

Don’t Let the Reefer Blow the Roof Off: Challenges and Guidance Surrounding Medical Marijuana Patients in Federally Assisted Housing

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One of the most fascinating aspects of cannabis[1] law in America is that, despite marijuana being illegal at the federal level, almost every state allows for its legal use in some form or fashion. As of this writing, thirty-seven states, Washington, D.C. and four U.S. territories [2] have laws authorizing the medical use of cannabis. An additional ten states allow for low-THC medical cannabis, but these state programs are so restrictive that they are typically not considered legal medical states. This conflict raises a number of issues with respect to criminality, banking and business considerations. Layer on top of that the unique issues that have arisen since the passage of the 2018 Farm Bill, which federally legalized hemp though it comes from the same plant species as marijuana (*Cannabis sativa L.*), the only differentiating factor for purposes of controlled substances law criminal legality-being the level of THC concentration.

Even though the majority of states have legalized marijuana for medical use, families and individuals living in affordable housing across the nation risk losing their homes because the substance remains federally illegal, with no patient protections in places. Until this federal/state conflict is addressed, property owners-including public housing authorities-are left having to carefully navigate satisfying resident medical needs while remaining federally compliant. This article discusses state medical marijuana laws against the backdrop of federal affordable housing requirements,

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calls attention to the many issues surrounding this tension, and offers strategies for success going forward.

I. Cannabis Law: Rapidly Changing and Incredibly Complex

A. Federal Laws

At the federal level, marijuana is still completely illegal, save for a very limited number of registrants approved by the Drug Enforcement Administration for research purposes.[3] It is classified as a Schedule I drug, making it one of the mostly highly regulated substances in the United States-one with "no currently accepted medical use and a high potential for abuse."[4] Such drugs can only be legally possessed to conduct federally approved studies.[5] Marijuana has been classified as a Schedule I drug since the passage of the Controlled Substances Act of 1970 (CSA), despite the overwhelming amount of research showing a myriad of medical benefits, from treating seizures and chronic pain to alleviating the side effects of chemotherapy.[6]

A consistent push has been made over the last few years to either legalize or decriminalize marijuana at the federal level, but nothing has passed yet. Various legislative proposals to de-schedule marijuana have been offered by both Democrats[8] and Republicans,[9] including sweeping reform bill S.4591 "No decriminalize and deschedule cannabis, to provide for reinvestment in certain persons adversely impacted by the War on Drugs, to provide for expungement of certain cannabis offenses, and for other purposes."[10] However, industry insiders believe that the only chance of movement this year might be in the form of piecemeal proposals such as protections for banking institutions and insurers servicing marijuana businesses that will get attached to larger bills with momentum, such as the America Competes Act.[11]

B. State Laws

Laws concerning cannabis vary from state to state. As mentioned previously, thirty-seven states have some form of a medical use

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program for marijuana, a number which does not take into account the additional ten states that allow low-THC/CBD medical cannabis in limited circumstances, bringing the total count to forty-seven states that recognize the medical benefits of cannabis and provide some patient access, though significantly restricted.[12] Nineteen of those states, Washington D.C., and two U.S. territories (Northern Mariana Islands and Guam) also permit and regulate adult use for nonmedical purposes (i.e., recreational use).[13] Even among the states with adult use laws, there is a wide range of policy and regulation. For example, some legislation provides for record expungement of those with prior marijuana arrests or convictions before it was legalized, while others do not act retroactively or address past convictions at all.[14]

New marijuana legislation is also being passed quite frequently.[15] Voters in Mississippi passed a medical use ballot initiative in 2020, but it was subsequently overturned by the state supreme court, and then lawmakers passed legislation in early 2022. Voters in four states legalized marijuana for adult-use via ballot referendum in the 2021 election alone (Arizona, Montana, New Jersey, South Dakota), and five more states took legislative action to do the same (New Jersey, New York, Virginia, New Mexico, Connecticut). The South Dakota measure was subsequently overturned by the state supreme court. These frequent changes make cannabis law incred ibly difficult to keep track of, and even more challenging to reconcile.

C. Hemp

Per the 2018 Farm Bill,[16] cannabis plants and products that come from such plants, which do not exceed 0.3% delta-9 THC, are deemed hemp and have been removed from control under the federal CSA. All fifty states have followed suit, each with its own specific laws regulating hemp. Like marijuana laws, these differ from state to state. Hemp plants can often look and smell the same as marijuana plants, the only legally differentiating factor being the THC concentration level'[7] The scope of this article does not cover hemp use, but it is worth pointing out that hemp can easily be con fused with marijuana but does not carry the same criminal law

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violation concerns, though there are still other state/federal law conflicts, including those related to food/drug and public safety regulations.

