"HIGH" EXPECTATIONS FOR THE VETERAN'S MEDICAL MARIJUANA SAFE HARBOR ACT, BUT NOT HIGH ENOUGH

I. INTRODUCTION

Though the use of marijuana has been a very fiercely debated and divisive issue in the United States for nearly a century, the evolution of culture and developments in science have led to rapid shifts in public opinion about the use of marijuana for both recreational and medicinal purposes in recent years.[1] Medical marijuana in particular has had a meteoric rise in the last two decades in both acceptance as an alternative treatment for a number of chronic issues, as well as popularity as a safer alternative to traditional pharmaceuticals.[2] Among the highly diverse base of support for medical marijuana are advocates for a wide variety of groups, including cancer patients, children with epilepsy, glaucoma sufferers, and veterans who suffer from chronic ailments such as post-traumatic stress disorder ("PTSD") and pain.[3] However, despite the meteoric rise of acceptance and popularity of medical marijuana, veterans, who remain among the groups most in need of such alternative treatments, experience many additional barriers to medical marijuana—even in states where it is legalized—that thwart access to these safer alternatives for their service-related injuries.[4]

This Comment will review the history, merits, benefits, and shortcomings of Senate Bill 1184, the "Veteran's Medical Marijuana Safe Harbor Act" (the "Safe Harbor Act"), which is currently pending before the 117th Congress and is intended as an entry level solution to this dilemma.[5] First, this Comment will chronicle the history of marijuana in the U.S., its legal status, medical uses, and the juxtaposition of marijuana, veterans, and the U.S. Department of Veterans Affairs ("VA") to provide a backdrop for the pending legislation. Next, in Part III, this Comment will explore the specific case for medical marijuana as a safer and more effective alternative treatment for veterans with PTSD and chronic pain to emphasize the nontrivial importance of the Safe Harbor Act's passage. Finally, Parts IV and V include analysis of whether the passage of the Safe

1. Representative Dina Titus, *Puff, Puff, Pass . . . That Law: The Changing Legislative Environment of Medical Marijuana Policy*, 53 HARV. J. ON LEGIS. 39, 39 (2016).
2. *Id.* at 40.
3. *Id.*
4. *Id.* at 45.
5. S. 1183, 117th Cong. (2021).

Harbor Act provides a sufficient solution for veterans' access to medical marijuana, recommendations for improvement, and other potential implications for veterans.

II. HISTORY AND BACKGROUND

A full discussion of the merits and benefits of passing legislation to increase veterans' access to medical marijuana first requires exploring how the current legal landscape of medical marijuana came to be. Though the road to understanding the full context of this conversation is a long and winding one, it starts with exploring the history of marijuana prohibition in the U.S.

Most Americans do not recall an America when marijuana was not prohibited. In fact, for most of our lifetimes, the media, government, and mainstream society has spent considerable capital demonizing marijuana, linking it with criminal activity, debauchery, and addiction.[6] The government campaigns evolved over time, but we all remember them from elementary, middle, and even high school. We remember vividly the "War on Drugs," "McGruff the Crime Dog," and every one of us, at some point, brought a "D.A.R.E." sticker home from school after an impassioned lecture from a local police officer at school. Nearly all of us probably swore an oath to that officer, our teachers, our parents, and even our friends, that we would "never take drugs." It is so engrained in our culture that it has practically become a rite of passage in America.

Nowadays, even in states where marijuana has been legalized, there is an aura of taboo that is still associated with its purchase and consumption.[7] Oddly enough, though, when the same individuals saunter across to street to the local bar and order a double pour of Jameson's whiskey, no one gives it a second thought. The truth is, marijuana has been illegal and defamed for so long that many people who consume it legally probably still feel as though they are doing something forbidden when they do.

Moreover, few people have probably ever stopped to ask the question: "Why is marijuana illegal today?" The answer to that question is a surprising one, because, according to the most widely popular explanations, it did not even begin with marijuana.[8]

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6. *See* Eric Schlosser, *Reefer Madness*, ATL., Aug. 1994, at 46–47.

7. Adam Gabbatt, *Marijuana May be Legal, but it's Still Taboo in Washington DC*, GUARDIAN (Feb. 28, 2015, 09:48 PM), https://www.theguardian.com/us-news/2015/feb/28/marijuana-legal-but-still-taboo-washington-dc.

8. John White, *The History of Marijuana Prohibition in the U.S.*, CNBS (Feb. 7, 2019), https://www.cnbs.org/cannabis-101/cannabis-prohibition/.

