup> both psilocybin and mental illness are misunderstood in American society.<sup>21</sup> Research shows that employers are less likely to hire individuals with mental illnesses than those with physical disabilities.<sup>22</sup> Without statutory employment protections regarding therapeutic psilocybin use, patients may hesitate to participate in such programs out of fear of losing employment.<sup>23</sup> If jurisdictions are willing to permit the use of therapeutic psilocybin, they should not force citizens to choose between their health and employment. State protections like those instituted for medical cannabis users could shield patients from employment discrimination solely based on off-site and off-hours therapeutic psilocybin use.<sup>24</sup> This paper recommends

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<sup>18</sup> Ben Adlin, *DEA Sued by Doctor Who Wants Permission to Give Psilocybin Mushrooms to Patients*, MARIJUANA MOMENT (Mar. 10, 2021), <https://www.marijuanamoment.net/dea-sued-by-therapists-who-want-permission-to-give-psilocybin-mushrooms-to-patients/>.

<sup>19</sup> See generally, Dustin Marlan, *Beyond Cannabis: Psychedelic Decriminalization and Social Justice*, 23 LEWIS & CLARK L. REV. 851, 873-74 (2019); Eric W. Dolan, *A single dose of psilocybin has a lasting therapeutic effect on migraine headache, according to a new placebo-controlled study*, PSYPOST (May 18, 2021), <https://www.psypost.org/2021/05/a-single-dose-of-psilocybin-has-a-lasting-therapeutic-effect-on-migraine-headache-according-to-a-new-placebo-controlled-study-60793>. Investors such as *Shark Tank*'s Kevin O'Leary are increasingly bullish regarding psychedelic investments. Eric Rosenbaum, *'Shark Tank' host Kevin O'Leary: Psychedelic drugs 'far exceed' cannabis investment potential*, CNBC (May 12, 2021), <https://www.cnbc.com/2021/05/11/kevin-oleary-psychedelic-drugs-far-exceed-cannabis-potential.html>.

<sup>20</sup> Elisa Y. Lee, *An American Way of Life: Prescription Drug Use in the Modern ADA Workplace*, 45 COLUM. J.L. & SOC. PROBS. 303, 352 (2011).

<sup>21</sup> Mason Marks, *Psychedelic Medicine for Mental Illness and Substance Use Disorders: Overcoming Social and Legal Obstacles*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 69, 96 (2018) [hereinafter *Marks I*]

<sup>22</sup> See, e.g., Song Ju et al., *Employer Attitudes Toward Workers with Disabilities: A Review of Research in the Past Decade*, J. VOCATIONAL REHABILITATION 113, 119 (2013).

<sup>23</sup> *Marks I*, *supra* note 21 at 132-33; See also Paul E. Cirner, *New Measures in Oregon Decriminalize Certain Narcotics and Legalize Psilocybin Therapy*, OGELTREE DEAKINS (Nov. 18, 2020), <https://ogletree.com/insights/new-measures-in-oregon-decriminalize-certain-narcotics-and-legalize-psilocybin-therapy/>. (“[Oregon’s therapeutic psilocybin law does] not impact an Oregon employer’s drug testing or drug-free workplace practices... [it does not require] an employer to tolerate on-the-job drug possession, reporting to work impaired, or continued employment of an individual who violates an employer’s legally compliant drug testing or drug-free workplace policies.”); Michael D. Moberly, *Weeding Out Risky Employees Little Guidance for Arizona in Landmark Medical Marijuana Ruling*, ARIZ. ATT’Y, (June 1, 2016) at 38 (illustrating the distinction between states that provide employment protections for medical cannabis users and those that do not).

<sup>24</sup> *Marks I*, *supra* note 21 at 133.

states enact employment protections for therapeutic psilocybin users in tandem with state level legalization.

This paper proceeds in three Parts. Part I provides background on psilocybin's medical benefits and its governmental regulation. Part II focuses on state employment protections for drug users and concludes such statutes are likely *not* preempted by the CSA. Part III proposes a statute that protects employees from wrongful termination solely because of their therapeutic psilocybin use.

## I. A MICRODOSE OF PSILOCYBIN

This section introduces the reader to psilocybin. It begins with a discussion on how psilocybin works and its therapeutic applications for mental illnesses. This section then surveys the federal, state, and local regulations regarding psilocybin.

### A. WHAT IS PSILOCYBIN?

Psilocybin is the main psychoactive component of hallucinogenic mushrooms.<sup>25</sup> Hallucinogenic mushrooms were used by indigenous people for thousands of years primarily for spiritual or religious purposes.<sup>26</sup> Psilocybin entered US public discussion in 1957 when R. Gordon Wasson published an essay in *Life Magazine* regarding his experience ingesting hallucinogenic mushrooms in a Mazatec ritual.<sup>27</sup>

Psilocybin works as a “serotonin receptor agonist,” by primarily affecting the brain's serotonin.<sup>28</sup> The effects of psilocybin occur in two distinct stages. First, shortly after psilocybin is consumed, the user enters an acute psychedelic state that significantly alters the conscious experience.<sup>29</sup> This phase may cause

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<sup>25</sup> R.R. Griffiths et al., *Psilocybin Occasioned Mystical-Type Experiences: Immediate and Persisting Dose-Related Effects*, 218 J. PSYCHOPHARMACOLOGY 649 (2011).

<sup>26</sup> Kathryn L. Tucker, *Psychedelic Medicine: Galvanizing Changes in Law and Policy to Allow Access for Patients Suffering Anxiety Associated with Terminal Illness*, 21 QUINNIPIAC HEALTH L.J. 239, 240 (2018) [Tucker I].

<sup>27</sup> *Id.* at 240.

<sup>28</sup> R.L. Carhart-Harris & D.J. Nutt, *Serotonin and Brain Function: A Tale of Two Receptors*, J. PSYCHOPHARMACOLOGY (Aug. 31, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5606297/>; Charles D. Nichols & Elaine Sanders-Bush, *Serotonin Receptor Signaling and Hallucinogenic Drug Action*, 2 HEFFTER REV. PSYCHEDELIC RES. 73 (2001), <https://bibliography.maps.org/bibliography/default/resource/5874>.

<sup>29</sup> James W.B. Elsey, *Psychedelic Drug Use in Healthy Individuals: A Review of Benefits, Costs, and Implications for Drug Policy*, DRUG SCI. POL'Y & L., (July 26, 2017) at 2.

users to feel a sense of unity, ineffability, extreme positivity, transcendence of time and a feeling of revelation.<sup>30</sup> This stage lasts from minutes to hours.<sup>31</sup>

Second, after the acute psychedelic state, the user often experiences the “afterglow phase” where they may have an increased positive mood and feel less preoccupied by worries and stresses.<sup>32</sup> This phase usually lasts about two to four weeks.<sup>33</sup> There may be lasting long-term psychological changes such as increased emotional and brain plasticity caused by psilocybin’s effects or of the subjective psychedelic experience itself.<sup>34</sup>

Neuroscience research suggests the aforementioned stages occur because of significant changes to the brain’s default mode network (“DMN”).<sup>35</sup> The DMN supports cognitive processes such as introspection and contemplation of one’s past and future.<sup>36</sup> Psilocybin consumption promotes an unrestrained style of thinking by reducing neural activity inside the DMN and creates its mystical effects.<sup>37</sup>

### *B. HOW PSILOCYBIN CAN TREAT MENTAL ILLNESS*

Psilocybin has been used as an effective treatment for depression, anxiety, substance use disorders, opioid addictions, and other mental illnesses.<sup>38</sup> Recent scientific research showed psilocybin rapidly improved symptoms and even resulted in remission in some cases for patients with major depressive disorders.<sup>39</sup> The results of the trial showed psilocybin treatment was associated with a greater than fifty percent reduction in depressive symptoms in sixty-seven percent of study participants.<sup>40</sup> Additionally, seventy-one percent of participants showed progress in reducing their major depression at a four-week follow-up.<sup>41</sup> A total of

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<sup>30</sup> Mason M. Marks, *Controlled Substance Regulation for the COVID-19 Mental Health Crisis*, 72 ADMIN. L. REV. 649, 685 (2020) [hereinafter *Marks II*].

<sup>31</sup> Elsey, *supra* note 29 at 2.

<sup>32</sup> *Id.*; Fredrick S. Barrett et al., *Emotions and brain function are altered up to one month after a single high dose of psilocybin*, 10 SCIENTIFIC REPORTS 1 (2020).

<sup>33</sup> Elsey, *supra* note 29 at 2.

<sup>34</sup> *Id.*; Barrett et al., *supra* note 32 at 1.

<sup>35</sup> Robert Leech et al., *The Entropic Brain: A Theory of Conscious States Informed by Neuroimaging Research with Psychedelic Drugs*, FRONT. HUM. NEUROSCI., 1, 6 (Feb. 2014).

<sup>36</sup> Leech et al., *supra* note 34 at 1,6.

<sup>37</sup> Jasmine Virdi, *Psychedelics and the Default Mode Network*, PSYCHEDELICS TODAY (Feb. 4, 2020), <https://psychedelictoday.com/2020/02/04/psychedelics-and-the-default-mode-network/>

<sup>38</sup> Marlan, *supra* note 19 at 873-74.

<sup>39</sup> Alan K. Davis et al., *Effects of Psilocybin-Assisted Therapy on Major Depressive Disorder*, JAMA PSYCHIATRY (2020).

<sup>40</sup> Davis et al., *supra* note 39 at 33.

<sup>41</sup> *Id.*

fifty percent of participants achieved remission from their major depression.<sup>42</sup> These findings are particularly exciting because psilocybin worked as a treatment only after a single session or a few sessions and had enduring effects.<sup>43</sup> By contrast, most conventional depression treatments are given frequently and have chronic side effects.<sup>44</sup> However, researchers believe patients who suffer from decades long depression may require more than one or two psilocybin doses.<sup>45</sup>

Other related studies support psilocybin uses in depression treatment. In 2016, research showed psilocybin helped treatment resistant major depression patients.<sup>46</sup> In this study, sixty-seven percent of participants showed significant reductions in symptoms after only one week.<sup>47</sup> Another study showed psilocybin dramatically improved depressive symptoms for cancer patients.<sup>48</sup> The panoply of studies supporting psilocybin as a treatment for depression caused the Food and Drug Administration (“FDA”) to designate psilocybin a “breakthrough therapy” for treating major depressive disorder.<sup>49</sup>

### C. Government Regulation of Psilocybin

#### 1. FEDERAL GOVERNMENT REGULATION OF PSILOCYBIN

Despite the FDA deeming psilocybin a breakthrough therapy the CSA outlaws all uses of psilocybin. Some of the earliest federal regulations concerning psilocybin were the 1962 Kefauver-Harris Amendments to the 1938 Food, Drug, and Cosmetics Act.<sup>50</sup> The Amendments required detailed and well-controlled investigations showing that drug was safe and effective before marketing to the public.<sup>51</sup> Under the Amendments, psychedelics could no longer be provided to

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<sup>42</sup> *Id.* Five years later the single dose of psilocybin still showed significant benefits for the patients in the study. Gabrielle Agin-Liebes, *Long-term follow-up of psilocybin-assisted psychotherapy for psychiatric and existential distress in patients with life-threatening cancer*, J. OF PSYCHOPHARMACOLOGY (2020).