D. Federal Supremacy

The Supremacy Clause of the U.S. Constitution states the Constitution "shall be the supreme Law of the Land,"[18] so where conflict exists between federal and state law, federal law supersedes. This conflict arises frequently in the area of cannabis law, but often only in theory. In 2013, the Department of Justice released an official memorandum outlining its policy of nonenforcement concerning federal marijuana law in cases where state law permits the use of marijuana.[19] It essentially decided to allow states to regulate marijuana the way they see fit, even if their policies technically violate federal law. While the subsequent administration formally rescinded the memorandum, lack of enforcement largely remains. However, this nonenforcement becomes complicated when federal funds are brought into the picture. Programs and organizations that are federally subsidized or funded must follow federal law, even when not aligned with the laws of the state in which they are based. This article specifically delves into issues that arise with respect to federally assisted housing programs and medical cannabis use by tenants.

II. Affordable Housing Programs Come in Many Forms

There are various affordable housing programs across the country, some of which are funded directly by federal initiatives while others are financed by state and local programs and even private developers and nonprofits, some of which derive from federal funds. Often, affordable housing is funded using a combination of federal, state and local resources.[20] This article will focus on certain types of federally assisted housing programs.

It is worth noting that housing funded by the Low-Income Housing Tax Credit (LIHTC) program is often not subject to rules that explicitly apply to other forms of federal assistance. Note, however,

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that LIHTC projects often benefit from additional layers of financing that will implicate the rules discussed in this article. Federally assisted housing programs are typically overseen by the U.S. Department of Housing and Urban Development (HUD), which provides federal funding to private landlords and local public housing authorities (PHAs) to operate and manage housing at the local level2[1] A brief overview of some of these programs follows.

A. Low-Income Housing Tax Credits

With more than 3.5 million affordable units built, the LIHTC program is the most used resource to develop, rehabilitate, and maintain affordable housing in the United States.[22] While most federally assisted housing programs are regulated by HUD, allocations of LIHTCs come from the Internal Revenue Service and are doled out to states based upon population. Though created by Congress, LIHTC housing is not deemed "federally assisted" in and of itself (but could fall under that category depending on other sources of funding that may be combined with the LIHTCs). The LIHTC program is often incredibly competitive for developers and provides a dollar-for-dollar federal tax liability reduction in exchange for investor equity used to fund the construction/rehabilitation of housing expressly reserved for rent to low-income tenants.[23] LIHTC housing usually takes the form of apartment complexes, but single-family rentals are also possible.[24]

Each state sets its own guidelines within the federal framework, allowing states wide discretion in setting their own housing priorities and incentives.[25] LIHTC program applicants are typically private for-profit developers, but nonprofits and PHAs participate as well. In fact, the LIHTC program requires ten percent of each state's allocation to be set aside for projects owned by qualified nonprofits materially participating in their operation and development.[26] LIHTC projects owned by private entities typically have more discretion in approving tenant applicants and lease termination policies than those where ownership or funding involves PHAs or HUD. However, some households that live in LIHTC developments may also be recipients of federal housing assistance, further complicating the requirements expected of tenants and

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property owners?[7] When LIHTC properties or tenants also receive federal subsidies, federal laws often apply.

B. Section 8 Assistance

Colloquially known as "Section 8"-named after the section of the Housing Act of 1937 in which low-income housing support provisions were introduced-this program is the most common form of federally subsidized housing and perhaps the one that most frequently comes to mind when laypersons think of affordable housing. Section 8 housing programs have evolved over time and encompass several forms of assistance, but typically in the form of a voucher program or project-based rental assistance. Section 8 assistance allows a household to pay thirty percent of its adjusted income towards rent, with the remaining rent being subsidized by HUD.[28]

Project-based Section 8 rental assistance is a form of federal assistance tied to a multifamily property and usually operated by a private owner under contract with HUD. These housing units are rented to eligible low-income tenants earning no more than eighty percent of the area median income (AMI), with forty percent of them being reserved for those earning at or below thirty percent AMI.[29] The rent amount is set by HUD and tenants pay an income-based contribution towards it, with HUD paying the owner the difference. HUD stopped entering into new contracts with private landlords in the mid-1980s, but there are still approximately one million units existing under these project-based rental assistance contracts, which remain renewable.

Section 8 housing choice vouchers are also funded by HUD, but administered by a local PHA, with the PHA paying the subsidy to the landlord. Section 8 vouchers are "tenant-based" but can also be "project-based," with tenant-based vouchers allowing low-income families to rent privately owned homes that meet program guidelines and bring the subsidy with them anywhere in the country should they move.[31] Project-based vouchers are instead tied to a unit in a multifamily development (either privately owned or owned by a PHA) and are not transferable with the tenant. Eligibility for Section 8 is determined by the local PHA based on income. The vast

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majority of housing choice vouchers (seventy-five percent) are reserved for applicants with incomes up to the poverty line or thirty percent AMI, whichever is higher, with the remainder reserved for those whose incomes do not exceed eighty percent AMI.[32]

