

Title: Cannabis Law Update: Second [Amendment] Edition

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Mr. Rusek is a graduate of Oakland University and Michigan State University College of Law, *cum laude*. Mr. Rusek is currently a Director of The Army of Survivors, Inc., board member and Treasurer of the Ingham County Bar Association, Past-President of the Ingham County Bar Association Young Lawyers Section, Past-Chairperson of the Ingham County Board of Commissioners Equal Opportunity Committee, former Democratic Precinct Delegate for Lansing’s Ward 1, Precinct 6, and a member of multiple local and national bar associations. Mr. Rusek is a 2023 recipient of the Ingham County Bar Association’s President’s Special Recognition Award, a 2018 recipient of the Lansing Regional Chamber of Commerce 10 Over the Next 10 Award, a 2018 recipient of Oakland University’s Young Alumni 10 Within 10 Award, and a 2016 recipient of the Ingham County Bar Association Top 5 Under 35 Award. He has authored multiple articles that have appeared in American Bar Association publications, State Bar of Michigan publications, the Detroit Bar Association’s Detroit Lawyer, and the Ingham County Bar Association’s BRIEFS. Mr. Rusek was Mental Health First Aid USA certified in 2019 and seeks to incorporate trauma-informed principles into his practice every day.

John Fraser

As the Michigan Team Leader of Dykema’s Cannabis Practice, John often serves as the legal “quarterback” for a cannabis business’s myriad of issues as part of a multidisciplinary legal team. Whether it’s providing rapid feedback on an emerging legal issue or negotiating a multi-million-dollar cannabis brand licensing agreement, Mr. Fraser provides effective leadership and counsel so that clients can conduct their business effectively, efficiently, and—most importantly—in compliance with applicable laws. In addition to his cannabis experience, Mr. Fraser has litigated cases in state and federal trial courts throughout Michigan and has argued cases before the Michigan Court of Appeals and the Michigan Supreme Court. His unique combination of regulatory and litigation experience allows him to provide clients with creative and effective solutions to complicated problems.

Mr. Fraser’s knowledge and expertise in the field of cannabis law has been recognized by his peers and colleagues. He previously served as the Chairperson of the Cannabis Law Section of the State Bar of Michigan. In addition, Mr. Fraser is an adjunct professor of law at Cooley Law School where he teaches a course on Michigan Marijuana and the Law. He has been recognized by Super

Lawyers as Rising Star in the fields of Cannabis Law and Appellate Law since 2020. Mr. Fraser was also named a 2023 “Rising Star” by Law360 in the Cannabis Rising Star category. He also regularly lectures and presents on cannabis law topics to attorneys and the community. He is also a 2018 recipient of the Ingham County Bar Association’s Top 5 Under 35 Award.

More than half of Americans now have access to legal recreational cannabis in their state. As of the date of this article, 23 states have legalized cannabis for adult recreational use and 40 states have legalized cannabis for medical use.ⁱ Cannabis occupies an incredibly tenuous position in our nation’s federal system, as states continue to serve as “laboratories of democracy” on this issue—despite cannabis’s persisting illegality under federal law. The state-federal conflicts surrounding the topic of cannabis create an ever-increasing number of issues for practitioners to navigate. In particular, significant confusion surrounds the interplay of constitutional principles, federal laws, and state laws when it comes to cannabis use and the purchase and possession of firearms. On May 30, 2023, the St. Paul Field Division of the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) attempted to clarify any ambiguity in these overlapping and intertwined laws by issuing a statementⁱⁱ setting forth that “Regardless of the recent changes in Minnesota law related to the legalization of marijuana, an individual who is a current user of marijuana is still federally defined as an ‘unlawful user’ of a controlled substance and therefore is prohibited from shipping, transporting, receiving, or possessing firearms or ammunition.”ⁱⁱⁱ This position is not a new one for the ATF.^{iv} It is also important to note that this prohibition is not limited to only persons who actively use cannabis before or during their use of firearms (which should never be done). This article will explore the historical underpinnings of Michigan’s cannabis laws, the Second Amendment, and the future of both.