<sup>43</sup> Batya Swift Yasgur, *Psilocybin Delivers ‘Remarkable’ Relief in Severe Depression*, MEDSCAPE (Nov. 05, 2020), <https://www.medscape.com/viewarticle/940477>.

<sup>44</sup> *Id.*

<sup>45</sup> Zoe Cormier, *Psilocybin Therapy May Work as Well as Common Antidepressant*, SCIENTIFIC AMERICAN (Apr. 15, 2021), <https://www.scientificamerican.com/article/psilocybin-therapy-may-work-as-well-as-common-antidepressant/>.

<sup>46</sup> Mark Bolstridge et al., *Psilocybin with psychological support for treatment-resistant depression: an open-label feasibility study*, LANCET PSYCHIATRY (2016).

<sup>47</sup> *Id.* at 39.

<sup>48</sup> Yasgur, *supra* note 43. Additional research with more participants is needed regarding therapeutic psilocybin. Ezra Klein, *Can Magic Mushrooms Heal Us?*, N.Y. TIMES (Mar. 21, 2021), <https://www.nytimes.com/2021/03/18/opinion/oregon-psychedelic-therapy.html>.

<sup>49</sup> Matt Lamkin, *Legitimate Medicine in the Age of Consumerism*, 53 U. CAL. DAVIS L. REV. 385, 389-90 (2019).

<sup>50</sup> Marlan, *supra* note 19 at 867; Drug Amendments of 1962, Pub. L. No. 87-781, 76 Stat. 780, 780 (1962).

<sup>51</sup> Drug Amendments of 1962, 76 Stat. at 781.

physicians directly by pharmaceutical companies.<sup>52</sup> Now psychedelics could only be supplied after permission from federal or state agencies.<sup>53</sup>

After the Kefauver-Harris Amendments, the federal government tightened psilocybin regulation with the Drug Abuse Control Amendments of 1965 that forbid the sale or manufacture of any drug with a “hallucinogenic effect.”<sup>54</sup> However, the Amendments did not criminalize the possession of psilocybin.<sup>55</sup>

The federal criminalization of psilocybin came at the urging of President Richard Nixon.<sup>56</sup> In 1969, Nixon officially announced the “War on Drugs,” and claimed “[drug use] afflict[ed] both the body and soul of America.”<sup>57</sup> Subsequently, in 1971, President Nixon stated, “America’s public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive.”<sup>58</sup>

Shortly after President Nixon’s declaration, Congress passed the CSA.<sup>59</sup> The CSA classifies controlled substances into five schedules based on the substance’s potential for abuse and its potential for medical uses.<sup>60</sup> Psilocybin is classified as a Schedule I drug, the most severe classification alongside heroin.<sup>61</sup>

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<sup>52</sup> Marlan, *supra* note 19 at 867.

<sup>53</sup> LESTER GRINSPOON & JAMES B. BAKALAR, PSYCHEDELIC DRUGS RECONSIDERED 192 (1997).

<sup>54</sup> Drug Abuse Control Amendments of 1965, 89 Pub. L. No. 74, 79 Stat. 226-28, 230 (1965); Kathryn L. Tucker, *Oregon’s Pioneering State Law to Allow Access to Psilocybin, A New Palliative Care Tool for Patients Suffering Anxiety and Depression*, 57 WILLAMETTE L. REV. 13, 17 (2020).

<sup>55</sup> Marlan, *supra* note 19 at 868.

<sup>56</sup> See *Tucker I*, *supra* note 26 at 242-43.

<sup>57</sup> Taylor E. Overman, A “Dubious Distinction”: *New Jersey’s Drug-Free School Zones & Disparately Impacted Minority Communities*, 34 B.C. J.L. & SOC. JUST. 397, 401 (2014). In 1994, John Ehrlichman, one of Nixon’s top advisors, suggested Nixon wage the war on drugs to target political enemies such as black people and antiwar activists. Courtney Harper Turkington, Comment, *Louisiana’s Addiction to Mass Incarceration by the Numbers*, 63 LOY. L. REV. 557, 571, 560-61 (2017); Dan Baum, *Legalize It All*, HARPER’S MAGAZINE (June 2013), <https://harpers.org/archive/2016/04/legalize-it-all/>.

<sup>58</sup> President Richard M. Nixon, *Remarks About an Intensified Program for Drug Abuse Prevention and Control*, (June 17, 1971), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/remarks-about-intensified-program-for-drug-abuse-prevention-and-control>.

<sup>59</sup> See Spencer A. Stone, Note, *Federal Drug Sentencing - What Was Congress Smoking? The Uncertain Distinction Between “Cocaine” and “Cocaine Base” in the Anti-Drug Abuse Act of 1986*, 30 W. NEW ENG. L. REV. 297, 309-10 (2007); Dave Rodman, *Revisiting the War on Drugs & Its Impact*, THE RODMAN LAW GROUP, LLC (Aug. 8, 2019), <https://therodmanlawgroup.com/revisiting-the-war-on-drugs-its-impact/>.

<sup>60</sup> 21 U.S.C. § 812 (2018).

<sup>61</sup> See *Id.* Curiously, cocaine is classified as a Schedule II drug despite killing over four thousand Americans each year. See Keith Humphreys, *The Government Still Insists Pot Is More Dangerous than Cocaine*, WASH. POST. (May 15, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/05/15/why-the-government-still-insists-pot-is-more-dangerous-than-cocaine/?utm\\_term=.9126ca793b1c](https://www.washingtonpost.com/news/wonk/wp/2015/05/15/why-the-government-still-insists-pot-is-more-dangerous-than-cocaine/?utm_term=.9126ca793b1c).

Despite the previously discussed scientific studies, the federal government by statutory definition deems psilocybin to have a high risk for abuse and no recognized medical value. Additionally, as a Schedule I substance, *all* uses of psilocybin are illegal under federal law.<sup>62</sup> Despite the federal government's blanket criminalization of psilocybin, the CSA does *not* regulate employment law,<sup>63</sup> and does *not* forbid the employment of a therapeutic psilocybin user.<sup>64</sup>

## 2. STATE AND LOCAL LAWS CONCERNING PSILOCYBIN

Despite psilocybin use being illegal under federal law, therapeutic psilocybin is legal or deemed the lowest criminal enforcement priority in some jurisdictions. This trend began in May 2019, when Denver, Colorado made criminal enforcement of its psilocybin statutes the city's lowest enforcement priority.<sup>65</sup> As of April 2021, seven US cities followed Denver's lead and made psilocybin possession law enforcement's lowest priority.<sup>66</sup> In 2020, despite gathering restrictions created by the COVID-19 pandemic, Oregon activists submitted enough signatures to place therapeutic psilocybin legalization on the state's November ballot.<sup>67</sup> It succeeded and Oregon became the first state to legalize therapeutic psilocybin use.<sup>68</sup>

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<sup>62</sup> 21 U.S.C. § 844(a) (2018).

<sup>63</sup> *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326, 336 (D. Conn. 2017).

<sup>64</sup> See *James v. City of Costa Mesa*, 700 F.3d 394, 411-13 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2396 (2013); See also Appeal of Panaggio, No. 2019-0685, 2021 WL 787021 \* at 8 (N.H. Mar. 2, 2021) (same result); Alexis Gabrielson, *The "Right to Use" Takes Its First Hit: Marijuana Legalization and the Future of Employee Drug Testing*, 18 EMP. RTS. & EMP. POL'Y J. 241, 261 (2014).

<sup>65</sup> See *Marks II*, *supra* note 30 at 669-70. Denver is considering decriminalization of medical psilocybin and the gifting of psilocybin. Alayna Alvarez, *Denver pursues further decriminalization of magic mushrooms*, AXIOS (Apr. 13, 2021), <https://www.axios.com/denver-magic-mushrooms-decriminalization-psilocybin-63ffdc19-f2b1-421c-ab09-dcf45559bda4.html>.

<sup>66</sup> The seven cities are Washington, DC, Oakland, CA, Santa Cruz, CA, Ann Arbor, MI, Cambridge, MA, Somerville, MA, and Northampton, MA. Allison Margolin, *California Climbs Aboard the Psychedelic Spaceship*, MARGOLIN & LAWRENCE, <https://www.margolinlawrence.com/california-climbs-aboard-the-psychedelic-spaceship/>; Peter-Astrid Kane, *The Commodification of Psychedelics*, SFWEEKLY (Apr. 15, 2021), <https://www.sfwecly.com/culture/commodification-psychedelics-mushrooms/>. Spokane activists are pursuing legislative action to make psilocybin criminal enforcement law enforcement's lowest priority. Casey Decker, *Could magic mushrooms be decriminalized in Spokane?*, KREM2 (Mar. 16, 2021), <https://www.krem.com/article/news/news-explainers/spokane-group-works-to-decriminalize-magic-mushrooms/293-10b60c63-cac9-40c3-bb7d-a51c9279f2ff>.

<sup>67</sup> Tom Angell, *Coronavirus Upends Marijuana, Psychedelics And Drug Reform Ballot Measures*, FORBES (Mar. 31, 2020, 10:23 AM), <https://www.forbes.com/sites/tomangell/2020/03/31/coronavirus-upends-marijuana-psychedelics-and-drug-reform-ballot-measures/?sh=7ed8ff2f3645>.

<sup>68</sup> Will Feuer, *Oregon becomes first state to legalize magic mushrooms as more states ease drug laws in 'psychedelic renaissance'*, CNBC (Nov. 4, 2020, 10:55 AM), <https://www.cnbc.com/2020/11/04/oregon-becomes-first-state-to-legalize-magic-mushrooms-as-more-states-ease-drug-laws.html>.

Psilocybin’s legal rethinking continues. Legislators in California, Connecticut, Florida, Hawaii, Iowa, Kansas, Missouri, New Jersey, New York, Texas, Washington, Vermont, and Virginia have all considered psilocybin reform bills.<sup>69</sup> On April 6, 2021 a California psilocybin decriminalization bill advanced through a senate committee by a vote of 4-1.<sup>70</sup> The California psilocybin reform bill is the farthest any state besides Oregon has gone regarding psilocybin reform this legislative term.<sup>71</sup>

## II. EMPLOYMENT PROTECTIONS FOR DRUG USERS

Despite psilocybin’s increased acceptance at the state and local level, no jurisdiction has adopted employment protections for psilocybin users.<sup>72</sup> As states legalize therapeutic psilocybin, they should enact employment protections for therapeutic psilocybin users just like many states that have enacted employment protections for medical cannabis users.<sup>73</sup> This section begins by surveying the differing medical cannabis employment protections. Next, the section considers case law and argues state employment protections for state sanctioned therapeutic drug users are likely *not* preempted because the CSA does not include an express preemption provision, does not intend to occupy the field of illicit drug regulation, employment protections do not create conflict preemption, and antidiscrimination statutes regarding drug users do not frustrate the purpose of federal law.<sup>74</sup>

### A. REEFER MADNESS: HAZY STATE EMPLOYMENT PROTECTIONS FOR DRUG USERS

Case law concerning medical cannabis employment protections is helpful when considering therapeutic psilocybin protections because both drugs are Schedule I substances under the CSA. Of the thirty-five states that have legalized medical cannabis only seventeen provide medical cannabis users with some form

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<sup>69</sup> Adlin, *supra* note 18; Sean Neumann, *Rick Perry Urges Study Into Using ‘Magic Mushrooms’ to Treat Veterans with PTSD*, PEOPLE (Apr. 14, 2021, 3:21 PM), <https://people.com/politics/rick-perry-urges-texas-to-launch-study-into-using-magic-mushrooms-to-treat-veterans-with-ptsd/>; Dom Amato, *Should Vermont decriminalize some hallucinogenic drugs?*, WCAX 3 (Jan. 23, 2020, 5:22 PM) (“The bill was read in the [Vermont] House and referred to the [Vermont] Committee on Judiciary. No word on when it will be discussed next or how far it will go.”), <https://www.wcax.com/content/news/Should-Vermont-decriminalize-some-hallucinogenic-drugs-567241491.html>. Globally, Austria, Brazil, Czech Republic, Italy, the Netherlands, Portugal, and Spain decriminalize psilocybin use. Patrick Smith, *Magic Mushroom Legality Around the World*, ENTHEONATION <https://entheonation.com/blog/magic-mushroom-legality/>.