There are also several specialized forms of Section 8 vouchers, such as tenant protection vouchers (to assist tenants being displaced from other HUD programs) and VASH vouchers (for homeless veterans suffering from mental health or substance abuse). Other Section 8 programs set income restrictions at thirty percent, fifty percent, or eighty percent AMI, in accordance with HUD requirements. Local PHAs can prioritize certain households based on extreme circumstances such as homelessness or involuntary displacement.[33] While Section 8 assistance is highly effective to mitigate housing costs, it suffers from capacity problems, with waitlist times extending up to eight years in some cases.[34]

C. Public Housing

Though public housing is not the most common form of federally subsidized housing (serving under one million households),[35] it is often incorrectly interchanged with the term "Section 8," though they are separate programs with different practical implications. Public housing developments are owned and operated by local PHAs using federal funds provided by HUD.[36] The history of public housing in America is complicated and, much like the history of cannabis prohibition, has been shaped in large part by politics of the moment, such as race and socio-economics.[37]

As part of the recovery effort from the Great Depression,[38] known as the New Deal,[39] public housing was created in the 1930's[40] as a tool to boost jobs, clear slums, and improve the quality of housing that had become dilapidated."

Public housing serves only eligible residents whose household income does not exceed eighty percent AMI, which varies based on location and family size.[42] At least forty percent of these units are restricted to families with incomes no more than thirty percent AMI or the poverty line, whichever is higher.[43] Tenants generally pay thirty percent of their adjusted income for rent and utilities, with the

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remaining costs being subsidized.“ Individuals and families apply for assistance with their local PHA, which then determines eligibility based on income, age/disability/familial status, and citizenship. However, just because an applicant qualifies for public housing does not mean that the applicant will receive it. Households stay on public housing waitlists for a median of nine months, with at least a quarter waiting for eighteen months or more, and many waitlists are often closed to new applicants for years at a time.[45]

Through HUD's Rental Assistance Demonstration program, introduced in 2012, a concerted effort is being made to convert public housing to Section 8 assisted projects as a method to preserve long-term affordability while incentivizing private investment to assist with rehabilitating outdated and dilapidated developments.°

D. Section 202 Supportive Housing for the Elderly

Created as part of the National Housing Act of 1959, the "Section 202" federal housing program is exclusively for low-income elderly households (defined as those where one or more persons are age sixty-two or older)4[7] The owner (typically a nonprofit developer or a limited partnership owner with a nonprofit general partner) contracts with HUD to provide units to eligible seniors with incomes that do not exceed fifty percent AMI. This program evolved significantly since its inception and many of these contracts with HUD are governed under rules applicable at the time the devel opment was built.[48] While HUD has not funded the construction of new developments under this program since 2011, rental assistance continues to be appropriated by Congress for those already in existence.[49]

E. Supportive Housing for Persons with Disabilities

Often referred to simply as "Section 811," the Cranston-Gonzalez National Affordable Housing Act created the Section 811 Supportive Housing for Persons with Disabilities Program in 1990 for adults with disabilities.[50] Housing assisted under this program includes group homes, independent living facilities, multifamily rentals, condominiums, and cooperative hous-ing.[51] Similar to Section 202

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assistance (from which the Section 811 concept stemmed), this program has evolved over time, with key changes enacted in 2010 as part of the Frank Melville Supportive Housing Investment Act.

Developers of Section 811 units are required to provide supportive services to help the tenants live independently. Where the program used to provide grants to help fund construction, it now provides only rental assistance and is often provided to housing financed in combination with other sources of funding, such as LIHTC, HOME funds, Community Development Block Grant (CDBG) funds, or other public or private sources.[52] Residents must have income that does not exceed either thirty percent AMI or fifty percent AMI (depending on the fiscal year in which the funds were appropriated), and the tenant portion of the rent is limited to the greater of thirty percent of their adjusted income or ten percent of their gross income.[53]

F. Housing for Moderate Income and Displaced Families

Commonly known as the "Section 221(d)(3) Below Market Interest Rate Program" or simply "Section 221(d)(3)" loans, this program was enacted as part of the Housing Act of 1961, codified at 12 U.S.C. §1715l. This program was designed to incentivize public developers, housing cooperatives, governmental entities, and nonprofits to create affordable housing by providing FHA-insured loans with below-market interest rates. Units financed under this program are often also layered with rental assistance from HUD provided under separate programs, and many have converted to Section 8 assistance programs. Funding for this program ended in 1968 but many of these properties are still active due to the continuation of their affordability restrictions.

G. Rental and Cooperative Housing for Lower Income Families

This program, enacted as part of the Housing and Urban Development Act of 1968, codified at 12 U.S.C. §1715z-1 and commonly referred to as "Section 236," was intended to replace the Section 221(d)(3) and Section 202 programs. Loans under the Section 236 program were made to private and nonprofit

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developers and subsidized by the government in a manner to effectively reduce the mortgage interest payments to not more than one percent, but was eventually cut short after President Nixon declared a moratorium on new construction of subsidized housing.[54] Like Section 221(d)(3) loans, many of these properties are still operating under their affordability restrictions and are typically layered with other forms of HUD rental assistance, and many of the original subsidies have converted to Section 8 assistance. Rent and income restrictions apply.