A. A Brief History of Marijuana Prohibition in the U.S.

There is no consensus about the exact development of marijuana prohibition, but one of the most popular theories about the history of marijuana prohibition is that it all began with industrial hemp.[9]

Now, one might rightfully wonder what hemp has to do with marijuana prohibition? It does seem an odd place to start. After all, hemp is a nonpsychoactive form of cannabis that contains practically nonexistent levels of THC, the ingredient responsible for the "high" feeling people get from marijuana.[10] Though it has no psychotropic effect, it has been a staple of cash crops in the U.S. from the time settlers first immigrated from Europe through the industrial revolution due to its suitability for a wide variety of uses.[11] Throughout history, hemp has been used for everything from paper and clothing manufacturing to construction and food products.[12] However, despite its popularity and suitability for these essential products, hemp's competition with the powerful paper, pharmaceutical, textile, and gas and oil industries, fueled by bigotry and the political influence that comes with corporate America, was ultimately the catalyst that led to the campaign to criminalize marijuana.[13]

William Randolph Hearst was a newspaper mogul and well-known racist in the early 1900s, who best known for popularizing the "tabloid style" of sensational news reporting.[14] As a result of his natural dependance on paper to operate his empire, Hearst had a particular axe to grind with the hemp industry, and his access to his own personal newspaper gave him a prime "bully pulpit" from which to lobby.[15] By associating hemp with its THC-containing cousin cannabis, some creative marketing—renaming cannabis "marijuana"—capitalizing on the stereotypical association of marijuana with Mexican immigrants, and linking it to the racial undercurrent of immigrant crime, the opponents of hemp created a new public nemesis.[16] Examples of Hearst's sensationalized and bigoted campaigns against marijuana, as a proxy for hemp, included, "Was it marijuana, the new Mexican drug, that nerved the murderous arm of Clara Phillips when she hammered out her victim's life in Los Angeles? . . . THREE-FOURTHS OF THE CRIMES of violence in this country today are committed by DOPE SLAVES — that is a matter of cold record."[17] Another article in one of Hearst's papers proclaimed: "The fatal marihuana cigarette must be recognized as a DEADLY

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

DRUG, and American children must be PROTECTED AGAINST IT."[18]

The racist, anti-immigrant fueled campaign against marijuana—as a proxy for hemp—quickly spread across the country. Just a few years later, in 1936, forty-eight states had passed marijuana regulations.[19] In 1937, the federal government passed the Marijuana Tax Act of 1937, which did not ban marijuana outright but made it very difficult to legally possess or sell all forms of cannabis in the U.S.[20] The U.S. later included marijuana in the Narcotics Control Act of 1956 creating the first federal prohibition on marijuana, with penalties for first-time offenders ranging from two to ten years in prison and a fine of up to $20,000.[21] The escalation of marijuana prohibition continued until Congress passed the Controlled Substances Act of 1970 ("CSA"), which classified marijuana as a Schedule I drug with "no accepted medical use."[22] This classification remains today as the primary barrier for not only legal consumption of marijuana in any state that has not legalized it, but also for scientists' ability to freely research potential medical uses of cannabis.[23] Along the path to criminalizing marijuana, hemp, which has no psychotropic application whatsoever, also went "up in smoke" with its "wacky weed" cousin.[24]

B. Legal Status of Marijuana in the U.S.

In 1996, four decades after the paper industry's campaign to stamp out its rural competition culminated in the "war on drugs," the road to redemption for marijuana began in California.[25] The state's Compassionate Use Act of 1996 was passed to allow the use of marijuana as an alternative treatment for patients with specific medical conditions, such as cancer.[26]

After California created the blueprint for legalized marijuana in 1996, albeit for the limited purpose of alternative medicine, the ensuing decades have witnessed dozens of other states following suit by legalizing or decriminalizing for both medical and recreational purposes.[27] Additionally, in December 2018, Congress passed a farm bill which officially paroled marijuana's "vanilla" cousin (hemp) from

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18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Map of Marijuana Legality by State*, DISA (Jan. 2022), https://disa.com/map-of-marijuana-legality-by-state.

the purgatory of federal prohibition.[28] The path to legalization, however, was not without many obstacles.