<sup>70</sup> See Kyle Jaeger, *California Senators Approve Bill To Legalize Possession Of Psychedelics Like LSD, MDMA And Psilocybin*, MARIJUANA MOMENT (Apr. 6, 2021), <https://www.marijuanamoment.net/california-senators-approve-bill-to-legalize-possession-of-psychedelics-like-ldm-dma-and-psilocybin/>.

<sup>71</sup> *Id.*

<sup>72</sup> See Marks I, *supra* note 21 at 132-33; See also, Cirner, *supra* note 23.

<sup>73</sup> See Iris Hentze, *Cannabis & Employment Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Nov. 2, 2020), <https://www.ncsl.org/research/labor-and-employment/cannabis-employment-laws.aspx>.

<sup>74</sup> See *infra* Sec. II B.

of statutory employment protections; however, cannabis users enjoy different levels of employment protections in these various jurisdictions.<sup>75</sup> State cannabis employment protections can be classified into five categories: (1) jurisdictions requiring an employer make a reasonable accommodation for the employee's medical cannabis use, (2) jurisdictions that consider a medical cannabis user disabled, (3) jurisdictions in which the employee's underlying medical use and their status as a cardholder is protected, (4) jurisdiction in which medical cannabis users must be treated the same as prescription drug users, and (5) jurisdictions where only an employee's status as a medical cannabis cardholder is protected.

Nevada is the only jurisdiction that mandates employer's make a reasonable accommodation for an employee's medical cannabis use.<sup>76</sup> Under Nevada law, an employer must make a reasonable accommodation for an employee's medical cannabis use so long as it would not (1) pose a "threat" to persons or property; (2) impose an undue hardship on the employer; and (3) prohibit the employee from fulfilling their job's duties.<sup>77</sup> Nevada law does not mandate an employer tolerate an employee's on-site cannabis use.<sup>78</sup>

Nevada's approach to medical cannabis employment protections is unique in two ways. First, this approach provides medical cannabis users explicit employment protections.<sup>79</sup> Second, the statute's language requires employers prove the employee's medical cannabis use posed a "threat" to the worksite to

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<sup>75</sup> See Barreiro, *supra* note 14. Some commentators have suggested Maryland provides medical cannabis users employment protections. *E.g.* Shahabudeen K. Khan, *Employers Beware: What Are Employers' Obligations and Rights Given New Marijuana Legislations?*, 6 BELMONT L. REV. 74, 82 (2019) ("Based on a plain reading of [Maryland's medical cannabis law], it appears that employers may be required to accommodate such employees."). The Maryland law states "[a qualifying patient] may not be subject to arrest, prosecution, or any civil or administrative penalty, including a civil penalty or disciplinary action by a professional licensing board, or be denied any right or privilege, for the medical use of or possession of medical cannabis..." MD. CODE ANN., HEALTH-GEN. § 13-3313(a). Arguably, this law could apply to Maryland employers. However, the Maryland Medical Cannabis Website states: "Maryland law does not prevent an employer from testing for use of cannabis (for any reason) or taking action against an employee who tests positive for use of cannabis (for any reason)." Patient FAQ, "My employer tests for drug use including cannabis. Can they test me if I am a medical cannabis patient? Can they fire me if I use medical cannabis?" available at [http://mmcc.maryland.gov/Pages/patients\\_faq.aspx](http://mmcc.maryland.gov/Pages/patients_faq.aspx) (last visited May 30, 2021).

<sup>76</sup> Lindsey A. White et al., *Smoky Lines: Whether to Accommodate Employees' Use of Medical Marijuana May Now Depend on State Law*, 68 LAB. L.J. 202, 204 (2017); See also Jayden D. Gray, *Marijuana and the Workplace: How High Are the Stakes for Employees?*, 2017 UTAH L. REV. ONLAW 1, 12-13 (2017).

<sup>77</sup> Assemb. B. 533, 2019 Leg., 80th Sess. § 170(3)(a)–(b) (Nev. 2019); Harry Arnold, *When Your Blackjack Dealer Takes a Hit: How Nevada Assembly Bill 132 Threatens Vegas Casinos in an Age Of Legalized Marijuana*, 28 GEO. MASON L. REV. 449, 453 (2020) ("NRS 453A thus affords employers significant flexibility and deference in the form of various enumerated exceptions for when accommodations are not required for employees that use medical marijuana.").

<sup>78</sup> Assemb. B. 533, 2019 Leg., 80th Sess. § 170(2) (Nev. 2019).

<sup>79</sup> See Khan, *supra* note 75 at 82.

justify taking an adverse action.<sup>80</sup> By contrast, other statutes use the term “impairment,” meaning an employer is within its rights in firing an employee merely showing signs of possible impairment, such as distinct smell or odd movements, without proving the employee’s cannabis use posed a threat.<sup>81</sup>

New York follows a similar approach to Nevada but classifies a medical cannabis patient as being disabled under the New York Human Rights Act.<sup>82</sup> Deeming medical cannabis cardholders as automatically disabled means an employer must accommodate the employee’s disability that necessitates their cannabis use.<sup>83</sup> Like other jurisdictions, New York does not require an employer tolerate an employee’s on-site cannabis use.<sup>84</sup>

Arizona, Arkansas, Delaware, Minnesota, New Mexico, Oklahoma, and Virginia provide employment protections for medical cannabis users based on their status as cardholders and protection from a positive drug test for cannabis.<sup>85</sup> These protections are subject to several exceptions. First, employers who would lose federal contracting funding are exempt. Second, employees that use medical cannabis or are impaired at work are exempt from employment protections.<sup>86</sup> Notably, only Arizona provides a definition of “impairment” and contains certain conditions that are not necessarily indicators of present cannabis impairment such as smell and odor.<sup>87</sup> Under Arizona law, an employer cannot be sued for taking adverse action against a qualifying patient based on their “good faith belief” that the employee was impaired by cannabis at work.<sup>88</sup> It is clear, however, this category of medical cannabis antidiscrimination statutes protect users from termination because of a positive drug test. The same cannot be said for the remaining states.

The state of South Dakota will mandate beginning on July 1, 2021 that medical cannabis users are afforded the same rights they would have under state and local law if they were “pharmaceutical medication” users.<sup>89</sup> This protection for medical cannabis users includes “[a]ny interaction[s] with [their] employer[s]”

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<sup>80</sup> See Stephen M. Scannell, *Medical Marijuana and the ADA: Following the Path Blazed by State Courts to Extend Protection*, 12 ST. LOUIS U.J. HEALTH L. & POL’Y 391, 403-04 (2019).

<sup>81</sup> *Id.* at 404.

<sup>82</sup> N.Y. PUBLIC HEALTH LAW §3369(2) (McKinney 2021).

<sup>83</sup> Lucía Morán, *Emerging from the Smoke: Does an Employer Have A Duty to Accommodate an Employee’s Medical Marijuana Use After Garcia v. Tractor Supply Company?*, 48 N.M. L. REV. 194, 202 (2018).

<sup>84</sup> §3369(2).

<sup>85</sup> See Barreiro, *supra* note 14; V.A. Code § 54.1-3408.3 (2021).

<sup>86</sup> Scannell, *supra* note 80 at 404-05.

<sup>87</sup> See Kathleen Harvey, *Protecting Medical Marijuana Users in the Workplace*, 66 CASE W. RES. L. REV. 209, 226 (2015).

<sup>88</sup> See *Whitmire v. Wal-Mart Stores Inc.* 359 F. Supp.3d 761, 787 (D. Ariz. 2019).

<sup>89</sup> S.D. Codified Laws § 34-20G-22 (2021).

and “[d]rug testing by [their] employers.”<sup>90</sup> While the South Dakota employment protections seem to prohibit employers from specifically singling out medical users, it carves out several exceptions. First, this protection does not apply if federal law or regulations mandate adverse action for medical cannabis use.<sup>91</sup> Second, the South Dakota law does *not* protect adverse action based on on-site or working under the influence of cannabis.<sup>92</sup> The law attempts to define “under the influence” by stating medical cannabis users cannot be considered under the influence “solely because of the presence of metabolites or components of cannabis that appear in insufficient concentration to cause impairment.”<sup>93</sup>

The law’s subjective definition will likely cause employers confusion.<sup>94</sup> This confusion will arise because the present methodology for cannabis testing is *not* exact and is focused on testing for any past cannabis use instead of present cannabis impairment.<sup>95</sup> The root cause of this problem stems from the lack of studies on cannabis’s effects on the body because of federal prohibition.<sup>96</sup> However, some technologies are being researched to effectively test for present cannabis impairment.<sup>97</sup> Ultimately, the exception for adverse action based on present cannabis impairment proven via testing is likely meaningless for South

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<sup>90</sup> *Id.*

<sup>91</sup> S.D. Codified Laws § 34-20G-23 (2021).

<sup>92</sup> S.D. CODIFIED LAWS § 34-20G-24 (2021).

<sup>93</sup> *Id.*

<sup>94</sup> Rayna H. Jones et al., *Marijuana Ballot Initiatives Approved in Five States: What This Budding Trend Means for Employers*, OGLETREE DEAKINS (Nov. 11, 2020), <https://ogletree.com/insights/marijuana-ballot-initiatives-approved-in-five-states-what-this-budding-trend-means-for-employers/>.

<sup>95</sup> See Ed Finkel, *Ready or Not, Cannabis Is Here Will Unresolved Issues Spell Trouble for Legalized Recreational Cannabis in Illinois?*, 108 ILL. B.J. 24, 25 (2020); See also Matthew C. Rappold, *Criminal Law—Evidence of Inactive Drug Metabolites in Dui Cases: Using A Proximate Cause Analysis to Fill the Evidentiary Gap Between Prior Drug Use and Driving Under the Influence*, 32 UALR L. REV. 535, 549 n. 128 (2010).

<sup>96</sup> Spencer Gill, *Budding Marijuana Industry Meets Climate & Environmental Crisis: A Call to Legislative Action*, 5 OIL & GAS, NAT. RES. & ENERGY J. 661, 686 (2020) (“Because marijuana has been on the Schedule I list of controlled substances for the last fifty years, research concerning marijuana’s medicinal properties and effects or the plant’s optimal growth cycle has been severally inhibited because of the difficulty and potential legal liability associated with obtaining marijuana for such studies.”); Katherine Berger, *ABCs and CBD: Why Children with Treatment-Resistant Conditions Should Be Able to Take Physician-Recommended Medical Marijuana at School*, 80 OHIO ST. L.J. 309, 317 (2019) (“Because marijuana in most forms is federally illegal, little accountable, large-scale research exists documenting medical marijuana’s possible uses and effects.”).