H. Insurance of Loans for Housing and Related Facilities for Domestic Farm Labor

Funded by the United States Department of Agriculture (USDA), Section 514 Farm Labor Housing loans are available to nonprofits, certain limited partnerships with a nonprofit general partner, Native American tribes, and governmental entities. This program was created by the Housing Act of 1949 and is codified at 42 U.S.C. §1484. Section 514 loans seek to increase housing for domestic farm laborers by incorporating below-market interest rate loans to develop or rehabilitate housing rented to farm workers and are often coupled with grants and rental assistance that layer in income and rent restrictions.[55]

I. Housing and Related Facilities for Elderly Persons and Families or Other Persons and Families of Low Income

Also created by the Housing Act of 1949, and codified 42 U.S.C. §1485, this USDA-funded housing program, referred to as "Section 515," provides long-term, low-interest rate loans to limited-profit and nonprofit developers for constructing or rehabilitating rural rental and cooperative housing for the elderly, low-income families, and persons with disabilities.[56] These loans are typically used in conjunction with the Section 521 Rental Assistance program and/or Section 8 project-based assistance to facilitate rent and income restrictions.[57]

J. Other Federally Assisted Housing

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A multitude of other federal assistance housing programs exist but for purposes of what this article refers to as "federally assisted housing" the term applies only to public housing, Section 8 assistance, Section 202, Section 811, Section 221(d)(3), Section 514 and Section 515 programs. Nonetheless, all structures of federally subsidized housing incorporate certain federally mandated restrictions, which include barring drug use like medical marijuana regardless of conflicting state law.[58]

III. The Issue: Medical Marijuana Patients Face Housing Application Rejections and Evictions

The structure of federally subsidized housing in the United States remains complicated, as do the rapidly evolving laws surrounding cannabis. Intersection of the two is inevitable, as federally assisted housing is required to be operated in compliance with federal law. As part of large-scale public housing reform, the Quality Housing and Work Responsibility Act of 1998 (QHWRA) was enacted, which generally governs various aspects of HUD's public housing and tenant-based Section 8 housing assistance programs.[59] At that time, only California had begun to creep out of prohibition after voters approved the nation's first medical marijuana legalization law (post-prohibition) in 1996. Voters in Washington, D.C., Oregon, Alaska, Washington, and Nevada did the same in 1998, only weeks after President Clinton signed QHWRA into law. Since then, most of the rest of the states have followed suit to some degree.

QHWRA sought to reduce poverty concentration of public housing, protect housing assistance for the neediest families, support transitioning from welfare to work, raise PHA standards, revitalize aging communities funded by federal assistance, and consolidate/streamline/deregulate assistance programs to increase efficiencies.[60] Though the QHWRA generally applies to public housing and Section 8 assistance, the provisions relating to applicant screening and tenant terminations based on illegal drug use were expressly extended to the additional assistance programs described above (with the exception of LIHTC housing).[61] PHAs and other owners of federally assisted units are required to adopt

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policies related to the illegal use of a controlled substance. Recall that despite broad legalization in states across America, marijuana remains controlled as a Schedule 1 substance under the federal CSA. Thus, a resident in a federally assisted unit can simultaneously be authorized by the state to treat an ailment using the same substance that could be cause for eviction, and would have no protection despite the medical aspect.

A. "Illegal Drug Use" Is Treated Differently: Applicants v. Current Tenants

The QHWRA added new requirements applicable to the use of marijuana in federally assisted housing, but they impacted applicants and current tenants differently. For *applicants*, if the PHA or private landlord determines any member of the household is an illegal user of a controlled substance, such determination will bar admission to the housing:

> IN GENERAL.-Notwithstanding any other provision of law, a public housing agency or an owner of federally assisted housing, as determined by the Secretary, shall establish standards that **prohibit** admission to the program or admission to federally assisted housing for any household with a member- (A) who the public housing agency or owner determines is illegally using a controlled substance; or (B) with respect to whom the public housing agency or owner determines that it has reasonable cause to believe that such household member's illegal use (or pattern of illegal use) of a controlled substance, or abuse (or pattern of abuse) of alcohol, may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents (emphasis added).[62]

While this provision only applies to *applicants* for federally assisted housing (rather than current tenants), it is strict, as it completely bans admission for any marijuana use—even when the patient's medical use complies with state law. However, a subsequent provision does leave room for bureaucratic discretion when considering applicants that may have a "pattern of illegal use," as it allows for case managers to consider whether an individual has completed a treatment program and is no longer illegally using the substance.[63] The statute also leaves it up to the PHA/owner to devise its own policy for determining illegal use, the application of

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which is individualized and fact-specific.[64]

The law with respect to terminating the lease of a tenant already residing in federally assisted housing uses different language:

IN GENERAL.—Notwithstanding any other provision of law, a public housing agency or an owner of federally assisted housing (as applicable), shall establish standards or lease provisions for continued assistance or occupancy in federally assisted housing **that allow the agency or owner (as applicable) to terminate** the tenancy or assistance for any household with a member— (1) who the public housing agency or owner determines is illegally using a controlled substance; (2) whose illegal use (or pattern of illegal use) of a controlled substance, or whose abuse (or pattern of abuse) of alcohol, is determined by the public housing agency or owner to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents (emphasis added).[65]

This section, applying only to tenants already in the program, is much more lenient. It allows PHAs and owners to evict tenants who are marijuana users, but it does not require that they do so. This flexibility means that residents may be able to start using marijuana while living in public housing and have some leeway, with the level of leniency being entirely up to the PHA/owner, though the lease provisions still may not affirmatively permit such occupancy.

It is worth reiterating that these illegal drug use provisions also encompass state-legal medical marijuana, meaning that patients using it for health conditions in compliance with state law are technically prohibited from being admitted to federally assisted housing in the United States, and current tenants who become medical marijuana patients are at the mercy of the PHA or owner as to whether they can to remain in their homes. Further, neither circumstance is protected under federal disability laws given the Schedule 1 status of marijuana. It is also worth pointing out some of these housing programs are targeted specifically towards the elderly and those with disabilities, populations which are more likely to suffer from conditions that are alleviated by the medical use of marijuana.[66]

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IV. Real Life Application: Case Studies

A. California (federal court)

As of 2021, California has both an adult use and medical marijuana pro-gram.[67] Medical marijuana was first legalized in California in 1996, making it the first state to do so in the United States. Currently, Californian medical marijuana patients must be over the age of eighteen.[68] In 2018 it became legal for individuals over the age of twenty-one to purchase marijuana, though cannabis may be banned by landlords and is not permitted on federal land.

In 2016, Emma Nation of Arcata, California was threatened with evic tion after a maintenance worker said they saw cannabis in her federally subsidized dwelling.[69] She fought the eviction for two years, but her landlord eventually did remove her from her housing. Nation then filed in the U.S. District Court for the Northern District of California in *Nation v. Trump,* claiming discrimination.[70] The district court dismissed the suit, and Nation appealed in the Ninth Circuit Court of Appeals, which affirmed the lower court's dismissal of the case.[71]

The 2020 appellate court's affirmation of the dismissal was based on lack of jurisdiction, as the court claimed Nation had not exhausted all administrative remedies prior to pursuing court action, specifically that she should have petitioned the Drug Enforce ment Administration to reclassify the federal control status of marijuana. While the court did not technically rule on the use of marijuana in federally subsidized housing in this case, even a very marijuana-friendly state like California did not protect the rights of this cannabis user to remain in affordable housing.

B. New York (state court)

Medical marijuana has been legal in the state of New York since 2014, and an adult use program was legalized in March 2021, and is currently under development.[72] Marijuana may be smoked anywhere that tobacco smoking is allowed, though there are limits on the amount of marijuana an individual may possess at any time.[73]

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In 2018, seventy-eight-year-old John Flickner of Niagara Falls, New York, was evicted after staff at his housing complex found marijuana in his home.[74] The company that owned the unit had a zero-tolerance policy for marijuana, so the find resulted in a call to the police and the beginning of eviction procedures. The police did not press charges, as Flicker was using medical marijuana (legal in the state of New York), but the developer still pushed the case to eviction court. Flickner was evicted, but after backlash the developer reassessed their marijuana policies and allowed Flickner to return to his residence.[75] Here we see a clear example of a housing provider utilizing the discretion allowed by federal law to work *with* a resident patient taking medication in compliance with state law, even though the owner initially had policies that were stricter than necessary.

C. Pennsylvania (state court)

Medical cannabis has been legal in Pennsylvania since 2016, though the state has been slow on the uptake as its program is still in the process of being fully implemented.[76] However, medical cannabis is legal there and is available to people (including individuals under the age of eighteen) who are approved by their doctor.[77]

In an egregious case, Mary Cease, a Navy veteran earning less than thirty percent AMI in Indiana County, Pennsylvania, was denied housing when she moved there in 2018 after escaping an abusive spouse.[78] Cease had previously received federal housing support in a different county, so it was unclear if she was being treated as a new applicant or an existing tenant, complicating her case. Cease had no prior criminal record and was transparent in her application with the local PHA about her doctor-authorized medical use of cannabis in the treatment of her post-traumatic stress disorder and chronic back pain. After years of litigation stemming from the PHA's refusal to approve her housing application, she was victorious in February 2021 when the Pennsylvania Commonwealth Court found the term "illegally using a controlled substance" to be ambiguous where the resident's use was prohibited by federal law but permitted under state law.[79] The court went on to reason that "the pertinent provisions of QHWRA are based on the obsolete and

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scientifically flawed premise [of the federal Controlled Substances Act] that marijuana 'has no currently accepted medical use in treatment in the United States' and that 'there is a lack of accepted safety for use of marijuana under medical supervision.'"[80] The Pennsylvania Supreme Court denied further appeal, though the hous ing authority could still appeal to the federal court.