1. America’s Historical Love of Guns and Cannabis

America has a long history with and affliction for firearms of all kinds. As noted by the Supreme Court of the United States in *Heller*, “By the time of the founding, the right to have arms had become fundamental for English subjects.”^v Enshrined in the Bill of Rights, “[t]he Second Amendment provides: ‘A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.’”^{vi}

The *Heller* Court held that “There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment’s right of free speech was not, see, *e.g.*, *United States v. Williams*, 553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).”^{vii} The Court further stated that “Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”^{viii}

That fundamental right is still exercised today by a large portion of Americans. According to a June 2021 Pew Research Center survey, four-in-ten adults in the United States reported living in a household with a firearm, with 30% reporting that they personally own a firearm.^{ix} A 2019 Gallup poll found that firearm owners were most likely to cite personal safety or protection as the primary reason they owned a firearm.^x In 2023 so far, there have been more than 200 mass murders committed with firearms in America (wherein a mass shooting is defined as an event where four or more people are injured or killed).^{xi} Not surprisingly, about half of Americans report seeing gun violence as a very big problem in the country.^{xii}

Cannabis, too, has deep roots in America's early history. The cannabis plant is one of humanity's earliest domesticated plants with recorded uses in China, Ancient Greece, and Ancient Rome—dating back over 12,000 years.^{xiii} The cannabis plant has been used for millennia for textiles and for its medicinal and recreational properties. Given humanity's long and historic use of the cannabis plant—it is perhaps unsurprising that cannabis played a critical role in the founding of our country. Indeed, in 1619 colonial Jamestown, colonists were required by law to grow cannabis because of how fundamentally important cannabis was to the success of the colony as a source of textiles, medicine, and likely for recreational purposes as well.^{xiv} Some colonies also offered “bounties”—financial incentives for colonists to cultivate cannabis. Some famous colonial cannabis farmers include George Washington, Thomas Jefferson, and James Madison—among many other founding fathers.^{xv} Interestingly, if you make a visit to Mount Vernon today, you will find fields filled with cannabis plants, a historically accurate testament to George Washington's home.^{xvi}

2. The Evolution of the Legality of Cannabis

It is important to highlight how recent the trend of cannabis prohibition actually is. Cannabis was legal in the United States from (and before) the founding of the country until 1937, when the Marihuana Tax Stamp Act was enacted.^{xvii} Prior to the passage of the Marihuana Tax Act of 1937, cannabis extract was commonly found at drug stores and general stores across the country.^{xviii} The Marihuana Tax Act has its own sordid history, as it was principally advanced at the direction of Harry Anslinger, who was the director of the Federal Bureau of Narcotics. Mr. Anslinger's principal motivation in advancing the Marihuana Tax Act was not public health or good policy; instead, it was based in racial animus directed towards people who are Black and Latino with Anslinger arguing that cannabis was to blame for “satanic” jazz music among other horrible charges.^{xix}

The Marihuana Tax Act would eventually be declared unconstitutional by the United States Supreme Court in *Leary v. United States*;^{xx} however, cannabis would face prohibition again a year later with the enactment of the Controlled Substances Act of 1970 (“CSA”).^{xxi} While there is much more to the story to be told, the end result following the enactment of the CSA was the classification of cannabis as a Schedule I drug, which is the schedule reserved for drugs with a high potential for abuse and no currently accepted medical use in treatment in the United States.^{xxii} Despite the fact that a majority of states have flatly rejected this classification by passing laws permitting medical use of cannabis and 23 more have adopted laws to permit recreational use of

cannabis by adults age 21 and up, cannabis remains a Schedule I drug to this day under federal law.^{xxiii}

Stateside, in the 1950s, Michigan legislators (and others across the nation) passed numerous laws imposing severe criminal penalties for the possession of cannabis.^{xxiv} It would not be until 1996 that a state would legalize medical cannabis use (California).^{xxv}

In 2008, Michigan voters voted to amend Michigan’s Constitution through Proposal 1, which permitted medical cannabis patients to possess up to two and a half ounces of cannabis. In 2016, Michigan enacted laws creating and regulating medical cannabis dispensaries in the state, including the taxation of medical cannabis. In 2018, Michigan voters once again took to the polls and approved the Michigan Regulation and Taxation of Marihuana Act. Under these new laws, adults over 21 years old in Michigan can possess and consume cannabis recreationally under state law.

3. Current Problems Faced by Firearm Owners Who Use Cannabis

Turning back to the May 30, 2023 ATF Press Release, a number of potential pitfalls for legal users of cannabis under state law that wish to purchase or possess firearms are evident.

First, as noted by the ATF, to purchase a firearm from a Federal Firearms License (“FFL”) dealer, a purchaser must complete an ATF Form 4473.^{xxvi} ATF Form 4473 question 21(g) requires a purchaser to attest whether or not they are an unlawful user of cannabis (which every user of cannabis is under federal law per the ATF).^{xxvii} If a purchaser attests that they are an unlawful user of cannabis, they will be denied the ability to purchase the firearm. If a purchaser falsely attests that they are not an unlawful user of cannabis, but are in fact a user of cannabis—legally under state law or not—the purchaser has likely committed a federal criminal offense.