<sup>97</sup> See e.g. Jena Hilliard, *New Breathalyzer Can Now Detect Levels Of Marijuana*, ADDICTION CENTER (Sept. 13, 2019), <https://www.addictioncenter.com/news/2019/09/new-breathalyzer-marijuana/> (describing THC breathalyzer developed by a University of Pittsburgh research team); Rebekah F. Ward, *Impairment testing lags behind state cannabis legalization*, TIMES UNION (May 11, 2021) (describing oral fluid device to test for cannabis consumption in the past twenty-four hours).

Dakota employers until drug testing technology evolves.<sup>98</sup> Therefore, South Dakota employers should not take adverse action based solely on a positive test for cannabis or because the individual is a medical cannabis user.

The states of Connecticut, Illinois, Maine, New Jersey, Pennsylvania, Rhode Island, and West Virginia protect an employee from adverse employment action solely because of their status as a medical cannabis cardholder.<sup>99</sup> In fact, Illinois' statute explicitly grants an employer the right to enforce drug tests so long as they are not administered in a discriminatory fashion.<sup>100</sup> Some commentators interpret these laws to permit an employer to fire an employee because of a positive test for cannabis without facing an employment discrimination claim.<sup>101</sup>

Several court decisions have disagreed with this view, holding these statutes protect both the employee's status as a medical cannabis cardholder and from a positive drug test.<sup>102</sup> These courts reason the statutory intent is to protect an employee's right to use medical cannabis.<sup>103</sup> The remaining jurisdictions in this category have not considered which interpretation they find more persuasive.

Two jurisdictions, Colorado and Oregon, have considered legislation related to employment protections for therapeutic psilocybin users.<sup>104</sup> Colorado State Representative Jovan Melton introduced House Bill 1089 which "prohibits an employer from terminating an employee" for "lawful off-duty activities," even if the activity is illegal under federal law.<sup>105</sup> Melton proposed the law to overturn

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<sup>98</sup> See generally *What Measure 26 and Amendment A Mean for Employers*, DAVENPORT EVANS LAWYERS (Nov. 23, 2020), <https://dehs.com/what-measure-26-and-amendment-a-mean-for-employers/> (opining new South Dakota medical cannabis employment protections are the same as the status as cardholders and protection from a positive drug test for cannabis states until drug testing technology evolves).

<sup>99</sup> Barreiro, *supra* note 14.

<sup>100</sup> 410 Ill. Comp. Stat. Ann. 130/50 (2021).

<sup>101</sup> E.g. Harvey, *supra* note 87 at 225; John McCreary Jr., *Reprise of Employment Law Issues in Pa.'s Medical Marijuana Act*, LAW.COM THE LEGAL INTELLIGENCER, (Mar. 21, 2019, 2:49 PM), <https://www.law.com/thelegalintelligencer/2019/03/21/reprise-of-employment-law-issues-in-pa-s-medical-marijuana-act/?slreturn=20200723085151>.

<sup>102</sup> *Smith v. Jensen Fabricating Eng'rs, Inc.*, No. HHDCV186086419, 2019 Conn. Super. LEXIS 439, at \*4 (Conn. Super. Ct. Mar. 4, 2019); *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 R.I. Super. LEXIS 88, at \*16 (R.I. Super. Ct. May 23, 2017).

<sup>103</sup> E.g., *Callaghan*, 2017 R.I. Super. LEXIS 88 at \*16.

<sup>104</sup> See generally Randy Robinson, *Colorado Finally Files Bill to Protect Weed-Smoking Employees*, MERRY JANE (Jan. 15, 2020), <https://merryjane.com/news/colorado-finally-files-bill-to-protect-weed-smoking-employees/>; see also Canna Law Blog, *Will Oregon Finally Protect Off-Work Marijuana Use in 2019?*, HARRIS BRICKEN (Jan. 5, 2019), <https://harrisbricken.com/cannalawblog/will-oregon-finally-protect-off-work-marijuana-use-in-2019/>

<sup>105</sup> Employee Protection Lawful Off-duty Activity, H.B. 1089, 72nd Gen. Assemb., 2d Reg. Sess. (Colo. 2020); see Saja Hindi, *Colorado lawmakers want to stop employers from firing people for using weed in their personal time*, THE DENVER POST (Jan. 19, 2020, 11:59 AM), <https://www.denverpost.com/2020/01/14/colorado-legislature-marijuana-employees-fired/>.

*Coats v. Dish Network, LLC*,<sup>106</sup> where the Colorado Supreme Court held an employer could fire an employee for using state sanctioned medical cannabis because state law provided no statutory duty to accommodate medical cannabis use.<sup>107</sup> The proposed law would protect therapeutic psilocybin users if Colorado legalized psilocybin statewide;<sup>108</sup> a fact possibly forthcoming because Colorado activists are pursuing a 2022 psilocybin ballot measure that would legalize therapeutic psilocybin use.<sup>109</sup>

Despite this legislation's trail-blazing attempt at providing psilocybin users employment protections the bill as written has serious problems. First, the legislation provides no exception for an employee that poses a direct threat to either other employees, the public, or company property by forbidding an employer from taking necessary safety action.<sup>110</sup> It offers no exception for compliance with federal law or federal contracting requirements; the lack of such an exception would place employers in a difficult situation.<sup>111</sup>

Oregon Senator Floyd Prozanski took a similar approach like the proposed Colorado law. The proposed Oregon law would overrule *Emerald Steel*, where the Oregon Supreme Court refused to apply state antidiscrimination protections to a disabled medical cannabis user.<sup>112</sup> Senator Prozanski has proposed legislation concerning employment protections for individuals who use substances legally under state law but illegally under federal law twice -- in 2017 and 2019.<sup>113</sup> Prozanski's 2019 legislation forbid adverse action based solely on nonworking hours use of a substance legal under state law (regardless of federal legality or illegality).<sup>114</sup> The legislation permits adverse action *only* if it relates to a bona fide occupational qualification, on-site impairment, or permitted under a collective bargaining agreement.<sup>115</sup> Prozanski's legislation is more complete compared to Melton's legislation because it forbids work-hours impairment and allows for adverse action if it relates to a bona fide occupational qualification. However, the

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<sup>106</sup> *Coats v. Dish Network, LLC*, 350 P.3d 849, 853 (Colo. 2015).

<sup>107</sup>

*Id.*

<sup>108</sup> Robinson, *supra* note 104.

<sup>109</sup> Kyle Jaeger, *Colorado Activists Likely To Pursue 2022 Psilocybin Ballot Measure After Poll Shows Support*, MARIJUANA MOMENT (June 12, 2020), <https://www.marijuanamoment.net/colorado-activists-likely-to-pursue-2022-psilocybin-ballot-measure-after-poll-shows-support/>. A poll showed majority support for the proposed measure. *Id.*

<sup>110</sup> *See* H.B. 1089.

<sup>111</sup> *See Id.*

<sup>112</sup> *See* Megan Vaniman, *Oregon could learn from other states with employee protections for off-work medical marijuana use*, CANNABIS L. J., <https://journal.cannabislaw.report/oregon-could-learn-from-other-states-with-employee-protections-for-off-work-medical-marijuana-use/>.

<sup>113</sup> Chris Miller, *What's Happening In The World Of Weed*, THE SOURCE WKLY. (Mar. 20, 2019), <https://www.bendsource.com/bend/whats-happening-in-the-world-of-weed/Content?oid=9748506>.

<sup>114</sup> Relating to Unlawful Employment Practices; Prescribing an Effective Date, S.B. 301, 79th Legis. Assemb. (Or. 2017).

<sup>115</sup> *Id.*

proposed Oregon law fails to create an exception for compliance with federal contracting requirements.<sup>116</sup> The lack of such an exception would put Oregon contractors like their Colorado counterparts in an impossible situation regarding compliance with federal contracting requirements and state antidiscrimination law.<sup>117</sup>

### B. THE TENSION BETWEEN FEDERAL AND STATE DRUG LAW IN EMPLOYMENT LAW

The simultaneous ban of *all* uses of psilocybin under federal law and decriminalization in state and local laws creates tension in employment law. Psilocybin's illegality under the CSA prevents therapeutic psilocybin users from protection under the ADA because it does not cover adverse action taken because of illegal drug use.<sup>118</sup>

Perhaps an employee could argue their termination violates public policy because the state legalized their therapeutic drug use.<sup>119</sup> Two state courts have considered a wrongful discharge for drug use on public policy grounds.<sup>120</sup> In *Ross v. RagingWire Telecommunications, Inc.*, the California Supreme Court held generally employment at will governs the employment relationship, but the rule is subject to an exception that an employer may not discharge an employee for a

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<sup>116</sup> See Canna Law Blog, *supra* note 104.

<sup>117</sup> E.g., Letter from Associated General Contractors Oregon Columbia Chapters to Chair Prozanski and Members of the Committee (Feb. 20, 2017) *available at* <https://olis.oregonlegislature.gov/liz/2017r1/downloads/committeemeetingdocument/99340>.

<sup>118</sup> See 42 U.S.C. §§ 12111-14 (2018); *Izzo v. Genesco, Inc.*, 171 F. Supp. 3d 1, 6 (D. Mass. 2016) (“[I]f an employee is terminated for illegal drug use, and he is in fact engaging in such use, he does not qualify as disabled under the ADA. If an employee is not currently engaging in the illegal use of drugs, however, but is erroneously regarded as engaging in such use, then he does qualify for protection under the ADA.”); *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 609 (10th Cir. 1998) (“[U]nsatisfactory conduct caused by alcoholism and illegal drug use does not receive protection under the ADA or the Rehabilitation Act.”); Laura L. Hirschfeld, *Legal Drugs? Not Without Legal Reform: The Impact of Drug Legalization on Employers Under Current Theories of Enterprise Liability*, 7 CORNELL J.L. & PUB. POL’Y 757, 834-35 (1998); Leslie Francis, *Illegal Substance Abuse and Protection from Discrimination in Housing and Employment: Reversing the Exclusion of Illegal Substance Abuse as a Disability*, 2019 UTAH L. REV. 891, 904 (2019) (“The exclusion of current illegal drug use from the ADA definition of disability poses significant problems for employees challenging adverse employment actions resulting from knowledge of their substance use.”); Dale L. Deitchler & Wendy M. Krincek, *Weed and Work: Are Marijuana Users the Newest Protected Class?*, NEV. LAW., February 2018, at 11 (“Accordingly, we believe the ADA does not require that employers accommodate the use of medical marijuana by employees...”).

<sup>119</sup> See Dustin Stark, *Just Say No: Foreclosing a Cause of Action for Employees Seeking Reasonable Accommodation Under the New Jersey Compassionate Use Medical Marijuana Act*, 43 SETON HALL L. REV. 409, 428-29 (2013) (arguing against public policy grounds litigation); Kayla Goyette, *Legalizing Marijuana: State and Federal Issue: Recreational Marijuana and Employment: What Employees Don't Know Will Hurt Them*, 50 GONZ. L. REV. 337, 341-42 (2014).