D. Maryland (state court)

Marijuana has been legal for medical use in Maryland since 2013.[81] The Natalie M. Laprade Medical Cannabis Commission is responsible for implementing programs for medical cannabis to be available for qualifying patients.[82] Though not legal yet for adult-use (a ballot initiative will go before voters in 2022), Maryland no longer "punishes the possession of less than ten grams of marijuana as a crime," classifying such possession as a civil offense.[83]

In *Chateau Foghorn LP v. Hosford,* two exterminators were in Wesley Hos-ford's apartment in Baltimore, Maryland and saw a marijuana plant in the bathtub.[84] The exterminators reported this to the police, which resulted in a criminal citation against Hosford (for possession of less than ten grams) that was later dismissed.[85] However, Hosford's landlord subsequently served a notice of lease termination and filed an eviction for breach of the drug-free provision required under his lease.[86] Maryland law provides that a court should find in favor of the landlord only if "the court determines that the tenant breached the terms of the lease and that the breach was substantial and warrants an eviction."[87]

After a local circuit court ruling in favor of the landlord and a reversal by the Court of Special Appeals appealed by the landlord, the Court of Appeals found that Congress intended for evictions to be conducted by bringing an eviction action in state or local court, subject to state landlord-tenant law.[88] It determined that the landlord's argument that Congress intended to give housing providers the power to evict tenants strictly based on prohibited conduct was erroneous.[89] It reasoned that Congress only intended to give landlords the power to bring evictions for such conduct, which would then be determined according to state law.[90]

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Therefore, the landlord's eviction under Maryland's "substantial and warrants an eviction" standard did not properly take into consideration all the circumstances relevant to Hosford's case, and the court ruled Hosford's eviction could not proceed without allowing recourse under state law.

E. What Can We Take from These Cases?

While the federal court case referenced above was not favorable to the tenant, the state court cases eventually worked out for the tenants, but only after drawn out battles that very likely put the tenants in the unstable and terrifying position of not having certainty as to whether they had safe, decent, and stable housing secured. While the academic exercise of reading about and analyzing various real-world examples may drum up empathy for these tenants, the level of stress, anxiety, and hopelessness that often arises when there is no assurance of having a safe place to call home cannot truly be understood without experiencing it. To think that peace of mind can be denied or taken away simply for using state-legal medication to prevent suffering from diagnosable ailments is an abomination of justice that harms the most vulnerable communities.

One of the greatest injustices in this state/federal conflict is the creation of a second class of citizens when it comes to the legal use of cannabis. The wealthy do not need to access federal assistance for housing or other basic needs such as healthcare, freeing them to follow the state laws without fear of losing their homes. Meanwhile, the poor face severe penalties for using the same medicine, creating a new world of illegality that only applies to certain sects of our population. Under current laws, cannabis is functionally illegal for low-income individuals in federally assisted housing, even in states where it is legal for others. Citizens most in need cannot benefit from certain healthcare treatment options available to those with deeper pockets, despite such activities being sanctioned by medical professionals and state law.

F. A Proposed Solution—The Marijuana in Federally Assisted Housing Parity Act

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Recognizing the great harm the state/federal cannabis law conflicts cause to the nation's most needy citizens, Rep. Eleanor Holmes-Norton (D-DC) has three times filed legislation that would amend the QHWRA to expressly prohibit landlords and PHAs from establishing policies barring admission to federal housing programs where a household member is using medical cannabis in compliance with state law. The proposed legislation would clear the ambiguity found in the Cease case by explicitly stating the term "illegal use of a controlled substance" does not include "the use, distribution, possession, sale, or manufacture of marihuana (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)) that is in compliance with the law of the state in which such use, distribution, possession, sale, or manufacture takes place."[91] This bill was introduced in May 2021 but has not yet been heard in committee. Prior versions of the bill introduced in 2018 and 2019 similarly did not gain traction. There was a moment of hope earlier this year in July when two measures from Rep. Norton on an appropriations bill would have barred HUD from using its funds to enforce the federal prohibition on medical and recreational cannabis use or possession in federally assisted public housing. However, those measures were withdrawn just prior to a House Rules Committee hearing and have not shown up anywhere else, yet.[92]

G. Other Bills in the Federal Pipeline

While the bill discussed above would be the most direct solution to the disparity between federal and state cannabis law, there are a few other pieces of proposed legislation that could affect affordable housing tenants or applicants. The Fair Chance in Housing Act of 2019, proposed by then-Senator Kamala Harris (with companion bill filed in the House by Rep. Ocasio-Cortez), would amend the QHWRA to add (among other provisions) a ban on drug and alcohol testing for both applicants and current tenants, as well as provide a carve-out for low-level drug offenders, preventing them from being denied housing or evicted.[93] While this policy represents an important step that would likely help limit application rejections and evictions for marijuana use by making said use less likely to be discovered, it does not provide the legal protection that