Second, the ATF has taken the position that the “The Controlled Substance Act recognizes five categories while classifying various drugs, substances, and other chemicals. Marijuana is considered a Schedule I drug, which under federal definition, has no accepted medical use and a high potential for abuse. Other drugs in this category include heroin, LSD, ecstasy, etc. Federal law does not provide any exception allowing the use of marijuana for medicinal or recreational purposes.”^{xxviii} This means that “The federal Gun Control Act of 1968 prohibits any person who is an unlawful user of or addicted to any controlled substance as defined by the Controlled Substances Act of 1970 from shipping, transporting, receiving, or possessing firearms or ammunition.”^{xxix} As such, according to the ATF, a lawful user of cannabis under Michigan law is prohibited from shipping, transporting, receiving, or possessing firearms or ammunition under federal law.

4. Looking Forward

Given the current political climate in Washington, any discussion of future federal cannabis policy changes is an exercise in speculation. While there generally appears to be some consensus among Democrats and Republicans that reform is needed, they fundamentally and profoundly disagree on what that reform should look like. As a result, we expect the status quo—this profound tension of conflict between states and the federal government on cannabis policy—to persist for the foreseeable future.

Notwithstanding inaction by Congress, the Judiciary has been active on Second Amendment issues—including issues that may implicate cannabis. For example, the Supreme Court held in *Bruen* that “The [Second] Amendment ‘was not intended to lay down a novel principle but rather codified a right inherited from our English ancestors.’ *Id.*, at 599, 128 S.Ct. 2783 (alterations and internal quotation marks omitted). After surveying English history dating from the late 1600s, along with American colonial views leading up to the founding, we found ‘no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.’” (internal citations omitted)^{xxx} Moreover, the Court held that firearm “regulations must be consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’”^{xxxi}

Accordingly, after *Bruen*, federal district courts and courts of appeals have been or will be forced to address humanity’s historical relationship with cannabis—particularly at the time of the founding—which is obviously in conflict with present day prohibition. Stated differently, since cannabis was a serious, significant, and legal part of our country’s historical tradition, it is likely that the only “traditional” firearm’s regulations that existed at the Nation’s founding with respect to cannabis usage or possession are limited to regulations related to possession or operation of a firearm while intoxicated. For example, litigants in a variety of cases have advanced the argument—based on *Bruen*—that since cannabis was legal at the time of the enactment of the Second Amendment, the Second Amendment’s right to keep and bear arms cannot be limited or restricted by state action just by virtue of the fact that a person is a user or possessor of cannabis.

Indeed, the United States District Court for the Western District of Texas in *United States v Connelly*, recently reached this conclusion.^{xxxii} Ms. Connelly faced several firearms charges that were all predicated on the allegation that she was an unlawful drug user based on her admitted cannabis use. Ms. Connelly moved for dismissal of all charges on the basis of *Bruen* and argued that because cannabis usage and possession was legal at the time of the country’s founding that federal laws prohibiting possession of firearms for cannabis users violates the Second Amendment. *Connelly* analyzed a number of colonial laws that related to firearm restrictions—but all of the laws cited by the federal government focused effectively on prohibition of discharging firearms while intoxicated by alcohol under certain circumstances—and none of the colonial laws constituted a prohibition of possession of firearms by somebody who consumes alcohol under any circumstance.

Connelly also rejected a claim advanced by the federal government that cannabis users are “unlawful” individuals who would have historically been subjected to disarmament. *Connelly* noted that cannabis possession is only a misdemeanor under federal law, and there is no historical tradition of disarming people convicted of misdemeanors. Further, *Connelly* noted that Ms. Connelly had not yet been convicted of a predicate offense to support disarmament in the first place. As a result, the district court dismissed the charges against Ms. Connelly. A similar case reaching the same conclusion has also come out of the United States District Court for the Western District of Oklahoma in *United States v Harrison*.^{xxxiii} Both *Harrison* and *Connelly* are pending appeal in the United States Courts of Appeals for the Tenth Circuit and Fifth Circuit, respectively.^{xxxiv}

Given Americans’ longstanding traditions of firearms ownership and cannabis cultivation and use and the Supreme Court’s decision in *Bruen*, it is a near certainty that *Harrison* and *Connelly* are unlikely to be the only cases making these arguments nationwide. It seems inevitable that a hunter in Michigan who happens to be a lawful cannabis user may wish to challenge federal prohibitions on firearm purchase or possession. For the hunting enthusiasts out there who may also happen to enjoy an edible, these cases will be ones worth watching.