<sup>120</sup> Sara E. Payne & Geoffrey A. Mort, *Medical Marijuana in the Workplace: A Current Look at Cannabis Law*, N.Y. ST. B.J., July/Aug. 2018, at 8, 14.

reason which violates a fundamental policy interest.<sup>121</sup> To support such a cause of action, the policy in question must: (1) be supported by either constitutional or statutory provisions, (2) be public in the sense it benefits the public at large instead of merely the interests of the individual, (3) have been articulated at the time of the discharge, and (4) be “fundamental” and “substantial.”<sup>122</sup>

The court acknowledged that California did legalize medical cannabis use, but the law did not speak to employment law.<sup>123</sup> Additionally, the lack of statutory language failed to put employers on notice.<sup>124</sup> Therefore, the plaintiff failed to state a cause of action for wrongful termination in violation of public policy.<sup>125</sup>

The other state court that considered a public policy was the Washington Supreme Court in *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*. The Supreme Court of Washington employed a similar analysis to *Ross* and held because Washington state law provided no explicit employment protections for medical cannabis users the termination did not violate public policy.<sup>126</sup> Therefore, states *must* provide explicit statutory protections for therapeutic psilocybin users to prevent adverse employment action.<sup>127</sup>

### C. PREEMPTION CONCERNS

Even if a state were to enact an employment protection for therapeutic psilocybin users it would likely be challenged on preemption grounds. Federal law is “the supreme Law of the land” under the US Constitution’s Supremacy Clause.<sup>128</sup> The Supremacy Clause preempts state law that conflicts with federal law and leaves the conflicting state law without effect and void.<sup>129</sup> The Supreme Court has recognized four types of preemption: express, field, conflict, and

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<sup>121</sup> *Ross v. RagingWire Telecommunications Inc.*, 174 P.3d 200, 208 (Cal. 2008).

<sup>122</sup> *Id.* (quoting *Stevenson v. Superior Court*, 941 P.2d 1157, 1161 (Cal. 1997)).

<sup>123</sup> *Ross*, 174 P.3d at 208.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 209.

<sup>126</sup> *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC.*, 257 P.3d 586, 597 (Wash. 2011); *Payne & Mort*, *supra* note 120, at 14.

<sup>127</sup> See Lino S. Lipinsky, *A Shift in Accommodating Employee Medical Marijuana Use*, LAW360 (Oct. 3, 2017, 11:40 AM), <https://www.law360.com/articles/967140/a-shift-in-accommodating-employee-medical-marijuana-use>; Moberly, *supra* note 23, at 38; Tyler Duff, *Nip it in the Bud: Compassionate Use of Medical Cannabis Pilot Program Act Does Not Provide Employees a Legal Remedy for Adverse Action Based Upon Use in Compliance with the Statute*, 49 J. MARSHALL L. REV. 193, 201 (2015) (“The absence of any statutory protection for workplace discipline based upon [medical cannabis] use is significant. Without [statutory] protection, registered users are defenseless against discipline...”).

<sup>128</sup> U.S. CONST. art. VI, cl. 2.

<sup>129</sup> See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540–53 (2001); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 (2016).

obstacle.<sup>130</sup> First, express preemption occurs when a federal law contains a provision forbidding state legislation on the topic.<sup>131</sup> Second, field preemption exists when the federal statute implies Congress has intended to occupy an entire field and the states may not hinder federal law.<sup>132</sup> Third, conflict preemption occurs when it is impossible to comply with both federal and state law.<sup>133</sup> Fourth, obstacle preemption exists where compliance with state law frustrates the purpose and effect of federal law.<sup>134</sup>

A state employment protection for therapeutic psilocybin users would likely hinge on either conflict or obstacle preemption.<sup>135</sup> No provision within the CSA explicitly preempts state or local laws;<sup>136</sup> therefore express preemption is inapplicable. Field preemption is inapplicable too. After all, Section 903 of the CSA declares, “No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field.”<sup>137</sup>

The only two types of preemption that *may* apply to state or local psilocybin laws are conflict and obstacle.<sup>138</sup> Conflict preemption is a “rare creature”<sup>139</sup> and occurs when, “[The] conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.”<sup>140</sup> A hypothetical example of conflict preemption regarding psilocybin would occur if a state law

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<sup>130</sup> Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 372 n.6 (2000) (quoting English v. Gen. Elec. Co., 496 U.S. 72, 79 n.5 (1990)).

<sup>131</sup> E.g., Sprietsma v. Mercury Marine, a Div. of Brunswick Corp., 537 U.S. 51, 62-63 (2002).

<sup>132</sup> E.g., Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 377 (2015).

<sup>133</sup> E.g., Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

<sup>134</sup> E.g., Perez v. Campbell, 402 U.S. 637, 649 (1971).

<sup>135</sup> See Robert J. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 15–17 (2013).

<sup>136</sup> Connor P. Burns, *I Was Gonna Get a Job, But Then I Got High: An Examination of Cannabis and Employment in the Post-Barbuto Regime*, 99 B.U. L. REV. 643, 652 (2019); Brandy M. Parry, *Puff, Puff, Pass: How State Marijuana Laws May Impact Probate Courts and Lead to Liability*, 33 QUINNIPIAC PROB. L.J. 178, 188 (2020) (“[T]he CSA explicitly states that Congress did not intend to preempt the field of marijuana law...”); John G. Sprankling, *Owning Marijuana*, 14 DUKE J. CONST. L. & PUB. POL’Y 1, 21-22 (2019) (“Because no provision of the CSA expressly states that it will supersede state law, there can be no express preemption.”).

<sup>137</sup> 21 U.S.C. § 903 (2018); Gonzales v. Oregon, 546 U.S. 243, 289 (2006) (Scalia J., dissenting) (characterizing § 903 as a “nonpre-emption provision”); Luke C. Waters, *Does Federal Law Preempt State Marijuana Law? Analyzing the “Conflict”*, COLO. LAW., December 2018, at 34, 35 (“Congress not only excluded express preemption, but also made clear that it had no intent to occupy the field; thus neither express nor field preemption is an issue when determining what standard to apply in evaluating whether the CSA supersedes conflicting state laws.”).

<sup>138</sup> Qualified Patients Ass’n v. City of Anaheim, 115 Cal. Rptr. 3d 89, 106 (Cal. Ct. App. 2010); See generally Brannon P. Denning, *State Legalization of Marijuana as a “Diagonal Federalism” Problem*, 11 FIU L. REV. 349, 353 (2016).

<sup>139</sup> Robert S. Peck, *A Separation-of-Powers Defense of the “Presumption Against Preemption”*, 84 TUL. L. REV. 1185, 1193 (2010); See also Eang L. Ngov, *Under Containment: Preempting State Ebola Quarantine Regulations*, 88 TEMP. L. REV. 1, 24 (2015) (“Because this type of preemption requires a showing that state and federal laws are mutually exclusive, it is a rare form of preemption.”).

<sup>140</sup> Kelly v. Washington *ex rel.* Foss Co., 302 U.S. 1, 10 (1937).

required police officers return unlawfully seized psilocybin.<sup>141</sup> This hypothetical law is preempted under conflict preemption because the state law requires the distribution of psilocybin which is illegal under the CSA.<sup>142</sup> But neither state-level decriminalization of therapeutic psilocybin nor employment protections for its users conflict with the CSA because such laws do not require the possession of psilocybin but rather only permit it.<sup>143</sup>

The strongest case for preemption in employment protections for therapeutic psilocybin users lies with obstacle preemption.<sup>144</sup> Obstacle preemption arises when “under the circumstances of [a] particular case, [the offending state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>145</sup> Whether obstacle preemption exists with state employment protections for therapeutic psilocybin users depends on how the state law is construed.<sup>146</sup> State laws creating employment protections for therapeutic psilocybin users could be viewed as enabling psilocybin use because they make its consequences less severe.<sup>147</sup> This interpretation would frustrate the intent of the CSA to “conquer drug abuse.”<sup>148</sup> On the other hand, one could

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<sup>141</sup> This hypothetical is based on a real case concerning cannabis distribution. *See People v. Crouse*, 388 P.3d 39, 41 (Colo. 2017). A hotly debated area of conflict preemption is medical cannabis and workers’ compensation. Jacob P. LaFreniere, *A Bet Against Abetting: Why Medical Marijuana Reimbursement Under Workers’ Compensation Is Not a Federal Crime*, 125 PENN ST. L. REV. 223 (2020) (arguing employer reimbursement of medical cannabis is not illegal under the CSA.). Courts have reached conflicting conclusions regarding whether the CSA preempts a worker’s compensation order for an employer to pay for an employee’s medical cannabis. *Compare* Bourgoin v. Twin Rivers Paper Co., 187 A.3d 10 (Me. 2018) (holding CSA preempted workers’ compensation order to reimburse employee’s medical cannabis because the employer would knowingly assist in violating federal law), *with* Hager v. M & K Constr., 225 A.3d 137 (N.J. Super. Ct. App. Div. 2020) (holding ordering employer to cover medical cannabis costs under workers’ compensation claim was not preempted by the CSA because it did not require the company to possess, manufacture, or distribute cannabis), *and* Appeal of Panaggio, No. 2019-0685, 2021 WL 787021 at \*1, \*8 (N.H. Mar. 2, 2021) (same result).

<sup>142</sup> *Crouse*, 388 P.3d at 41.

<sup>143</sup> *See* Burns, *supra* note 136, at 652; Thomas R. Bender, *State Medical Marijuana Laws, The Federal Controlled Substances Act and Criminal Prosecutions*, 63 RI BAR JNL., Nov./Dec. 2014, at 13, 17 (“But, since state [therapeutic psilocybin] laws do not require [psilocybin] use, there are no positive conflicting state and federal law requirements.”)

<sup>144</sup> *See* Patricia J. Zettler, *Pharmaceutical Federalism*, 92 IND. L.J. 845, 880 (2017); *See also* Michelle Patton, *The Legalization of Marijuana: A Dead-end or the High Road to Fiscal Solvency?*, 15 BERKELEY J. CRIM. L. 163, 203 (2010).

<sup>145</sup> *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>146</sup> *See* Burns, *supra* note 136, at 652-55.

<sup>147</sup> *See generally* Mikos, *supra* note 135, at 37; Michael A. Cole, Jr., *Functional Preemption: An Explanation of How State Medical Marijuana Laws Can Coexist with the Controlled Substances Act*, 16 MICH. ST. U. J. MED. & L. 557, 575 (2012) (“By enforcing private protections for marijuana users, the state would be helping medical marijuana users actually use the drug by guaranteeing them certain safeguards, which is tantamount to encouraging the violation of the CSA. In that situation, the state would certainly be creating an obstacle, at least, if not an actual conflict worthy of preemption.”).