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cannabis users need. Additionally, no action has been taken on this bill since it was referred to committee after being introduced in 2019. However, several bills have been introduced in the current Congress (2021-2022) that could impact affordable housing. The Affordable HOME Act, introduced by Rep. Ilhan Omar in 2021, would protect tenants from eviction for the "manufacture of a cannabinoid extract," as long as they have the proper licensure.[94]

However, while this bill might allow for tenants to make their own medical tinctures, it would also still allow eviction for the *use* of any controlled substance, which would include cannabis. Less directly related but still potentially impactful is The Eviction Prevention Act of 2021, which would provide local governments with grants to help pay for the right to counsel for low-income individuals in eviction proceedings.[95] This could give tenants evicted for cannabis use the resources to fight their evictions in court, potentially leading to a case setting precedent for ending such evictions. Also worth noting is the Housing PLUS Act of 2021, which would require that HUD not prohibit or limit funding to housing programs that require sobriety.[96] This would limit HUD's discretionary power in this issue area, though it would likely not apply to most forms of affordable housing. All of these bills are currently in the very early stages of development, so it is unclear which, if any, will be passed. What is clear is that none of them would address the issue of unfair treatment of cannabis users who need affordable housing as well as the Marijuana in Federally Assisted Housing Parity Act.

V. Other Questions Raised

A. Quality of Life: How Does the Federal/State Conflict Affect Medical Marijuana Patients?

For many patients, medical marijuana is a miracle drug that alleviates symptoms that no other medication can safely address.[97] Unfortunately, under current federal drug laws, some patients are forced to choose between their medication or their home.[98] Neither is a safe option. While federal legalization may seem like a straightforward resolution, that framework has yet to be adopted, but other steps can be taken. Under the Fair Housing Act, property

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owners are allowed to ask about disabilities to determine if someone is illegally using a controlled substance, but they are not required to do so.[99] In states that allow the use of medical marijuana, it may even be a violation of state or local disability laws to prevent someone from accessing housing due to their medication. While not asking about marijuana use is a simple step that can be taken, PHAs and property owners can also implement policies that do not permit termination based on the use of a prescription medication. Such policies would have to be carefully written so as not to completely prevent termination for marijuana use (as federal law requires some avenues for termination in this front), but well drafted policies could be a straightforward approach to provide some assurances for medical marijuana patients.

B. Negative Report Scores: What Consequences May Arise for PHAs That Are Cannabis-Friendly?

HUD conducts regular inspections of public housing projects and scores the developments in four categories, the most heavily weighted being physical condition.[100] As a part of the physical assessment, reviewers are required to rate the safety and "neighborhood environment."[101] Drug use on the property may result in negatives scoring in these categories. If a development has low scores, it may lose funding opportunities and be subject to more oversight, including more frequent inspections.[102] This loss of autonomy may prevent a PHA from providing cannabis-friendly services or policies and further limit its ability to manage its properties in a manner best suited for the local demographics. Again, it is crucial to carefully craft policies that permit tenants to have reasonable options in forms that will not disturb others and will still maintain a safe environment.

C. What About Consumable Hemp?

HUD guidance has been clear and consistent on the issue of whether allowing the use of medical marijuana is a reasonable accommodation under the Fair Housing Act, Section 504 of the Rehabilitation Act (Section 504), and Title II of the Americans with Disabilities Act (ADA), and that answer is a resounding no[103]

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Interestingly, compliant consumable hemp products, which may include products such as tinctures, capsules, topicals, edibles, beverages, gummies, vapes, and smokable flower, are not controlled substances under the CSA after hemp was expressly carved out from the definition of marijuana per the 2018 Farm Bill. A patient with a disability might be able to successfully challenge a failure to reasonably accommodate the use of such legal hemp products.

It is worth noting, however, that housing providers are permitted to ban all forms of smoking on their properties (even with federally legal products like tobacco and smokable hemp).[104] Private individuals may also complain about the scent or smoke of hemp affecting their living conditions. They may even sue, or otherwise draw unwanted attention to the property or its tenants. The use of other consumption methods may be more innocuous and likely not impact anyone other than the consumer. Thus, consumption methods of hemp that do not interfere with the health, safety, or peaceful enjoyment of the property by other residents might be required to be reasonably accommodated.