ⁱ See <https://mjbizdaily.com/map-of-us-cannabis-legalization-by-state/>.

ⁱⁱ See “ATF Provides Clarification Related to New Minnesota Cannabis Law”

<https://www.atf.gov/news/pr/atf-provides-clarification-related-new-minnesota-cannabis-law>.

ⁱⁱⁱ See “ATF Provides Clarification Related to New Minnesota Cannabis Law”

<https://www.atf.gov/news/pr/atf-provides-clarification-related-new-minnesota-cannabis-law>.

^{iv} <https://www.atf.gov/firearms/docs/open-letter/all-ffls-sept2011-open-letter-cannabis-medicinal-purposes/download>.

^v *D.C. v. Heller*, 554 U.S. 570, 593; 128 S. Ct. 2783; 2798, 171 L. Ed. 2d 637 (2008).

^{vi} *Id.* at 576.

^{vii} *Id.* at 595.

^{viii} *Id.* at 626-27.

^{ix} See <https://www.pewresearch.org/short-reads/2021/08/04/wide-differences-on-most-gun-policies-between-gun-owners-and-non-owners-but-also-some-agreement/>.

^x See <https://news.gallup.com/poll/1645/guns.aspx>.

^{xi} See <https://www.bbc.com/news/world-us-canada-41488081>.

^{xii} See <https://www.pewresearch.org/politics/2021/04/15/americans-views-of-the-problems-facing-the-nation/>.

^{xiii} See <https://phys.org/news/2021-07-cannabis-domesticated-years.html>.

^{xiv} See <https://www.mprnews.org/story/2012/12/06/history-of-weed>

^{xv} *Id.*

^{xvi} See <https://www.npr.org/2018/08/23/640662989/after-centuries-hemp-makes-a-comeback-at-george-washingtons-home>

^{xvii} See <https://www.cbp.gov/about/history/did-you-know/cannabis#:~:text=Marihuana%20Tax%20Act%20of%201937,countries%20had%20banned%20the%20drug> (last accessed June 23, 2023).

^{xviii} See <https://www.history.com/topics/crime/history-of-cannabis> (last accessed June 23, 2023).

^{xix} See <https://www.cbsnews.com/news/harry-anslinger-the-man-behind-the-cannabis-ban/>.

^{xx} 395 US 6 (1969) (last accessed June 23, 2023).

^{xxi} See 21 U.S.C. § 801 *et seq.*

^{xxii} See <https://www.dea.gov/drug-information/drug-scheduling> (last accessed June 23, 2023).

^{xxiii} See <https://mjbizdaily.com/map-of-us-cannabis-legalization-by-state/> (last accessed June 23, 2023).

^{xxiv} See <https://www.lansingstatejournal.com/story/news/local/2018/02/08/recreational-medical-cannabis-legal-michigan-john-leni-sinclair-hash-bash/971540001/> (last accessed June 23, 2023).

^{xxv} See <https://mjbizdaily.com/map-of-us-cannabis-legalization-by-state/> (last accessed June 23, 2023).

^{xxvi} See <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download> (last accessed June 23, 2023).

^{xxvii} “Are you an unlawful user of, or addicted to, cannabis or any depressant, stimulant, narcotic drug, or any other controlled substance? Warning: The use or possession of cannabis remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside.” See <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download> (last accessed June 23, 2023).

^{xxviii} See “ATF Provides Clarification Related to New Minnesota Cannabis Law” <https://www.atf.gov/news/pr/atf-provides-clarification-related-new-minnesota-cannabis-law>.

^{xxix} See “ATF Provides Clarification Related to New Minnesota Cannabis Law” <https://www.atf.gov/news/pr/atf-provides-clarification-related-new-minnesota-cannabis-law> (last accessed June 23, 2023).

^{xxx} *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127; 213 L. Ed. 2d 387 (2022).

^{xxxi} *Id.* at 2130 (quoting *Konigsberg v State Bar of Cal.*, 366 US 36, 50 n 10 (1961)).

^{xxxii} *United States v Connelly*, No. EP-22-CR-229(2)-KC, 2023 U.S. Dist. LEXIS 62495 (W.D. Tex. Apr. 6, 2023).

^{xxxiii} *United States v Harrison*, No. CR-22-00328-PRW, 2023 U.S. Dist. LEXIS 18397 (W.D. Okla. Feb. 3, 2023).

^{xxxiv} *United States v Connelly*, No. 23-050312 (5th Cir. appeal docketed May 4, 2023); *United States v Harrison*, No. 23-6028 (10th Cir. appeal docketed Mar. 3, 2023).