<sup>148</sup> *Gonzales v. Raich*, 545 U.S. 1, 12 (2005); *Gonzalez v. Oregon*, 546 U.S. 243, 246 (2006).

interpret these employment protections as merely tolerating the employment of therapeutic psilocybin users, and authorizing use of psilocybin offsite would not frustrate the CSA’s intent.<sup>149</sup> The latter viewpoint is bolstered by the fact there is a presumption against preemption.<sup>150</sup> The Supreme Court has warned lower courts that obstacle preemption “does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; [because] such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law.”<sup>151</sup>

The presumption against preemption is even stronger in areas where states have traditionally occupied.<sup>152</sup> The Supreme Court has held, “States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.”<sup>153</sup> Despite this presumption courts have reached conflicting holdings regarding employment protections for individuals using state sanctioned medical/therapeutic drugs that remain federally illegal. The next section surveys the split between the courts regarding preemption and argues that courts finding no preemption present the stronger argument. Thus, an employer who terminates a therapeutic psilocybin user solely because of a positive drug test for psilocybin or due to their statute as a therapeutic psilocybin user likely violates state law where a state has enacted an employment protection for users.

## 1. COURTS FINDING PREEMPTION?

*Emerald Steel*, a landmark case from the Oregon Supreme Court finding that reading state antidiscrimination to include federally illegal drug users was

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<sup>149</sup> See *Smith v. Jensen Fabricating Eng’rs, Inc.*, No. HHDCV186086419, 2019 Conn. Super. LEXIS 439, at \*1, \*5–8 (Conn. Super. Ct. Mar. 4, 2019); *James v. City of Costa Mesa*, 700 F.3d 394, 412 (9th Cir. 2012).

<sup>150</sup> *Arizona v. Inter-Tribal Council of Ariz., Inc.*, 570 U.S. 1, 14 (2013); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001).

<sup>151</sup> *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring)).

<sup>152</sup> *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). (“[The presumption against preemption is heightened] where federal law is said to bar state action in fields of traditional state regulation.”); *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (“When Congress legislates in a field traditionally occupied by the States, ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”); Pooja Nair, *Wyeth v. Levine: Challenging Implied Pre-emption for drugs*, 37 J.L. MED. & ETHICS 527, 527 (2009) (“Unless there is clear evidence of congressional intent to pre-empt state law, courts generally employ a presumption against pre-emption, particularly in areas traditionally regulated by the states.”).

<sup>153</sup> *DeCanas v. Bica*, 424 U.S. 351, 356 (1976); See also *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 412 (1988) (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) (“[P]re-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State.”); Chris Conrad, *Reefer Access: Dispensaries as “Places of Public Accommodation” Under Title III of the ADA*, 108 Geo. L.J. 1331, 1360-61 (2020).

preempted under obstacle preemption analysis.<sup>154</sup> In *Emerald Steel*, an anonymous temporary employee used medical cannabis to treat anxiety, panic attacks, nausea, vomiting, and severe stomach cramps, all of which significantly limited his ability to eat.<sup>155</sup> On their own, the employee’s ailments qualified as a “debilitating medical condition under Oregon law.<sup>156</sup> Therefore, under state law the employee was permitted to use medical cannabis.<sup>157</sup>

In 2002, the employee began using medical cannabis to treat his ailments per physician recommendation.<sup>158</sup> Shortly after beginning his medical cannabis use the employee began work at Emerald Steel on a temporary basis as a drill press operator.<sup>159</sup> During this time, the employee used medical cannabis off-site and during off-hours.<sup>160</sup> Eventually, the employee approached his employer for full-time employment and disclosed his medical cannabis use.<sup>161</sup> In response, Emerald Steel terminated the employee based solely on his state sanctioned cannabis use.<sup>162</sup>

After his termination, the employee filed a complaint with the Oregon Bureau of Labor and Industries (“BOLI”) alleging employment discrimination under Oregon’s Employment Discrimination which prohibits discrimination against an otherwise qualified person based on disability.<sup>163</sup> BOLI investigated the employee’s complaint and filed charges against Emerald Steel.<sup>164</sup>

The Oregon Supreme Court upheld the employee’s termination because ORS 659A.112 (Oregon’s antidiscrimination statute) did not protect users of “illegal drugs.”<sup>165</sup> Interpreting ORS 659A.112 to protect users of illegal drugs would “authorize” cannabis use that is illegal under federal law.<sup>166</sup> Despite Oregon legalizing medical cannabis statewide federal law prohibited any form of cannabis use.<sup>167</sup> Therefore, the Supreme Court of Oregon upheld the employee’s termination because he used federally illegal drugs.<sup>168</sup>

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<sup>154</sup> *Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus.*, 230 P.3d 518 (Or. 2010).

<sup>155</sup> *Id.* at 520.

<sup>156</sup> *Id.* at 520-21.

<sup>157</sup> *Id.* at 521.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 520.

<sup>160</sup> *Id.* at 520.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 521.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 523.

<sup>166</sup> *Id.* at 525.

<sup>167</sup> *See id.*

<sup>168</sup> *Id.*

*Emerald Steel* is frequently cited for its preemption analysis and for the proposition that state employment protections for drug users are preempted under the CSA.<sup>169</sup> However, there are reasons to think *Emerald Steel* is not an example of federal preemption.<sup>170</sup> In *Emerald Steel*, the Oregon Supreme Court only considered a preemption argument to determine a statutory interpretation issue.<sup>171</sup> Specifically, the Supreme Court of Oregon’s holding in *Emerald Steel* hinged on ORS 659A.112’s exemption for employees using illegal drugs.<sup>172</sup> This turned on whether the plaintiff’s medical cannabis use was “authorized under ... other provisions of state or federal law.”<sup>173</sup> At this point, the court held that to extent Oregon law “authorized”<sup>174</sup> plaintiff’s medical cannabis use was preempted because such conduct would authorize “illegal drug use” and fell within ORS 659A.112’s statutory exception.<sup>175</sup>

ORS 659A.112’s exception for any “illegal use of drugs,” is significant. If ORS 659A.112 did *not* contain a statutory exception for the “illegal use of drugs,” the employee’s claim would likely have been able to proceed like in *Barbuto v. Advantage Sales & Mktg., LLC* also concerning employment termination on the

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<sup>169</sup> E.g., Kayla M. Jacob, *Reefer Madness: The Legal Quagmire of Medical Marijuana in the Workplace*, 47 S.U. L. REV. 423, 433-34 (2020); Helia Garrido Hull, *Lost in the Weeds of Pot Law: The Role of Legal Ethics in the Movement to Legalize Marijuana*, 119 PENN ST. L. REV. 333, 345-46 (2014).

<sup>170</sup> Burns, *supra* note 136 at 656; Scannell, *supra* note 80 at 412 (“[T]he Oregon Supreme Court determined that Oregon’s medical marijuana statute was preempted by the CSA. Why? Because the *Emerald Steel* court was interpreting a medical marijuana statute that did not contain a provision explicitly barring employment discrimination.”).

<sup>171</sup> *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp.3d 326, 335 n.3 (D. Conn. 2017) (“The decision in *Emerald Steel* turned on whether the plaintiff’s use of medical marijuana constituted ‘the use of illegal drugs,’ and therefore it turned on whether the use of medical marijuana was ‘lawful.’”).

<sup>172</sup> OR. REV. STAT. § 659A.124(1) (2021).

<sup>173</sup> OR. REV. STAT. § 659A.122(2) (2021) (defining “[i]llegal use of drugs” as “any use of drugs, the possession or distribution of which is unlawful under state law or under the federal [CSA] ... but does not include ... uses authorized ... under other provisions of state or federal law.”).

<sup>174</sup> *Emerald Steel*’s authorization/decriminalization distinction logic has been criticized by both courts and commentators. *Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus.*, 230 P.3d 518, 538–39 (Or. 2010) (Walters, J., dissenting) (criticizing the *Emerald Steel* majority’s authorization analysis); *White Mountain Health Ctr., Inc. v. Maricopa Cnty.*, 386 P.3d 416, 430 (Ariz. Ct. App. 2016) (“The authorization/decriminalization distinction itself seems to be primarily semantic and ultimately results in a circular analysis.”); Daniel S. Korobkin et al., Distinguished Brief, *John Ter Beek, Plaintiff-Appellee, v. City of Wyoming, Defendant-Appellant*, 31 T.M. COOLEY L. REV. 293, 346 (“There is much to criticize in the [authorization analysis] employed by the *Emerald Steel* majority...”). Additionally, the Supreme Court of Oregon has since tried to narrow *Emerald Steel*’s holding to the facts of its particular facts. *See Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 540 n.6 (Mich. 2014) (“[T]he Oregon Supreme Court has since moderated [the affirmative authorization] aspect of its analysis, clarifying that ‘*Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as ‘affirmatively authorizing’ what federal law prohibits is preempted.’” (quoting *Willis v. Winters*, 253 P.3d 1058, 1064 n.6 (Or. 2011))); Burns, *supra* note 136, at 657.

<sup>175</sup> *Emerald Steel*, 230 P.3d at 536.

sole basis of off-site medical cannabis use.<sup>176</sup> In *Barbuto*, Massachusetts general law contained no exception for illegal use of drugs.<sup>177</sup> Therefore, the Supreme Court of Massachusetts allowed the plaintiff's claim to proceed.<sup>178</sup> Therefore, the statutory language interpretation is significant in considering adverse employment action against medical cannabis or therapeutic psilocybin users.

The preceding analysis highlights how statutory interpretation, and *not* preemption, is the primary judicial methodology courts use to determine whether an employee's medical cannabis (or therapeutic psilocybin) use is protected under state law.<sup>179</sup>

## 2. COURTS FINDING NO PREEMPTION

When considering explicit statutory employment protections for medical cannabis users, five different courts have found such provisions are *not* preempted by the CSA.<sup>180</sup> This trend began in the summer of 2017 when the court in *Noffsinger v. SSC Niantic Operating Company, L.L.C.*, held Connecticut's employment protection for medical cannabis users was not preempted.<sup>181</sup>

In *Noffsinger*, the plaintiff was a registered medical cannabis cardholder.<sup>182</sup> She was offered employment at Bride Brook contingent on passing a drug test.<sup>183</sup> Noffsinger alerted her future employer she was a registered medical cannabis user and used cannabis to treat post-traumatic stress disorder.<sup>184</sup> After Noffsinger's drug test came back positive for cannabis, Bride Brook rescinded her employment offer.<sup>185</sup> In response, Noffsinger filed a complaint in federal court alleging Bride Brook violated state law, Palliative Use of Marijuana Act ("PUMA"), forbidding adverse action against a medical cannabis user's status as a cardholder.<sup>186</sup>

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<sup>176</sup> Burns, *supra* note 136, at 661.

<sup>177</sup> *Barbuto v. Advantage Sales & Mktg.*, 78 N.E.3d 37 (Mass. 2017).

<sup>178</sup> *Id.*

<sup>179</sup> See Burns, *supra* note 136 at 661; See also, Cal Keith & Joanna Perini-Abbott, *Reading the 'Tea' Leaves*, 21 No. 2 Or. Emp. L. Letter 1 (2014); Gregory A. Hearing & Michael A. Balducci, *Medical Marijuana's Effect on Employment Law: The Highs, the Lows, and the Unanswered Questions*, 91 FLA. B.J. 22, 24-25 (March 2017).

<sup>180</sup> See *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 WL2321181 (R.I. Super. Ct. May 23, 2017); *Chance v. Kraft Heinz Food Co.*, No. K18C-01-056 NEP, 2018 WL 6655670 (Del. Super. Ct. Dec. 17, 2018); *Whitmire v. Wal-Mart Stores Inc.* 359 F. Supp.3d 761, 787 (D. Ariz. 2019); *Hudnell v. Thomas Jefferson Univ. Hosps., Inc.*, No. CV 20-01621, 2020 WL 5749924 \* at 4 (E.D. Pa. Sept. 25, 2020) (collecting cases).