VI. Considerations, Guidance and Conclusions

A. Outdated Cannabis Laws Are Unjust

Centuries of racism and an intense history of racial discrimination have put minorities (Black people in particular) in a position to be disproportionately likely to require housing assistance.[105] Black people are also more likely to be arrested for marijuana use (while not being more likely to partake in cannabis consumption).[106] Additionally, while bureaucratic discretion can be useful, it also allows for human prejudices and unconscious/ implicit bias to affect the housing process. All these factors mean that marijuana use can bar someone from affordable housing and can be used as a weapon against minorities to prevent them from accessing the services that they need and are entitled to. If policies were more standardized and cannabis-friendly, individuals would not be forced to rely on their own biased perceptions to decide whether to allow medical marijuana patients to stay in their homes, and possible determining factors like arrest records may be less unequal in the first place.

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Unfortunately, despite Biden's Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government that required all federal agencies to assess areas of improvement for institutional equity, HUD has not taken note of the issues of cannabis injustice.[107] Its report on equity does not mention any form of substance use.[108]

B. Bureaucratic Discretion Can Be Used to Support Cannabis Patients

The benefits of the lax phrasing of the QHWRA are that PHAs have leeway with respect to their admission and occupancy policies. Unfortunately, most PHAs currently use this power to make them harsher on medical marijuana patients than necessary, some requiring drug testing to secure admission or immediate lease termination after discovery of any use of cannabis.[109] However, PHAs can develop policies that may provide flexibility on this issue, though they must be incredibly careful in crafting these so as not to explicitly permit federally illegal activities. Policies that aim to protect tenants and applicants using medical marijuana should be considered, including the following:

- prohibit drug testing of applicants for cannabis or altogether
- exclude medical marijuana from applicant inquiries on drug use
- provide for reasonable restrictions on smokables to reduce potential complaints from other tenants, or even implement smoke-free housing policies
- allow for discretion with respect to discovery of cannabis use by existing tenants
- prohibit lease terminations based on the use of medication authorized in accordance with state law

We urge housing providers to use discretion with respect to terminating leases and to develop practices that empower their employees to do so. While the law does require particular methods to terminate housing for users of marijuana, it does not require that this authority be acted on in every instance. PHAs must again have caution when developing and communicating these policies, and making it especially important to consult an individual with

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extensive knowledge of both cannabis and affordable housing law to help implement policies that will help the most people while still having the PHA operate within the law. HUD itself can also use bureaucratic discretion to create equity for cannabis users. It has the power to implement new rules that address problems it finds in programs under its purview (which does not include LIHTC), as long as they do not conflict with congressional legislation. That means that any of the above policies could theoretically be implemented at the federal level without need for Congress to act, either through rulemaking or internal directives, as long as they were carefully worded and developed. However, these policies could only ever serve as workarounds until the QHWRA is changed.

C. Change Is Possible at Many Levels

As discussed, PHAs have a wide degree of discretion in drafting poli cies that provide flexibility. Owners of LIHTC housing and other forms of affordable housing not deemed "federally-assisted housing" have even greater freedom. Housing providers must carefully examine all of their policies to make them as effective as possible. Until state and federal laws explicitly protect cannabis patients, it is up to PHAs and private owners to adopt policies that do so.

While state policies on marijuana obviously vary from state to state, some steps can be taken to help marijuana patients access housing. The most obvious is to legalize marijuana at the state level. However, it is crucial that records are expunged as a part of the legalization process. Many individuals who have criminal convictions struggle to access social services due to minor infractions that are now no longer illegal. Harsh sentencing promoted by the War on Drugs disproportionately affected low-level offenders, who are often forced to deal with the aftermath of one arrest for years. By not expunging records, states perpetuate the inequalities in the criminal justice system and transfer them into welfare programs like affordable housing.

States and local governments can also put in place certain laws or ordinances that support tenant and applicant protections, such as prohibiting landlords from making certain inquiries of housing

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applicants about participation in the state's medical cannabis program. Another option could be to prohibit landlords from terminating tenancy based on the use of state-legal medication taken in accordance with state law. As with PHA policies, any laws, ordinances, and local policies would need to be meticulously drafted due to the inherent conflict between state and federal law.

Cannabis must be rescheduled or de-scheduled at the federal level, as the current federal-state policy gap is untenable. Citizens have overwhelmingly shown in poll after poll they support legalization, and that support continues to grow. Schedule I classification is entirely inappropriate for a substance with the myriad health benefits formally acknowledged by ninety-four percent of the states. By allowing cannabis to remain illegal, the federal government blocks low-income patients from being able to access their medicine without fear of losing their housing. While there are workarounds on an individual level, people who are taking medication that their doctor prescribed should not be forced to hope for leniency with no guarantee of stable housing. Additionally, poor people should not be banned from using state-legal medicine that helps them just because they cannot afford unsubsidized housing. The current housing system is unjust when it comes to cannabis use, and this issue must be addressed.

Perhaps 2022 will be the year we see some forward progress with cannabis laws at the federal level in some aspect, though it is highly doubtful that comprehensive reform is likely any time soon. In the meantime, individuals and companies or organizations can advocate for the passage of the Marijuana in Federally Assisted Housing Parity Act (and cannabis reform generally) by reaching out to their legislators in Congress.

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