<sup>181</sup> See *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp.3d 326, 336 (D. Conn. 2017).

<sup>182</sup> See *Id.* at 331.

<sup>183</sup> *Id.* 331-32.

<sup>184</sup> *Id.* at 332.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

The US District Court of Connecticut held the CSA did not preempt PUMA for multiple reasons. The court rejected the defendant’s obstacle preemption argument PUMA hindered the effect of federal law because the CSA does not regulate employment practices nor does it forbid the employment of a drug user.<sup>187</sup> The *Noffsinger* court also held there is a presumption against preemption and that courts should not extend a state law further than necessary to create a conflict that leads to preemption.<sup>188</sup> Therefore, the court held the defendant violated PUMA by taking adverse employment action against Noffsinger solely because of her status as a medical cannabis user.

*Noffsinger*’s significance should not be understated because it showcased courts would uphold state employment protections for medical cannabis users.<sup>189</sup> At bottom, employment protections for therapeutic psilocybin users are likely *not* preempted under any species of preemption.

### III. STATUTE RECOMMENDATION

Because a hypothetical employment protection is likely not preempted, states should enact employment protections for therapeutic psilocybin users. Without the enactment of a statutory employment protection, what happened to Rojerio Garcia would likely happen to many employees who uses therapeutic psilocybin to treat mental illnesses.<sup>190</sup> As a result, they would be forced to choose between their medicine and employment.<sup>191</sup> Those who suffer from serious illnesses should not have to make this impossible choice. The statute presented in this section addresses the rights of therapeutic psilocybin users. The following section engages in statutory analysis.

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<sup>187</sup> *Id.* at 334.

<sup>188</sup> *Id.* (quoting *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996)).

<sup>189</sup> See Daniel L. Schwartz & Gregory S. Tabakman, *Connecticut Federal Court Finds Employer Liable For Refusing To Hire Medical Marijuana User*, DAY PITNEY LLP (Sep. 11, 2018), <https://www.daypitney.com/insights/publications/2018/09/11-connecticut-federal-court-finds-employer-liable>; Benjamin West, *The Grass Is Greener Somewhere: Protecting Privacy Rights of Medical Cannabis Patients in the Workplace*, 95 CHI.-KENT L. REV. 751, 771 (2020) (“While the [*Noffsinger*] decision is not binding, it suggests courts may lean toward protecting the privacy rights of employees when it comes to drug testing medical cannabis patients—at least in states with carefully crafted statutes.”); Jay Kendrick, *Blazed and Confused: The Hazy Legal Ethics of the Cannabis Craze and How Oklahoma Can Clear the Air for Its Attorneys*, 56 TULSA L. REV. 143, 144 (2020) (“[After *Noffsinger*,] Employers that were once permitted to fire employees for cause relating to any drug related offenses prior to medical marijuana becoming legal in their states now face pressure to consider employees’ newly-acquired rights when evaluating company drug use policies.”); Christine Sargent et al., *Recent Development in Employment and Labor Law*, 55 TORT & INS. L.J. 251, 257 (2020) (“Further, the *Noffsinger* decision proved that some federal courts were willing and ready to uphold autonomous state legislation regarding medical marijuana and disregard the fact that marijuana remained illegal under the CSA.”).

<sup>190</sup> See Anne Marie Lofaso & Lakyn D. Cecil, *Say “No” to Discrimination, “Yes” to Accommodation: Why States Should Prohibit Discrimination of Workers Who Use Cannabis for Medical Purposes*, 43 SEATTLE U. L. REV. 955, 993 (2020).

<sup>191</sup> *Id.* at 993-94.

A. *STATUTE LANGUAGE*

State legislatures must have the foresight to include employment protections in their therapeutic psilocybin statutes. In the medical cannabis context, states that did not enact employment protections in their legalization statutes failed to protect users from adverse employment action.<sup>192</sup> Based on the insights from case law and other states' medical cannabis statutes, as states legalize therapeutic psilocybin, I propose the following language be included in psilocybin reform statutes:

**§ V. Employment Protections for Therapeutic Psychedelics Users.**

(a) Unless failure to do so would cause an employer to lose a monetary or licensing-related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination, or any condition of employment, or otherwise penalize a person, based upon either:

(1) The person's status as a state sanctioned therapeutic psychedelic user; or

(2) A registered patient's therapeutic use of a psychedelic, unless the patient

used or possessed a psychedelic on company property during work hours.

(b) Section (a) of this provision shall not protect a patient whose therapeutic use of a psychedelic either:

(1) Poses a direct threat or danger to persons or property; or

(2) Prohibits the employee from fulfilling all of their job duties

(c) Employers shall be exempt from Section (a) to the extent required to comply with state drug testing laws or regulations.

(d) Employers not exempt from Section (a) shall not be denied any benefit for employing the persons identified in Sections (a)(1) and (a)(2).

(e) Nothing in this section is intended to require an employer to permit or accommodate the recreational use, sale, or possession of any psychedelic drug in the workplace or to affect the ability of employers to have policies restricting the use of recreational psychedelics by employees.

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<sup>192</sup> Weisenfeld, *supra* note 11 at 397.

## B. STATUTORY ANALYSIS

The first section describes who is protected and what actions constitute employment discrimination against therapeutic psychedelic users. I deliberately selected the word “psychedelic” instead of “psilocybin.” This word choice allows for the statute to auto update and include other substances considered “classic psychedelics”—psilocybin, lysergic acid diethylamide (“LSD”), N, N-dimethyltryptamine (“DMT”), ayahuasca, and mescaline (the peyote plant’s active compound).<sup>193</sup> If a state legalizes other classic psychedelics for therapeutic use the legislature will not have to update the statute to provide employment protections for users. For example, a 2016 English scientific study found LSD treated depressive patients by enhancing feelings of openness, optimism, and mood for about two weeks.<sup>194</sup>

This paper’s proposed statute opens with an exemption for employers that would violate federal law such as Department of Transportation (“DOT”) and Federal Railroad Administration (“FRA”) guidelines if they tolerated illegal drug use in the workplace.<sup>195</sup> This exemption protects both employers and insulates the law from a preemption challenge.

This exception should be construed narrowly. Of particular importance to employers, the exception largely does *not* apply to the federal Drug-Free Workplace Act of 1988 (“DFWA”). The DFWA only requires federal contractors make a good faith effort to “impose a drug-free workplace,” to remain eligible for federal contracting funds.<sup>196</sup> However, the DFWA does not mandate drug

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<sup>193</sup> Marlan, *supra* note 20 at 853.

<sup>194</sup> *LSD as a therapeutic treatment*, ALCOHOL AND DRUG FOUNDATION (Jul. 19, 2018), <https://adf.org.au/insights/lsd-therapeutic-treatment/>. The statute could be modified to include medical cannabis users too; Juan Jose Fuentes et al., *Therapeutic Use of LSD in Psychiatry: A Systematic Review of Randomized-Controlled Clinical Trials*, FRONT. PSYCHIATRY (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6985449/>.

<sup>195</sup> *‘Medical’ Marijuana Notice*, U.S. DEP’T OF TRANSP. (Feb. 13, 2015), <http://www.transportation.gov/odapc/medical-marijuana-notice>; 49 C.F.R. § 219.601. The DOT regulations do *not* mandate termination or discipline because of a positive drug test. *United Food & Commercial Workers Int’l Union, Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 174 (9th Cir. 1996) (“The DOT regulations only prohibit employees who test positive for drug use from operating commercial motor vehicles; the DOT regulations do not require that such employees be automatically discharged.”). Instead, DOT regulations only forbid the offending employee from performing safety-sensitive tasks until they complete education and treatment requirements. *E. Associated Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 64 (2000) (“The DOT regulations specifically state that a driver who has tested positive for drugs cannot return to a safety-sensitive position until ... the driver has followed any rehabilitation program prescribed ... and ... passed a return-to-duty drug test....”) (citations omitted).

<sup>196</sup> 41 U.S.C. §§ 8101-06 (2018).

testing<sup>197</sup> or adverse action based solely on a positive drug test.<sup>198</sup> In fact, it does not forbid the employment of a federally illegal drug user.<sup>199</sup> Instead, the DFWA is designed to only forbid the possession, sale, or use of federally illegal drugs at the contractor's worksite.<sup>200</sup> Accordingly, a contractor does not violate the DFWA by employing an off-site therapeutic psilocybin user.<sup>201</sup> At bottom, the federal law exception should be construed narrowly to apply only to DOT and FRA regulations regarding mandatory drug testing.

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<sup>197</sup> *Kamakeeaina v. Armstrong Produce, Ltd.*, 2019 U.S. Dist. LEXIS 50863 \* at 27 n.8 ([T]he DFWA does not regulate drug testing."); *Noffsinger v. SSC Niantic Operating Co., LLC*, 338 F. Supp. 3d 78, 84 (D. Conn. 2018) ("The DFWA does not require drug testing.") [*hereinafter Noffsinger II*]; *Harris v. Aerospace Testing All.*, 2008 U.S. Dist. LEXIS 1185, 2008 WL 111979, at \*4 (E.D. Tenn. 2008); *Parker v. Atlanta Gas Light Co.*, 818 F. Supp. 345, 347 (1993) ("[The] DFWA does not require employers to maintain a drug testing program."); *Mares v. Conagra Poultry Co.*, 773 F. Supp. 248, 254-55 (D. Colo. 1991) ("Nowhere in [the DFWA] does it require entities to engage in drug testing of employees."); *aff'd*, 971 F.2d 492 (10th Cir. 1992); Stephanie Speirs, *Will the Smoke Blow Over? Employers' Concerns as States Expand Protections for Medical Marijuana Users*, 36 HOFSTRA LAB. & EMP. L.J. 481, 486 (2019) ("The DFWA does not specifically declare that drug testing must be implemented."); George J. Tichy, II, *The Drug-Free Workplace Act of 1988*, 34 CATH. LAW. 363, 370 (1991) ("[T]he DFWA itself does not address drug testing."). Representative Jack Brooks (D-TX), the primary sponsor of the DFWA, made explicitly clear the law did not mandate drug testing stating, "[T]his bill does not require drug testing. This is a highly controversial issue, which is currently being examined in litigation before the Supreme Court, and the committee did not believe that such tests or searches should be incorporated as a requirement in this bill." Omnibus Drug Initiative Act of 1988, 134 CONG. REC. H7074 (daily ed. Sept. 7, 1988) (statement of Rep. Brooks); Rudy Yandrick, *The Anti-Drug Abuse Act Becomes Law*, THE ALMACAN, Dec. 1988, at 11.

<sup>198</sup> *Univ. of Haw. Prof'l Assembly v. Tomasu*, 900 P.2d 161, 169 (Haw. 1995); *State v. Connecticut Emps. Union Indep.*, 142 A.3d 1122, 1132 (Conn. 2016) ("[The DFWA] does not require termination for drug related misconduct in the workplace."); Deanne J. Mouser, *Combating Employee Drug Use Under a Narrow Public Policy Exception*, 12 INDUS. REL. L.J. 184, 190-91 (1990).

<sup>199</sup> *Noffsinger II*, 338 F. Supp. 3d at 84; *Washburn v. Columbia Forest Prod., Inc.*, 104 P.3d 609, 614-15 (Or. Ct. App. 2005), *rev'd on other grounds*, 134 P.3d 161 (Or. 2006) (holding employer did not violate DFWA because of medical cannabis-using employee).

<sup>200</sup> *Carlson v. Charter Communications*, No. CV 16-86-H-SEH, 2017 WL 3473316, at \*2 (D. Mont. Aug. 11, 2017) (holding DFWA preempted part of the Montana medical cannabis act that permitted cannabis possession at a contractor's worksite.); *Ross*, 174 P.3d at 213 (Kennard, J., dissenting); *Figueroa v. Fajardo*, 1 F. Supp. 2d 117, 123 (D.P.R. 1998); ("It is evident from the statute . . . that [the DFWA's] application is circumscribed to work-related problems caused by drug use."); Michael D. Moberly & Charitie L. Hartsig, *The Arizona Medical Marijuana Act: A Pot Hole for Employers?*, 5 PHOENIX L. REV. 415, 438-40 (2012) ("[F]undamentally, the [DFWA] expressly prohibits the unlawful use or possession of drugs only *in the workplace*."); Elizabeth Hurwitz, *Out of the Shadows, Into the Light: Preventing Workplace Discrimination Against Medical Marijuana Users*, 46 U.S.F. L. REV. 249, 273-74 (2011) ("Additionally, the purpose behind the DFWA is to prevent the provision of federal money to contractors and grantees who tolerate illegal drug use, possession, or distribution by their employees at the worksite."); Jeffrey J. Olsen, *A Comprehensive Review of Private Sector Drug Testing Law*, 8 HOFSTRA LAB. L. J. 223, 227 (1991) ("[A federal contractor's] employee may 'beat the system' under the [DFWA] by 'getting high' prior to work or during lunch breaks.").

<sup>201</sup> See generally *Noffsinger II*, 338 F. Supp. 3d at 84.

The statute then describes who is protected under the statute. It protects a therapeutic psilocybin or psychedelic user from adverse action solely because of a positive drug test *or* their status as a cardholder. But this statute goes further and requires that an employee’s off-site psilocybin/psychedelic use pose a “direct threat” to persons or property.

“Direct threat” tracks with the ADA provision that allows an employer to take adverse action against prescription drug users if their use poses a direct threat to others.<sup>202</sup> Under the ADA, the direct threat assessment must be an “individualized assessment of the individual's present ability to safely perform the essential functions of the job.”<sup>203</sup> The Supreme Court requires an “expressly individualized assessment of the individual’s present ability to safely perform the essential functions of the job,”<sup>204</sup> Additionally, a speculative or slight risk does *not* establish a direct threat exception.<sup>205</sup> This expressly individualized assessment should include consideration of the following factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.<sup>206</sup>

The direct threat framework balances the needs of employees and employers. On one hand, an employee whose off-site and off-hours therapeutic psychedelic use poses only a “slight or speculative risk” is protected under the statute.<sup>207</sup> However, the statute allows for some employer discretion if the employee’s use would present a significant risk of harm.<sup>208</sup> Under this proposed

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<sup>202</sup> 42 U.S.C. § 12113(b) (2018); Jacquelyn Leleu, *Dazed and Confused: An Employer's Perspective on the Not-Entirely-Cut-and-Dried Rules of Medical Marijuana in the Workplace*, NEV. LAW., November 2014, at 6 (“Because the ADA contains language similar to [this statutory language], maybe you can look at the law surrounding reasonable accommodation and undue hardship, under the ADA, in order to find some guidance on how to best interpret Nevada’s statute.”).

<sup>203</sup> 29 C.F.R. § 1630.2(r) (2021).

<sup>204</sup> *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 86 (2002) (quoting 29 C.F.R. § 1630.2(r) (2001)).

<sup>205</sup> See *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998); *Haynes v. City of Montgomery*, No. 2:06-CV-1093-WKW, 2008 U.S. Dist. LEXIS 79992, at 11-15 (M.D. Ala. Oct. 6, 2008); *Dipol v. N.Y.C. Transit Auth.*, 999 F. Supp. 309, 315-16 (E.D.N.Y. 1998) (holding diabetic employee did not pose a direct threat where employee had controlled their condition for forty years); *Doe v. County of Ctr., PA*, 242 F.3d 437, 450 (3d Cir. 2001) (“[a slight or speculative risk] is insufficient for a finding of significant risk, and insufficient for the invocation of the direct threat exception.”); *Equal Emp’t Opportunity Comm’n v. The Chrysler Corp.*, 917 F. Supp. 1164, 1172 (E.D. Mich. 1996); Stacy A. Hickox, *Clearing the Smoke on Medical Marijuana Users in the Workplace*, 29 QUINNIPIAC L. REV. 1001, 1046 (2011).

<sup>206</sup> 29 C.F.R. § 1630.2(r) (2021). The court in *EEOC v. Hussey Cooper Ltd.*, utilized the direct threat framework concerning whether an employee’s methadone use posed a direct threat. 696 F.Supp.2d 505, 506-07, 519 (W.D. Pa. 2010).

<sup>207</sup> See generally, Anastasia Hautanen, *Seeing Through the Haze: Navigating Veteran Employment Rights in Government Contracting, Medical Marijuana, and the Drug-Free Workplace Act of 1988*, 49 PUB. CONT. L.J. 371, 396 (2020).

<sup>208</sup> *Id.* at 396.

law, the on-site use or possession of a therapeutic psychedelic is prohibited. An employer that knows an employee is impaired during work hours could potentially be sued for negligence if the employee injures someone<sup>209</sup> under the doctrine of respondent superior.<sup>210</sup> Other employees may not want to be around someone who uses psilocybin, and an employer should be able to ensure productivity and morale with anti-drug policies.<sup>211</sup> These exceptions balance the needs of the employer and the employee.

Section (c) ensures that the statute does not disregard mandatory state drug testing requirements. Many states mandate drug testing for certain employees to ensure workplace safety, the public welfare, and security.<sup>212</sup> For example, Arizona law requires vehicle for hire companies drug test their employees.<sup>213</sup> Without this section, employers face an impossible choice—violate the mandatory state drug testing requirements or comply with therapeutic psychedelic user employment protections.

Section (d) protects employers from discrimination based on employing therapeutic psychedelic users. It ensures that statutory compliance will not create any negative ramifications for the employer. Insurance companies could attempt to encourage zero-tolerance drug testing policies by offering incentives to employers that enforce them. With Section (d), an employer could not be denied *any* benefit for refusing to take adverse action against an employee who uses therapeutic psilocybin off-site and during off-hours.

#### IV. CONCLUSION

No employee should have to choose between their medicine and their career. In response to scientific studies showing psilocybin can treat major depressive disorders such as postpartum depression states should enact employment protections for therapeutic psilocybin users. Often when an employee is known to both suffer from a mental illness and use psilocybin to treat their condition, they risk being chastised by their coworkers or suffer adverse

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<sup>209</sup> Jeremy Kidd, *The Economics of Workplace Drug Testing*, 50 U.C. DAVIS L. REV. 707, 715 n.17 (2016); Deborah J. La Fetra, *Medical Marijuana and the Limits of the Compassionate Use Act: Ross v. Ragingwire Telecommunications*, 12 CHAP. L. REV. 71, 79-80 (2008) (“History abounds with cases of employers found liable because their employees were driving vehicles, operating heavy equipment, or otherwise performing tasks made more dangerous by their being under the influence of alcohol or drugs.”); *E.g.*, *Laidlaw Transit v. Crouse*, 53 P.3d 1093 (Alaska 2002) (employer liable for school bus passenger’s injuries where driver was high on cannabis during scope of employment); *Howell v. Ferry Transp., Inc.*, 929 So. 2d 226, 227-231 (La. Ct. App. 2006).

<sup>210</sup> RESTATEMENT (THIRD) OF AGENCY § 7.07 (Am. Law. Inst. 2006).

<sup>211</sup> *See* Lofaso & Cecil, *supra* note 190 at 999.

<sup>212</sup> 50 States Statutory Surveys: Employment: Drug Testing Westlaw (2020) (collecting state statutory provisions mandating drug testing).

<sup>213</sup> *E.g.*, ARIZ. REV. STAT. ANN. § 28-9507 (2016).

employment action.<sup>214</sup> The statute in this paper lets therapeutic psilocybin users (and potentially other therapeutic psychedelic users) avoid adverse employment action based solely on their therapeutic drug use. The statute requires an employer prove that the employee's psilocybin use was a direct threat to workplace safety. As Oregon regulators work to implement therapeutic psilocybin over the next two years, the legislature should enact employment protections for therapeutic psilocybin users. Additionally, as other states legalize therapeutic psilocybin, they should not repeat the same mistakes that plagued medical cannabis legalization.<sup>215</sup> Instead, states can enact this paper's proposed statute in tandem with therapeutic psilocybin legalization to protect users from adverse action solely for using state sanctioned medicine.

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<sup>214</sup> *Marks I*, *supra* note 21 at 96.

<sup>215</sup> *E.g.*, *Coats v. Dish Network, LLC*, 350 P.3d 849, 853 (Colo. 2015).

**Appendix A**  
**Psilocybin Reform**  
**Jurisdictions<sup>216\*</sup>**

Therapeutic Use Legal	Lowest Law Enforcement Priority
Oregon	Denver, Colorado Oakland, California Santa Cruz, California Ann Arbor, Michigan Washington, D.C. Somerville, Massachusetts Cambridge, Massachusetts Northampton, Massachusetts

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<sup>216\*</sup> Margolin, *supra* note 66; Kane, *supra* note 66.

**Appendix B**

**EMPLOYMENT PROTECTIONS FOR DRUG USERS<sup>217\*</sup>**

<b>REASONABLE ACCOMMODATION</b>	<b>MEDICAL CANNABIS USER IS CONSIDERED HANDICAPPED</b>	<b>MEDICAL CANNABIS USER'S STATUS/ DRUG TEST PROTECTED</b>	<b>MEDICAL CANNABIS TREATED THE SAME AS PRESCRIPTION DRUG USER</b>	<b>MEDICAL CANNABIS USER'S STATUS IS PROTECTED</b>	<b>NO EMPLOYMENT PROTECTIONS</b>
NEVADA **** PAPER'S PROPOSED PSYCHEDELIC STATUE	NEW YORK	ARIZONA ARKANSAS DELAWARE MINNESOTA NEW MEXICO OKLAHOMA VIRGINIA <sup>218**</sup>	SOUTH DAKOTA	CONNECTICUT ILLINOIS MAINE NEW JERSEY PENNSYLVANIA RHODE ISLAND WEST VIRGINIA	ALABAMA ALASKA CALIFORNIA COLORADO FLORIDA GEORGIA HAWAII MARYLAND MICHIGAN MONTANA NEW HAMPSHIRE NORTH DAKOTA OHIO OREGON <sup>219***</sup> VERMONT WASHINGTON

<sup>217\*</sup> See Barreiro, *supra* note 14; V.A. Code § 54.1-3408.3 (2021)

<sup>218\*\*</sup> Only protects medical cannabis oil users. *See id.*

<sup>219\*\*\*</sup> No employment protections for therapeutic psilocybin or medical cannabis users.

**Appendix C**  
**An Employer's Reasonable  
Accommodation Flow Chart**