Despite the slow surge of legalization at the state level, the CSA remains the "supreme law of the land."[29] Any constitutional scholar worth her salt knows that, under the Supremacy Clause, state laws that conflict with federal law are generally preempted and therefore void.[30] So, how does state legalization of marijuana square with the federal prohibition of it and the Supremacy Clause? The answer is surprisingly simple: Congress left a loophole in the CSA. According to Section 903, "Congress did not intend to entirely occupy the regulatory field concerning controlled substances or wholly supplant traditional state authority in the area."[31] As a result, when adjudicating this particular provision, courts have consistently held it to mean that a state medical marijuana law is *only* in violation of the CSA if it is "physically impossible" to comply with both the state and federal law.[32] Because laws that exempt individuals from prosecution for possession of marijuana do not make it "impossible to comply" with both state and federal law or stand as an obstacle to Congress's stated objectives, the "physically impossible" requirement is not met.[33]

Today, marijuana is still considered a Schedule I drug with "no accepted medical use" by the federal government.[34] However, the courts' liberal statutory interpretation of the CSA has created a legal haven from the Supremacy Clause wherein states remain free to pass laws relating to marijuana, although they remain beholden to the clause under the majority of other federal laws.[35] As a result, marijuana is currently legal for adult use in eighteen states, and thirty-two states have decriminalized it.[36] Marijuana remains illegal in all forms in six states.[37] However, while just over one-third of the U.S. has fully embraced the legal use of recreational marijuana and fourteen states allow recreational marijuana to exist in the legal "grey area" of decriminalization, it is noteworthy that thirty-six states—almost three-quarters of the states—the District of Columbia, Guam,

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28. *See* White, *supra* note 8.

29. TODD GARVEY, CONG. RSCH. SERV., R42398, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS (Nov. 9, 2012).

30. *Id.*

31. *Id.* at 9; *see also* 21 U.S.C. § 903.

32. *See* GARVEY, *supra* note 29, at 7–9.

33. *Id.*

34. *Id.*

35. *Id.*

36. Will Yakowicz, *Where is Cannabis Legal? A Guide to all 50 States*, FORBES (Jan. 10, 2022), https://www.forbes.com/sites/willyakowicz/2022/01/10/where-is-cannabis-legal-a-guide-to-all-50-states/; *See also Map of Marijuana Legality by State*, *supra* note 27.

37. *See* GARVEY, *supra* note 29, at 7–9.

Puerto Rico, and the U.S. Virgin Islands have state-approved medical marijuana programs.[38]

When viewing the large disparity between the number of states where recreational marijuana has been explicitly legalized and the number of states and territories where medical marijuana has been explicitly legalized, it logically follows that, in general, the U.S. is markedly more accepting of medical marijuana than its recreational counterpart.[39] Though a polling of individuals, even those in states where marijuana remains illegal, would likely reveal much more liberal attitudes towards recreational marijuana than are reflected by the states' legal statuses, the decidedly larger sovereign acceptance of medical marijuana is more significant.[40] While the threshold for individual acceptance of marijuana is quite low, the threshold for legislative acceptance of marijuana in general is high for a number of reasons, including decades of politicization, moral fearmongering, and antidrug campaigns.[41] Additionally, the inherent inefficiency of government makes passing any legislative change difficult, let alone legislation that counters fifty years of federal prohibition.[42] Thus, the fact that three-quarters of the country—including eighteen states that have not seen fit to accept legal recreational marijuana use—have legitimized medical marijuana says a lot of its use and place in society.

Having established the relative significance of medical marijuana in the U.S., it is under that umbrella of context from which the primary evaluation of this Comment—veterans and medical marijuana—will proceed.

C. *Marijuana, Veterans, and the VA*

With the chaotic withdrawal of the last troops and most citizens from Afghanistan in August 2021, the U.S. ended the longest war in American history.[43] Though the nearly twenty-year war, which served as the backdrop for the larger "Global War on Terror" and ushered in years of war in Iraq and conflict in many other countries, was a defining landscape for the "9/11 generation," it was not a

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38. *Id.*; *see also Medical Cannabis*, DISABLED AM. VETERANS, https://www.dav.org/veterans/resources/medical-cannabis/ (last visited Jan. 31, 2022).

39. *See* Yakowicz, *supra* note 36.

40. *Id.*

41. *See supra* Subpart II.A.

42. Andrew Rudalevige, *Why Does Congress Have Such a Hard Time Passing Laws? Let's Blame the Constitution*, WASH. POST (July 11, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/11/why-does-congress-have-such-a-hard-time-passing-laws-lets-blame-the-constitution/.

43. Nicole Gaouette et al., *The Last US Military Planes Have Left Afghanistan, Marking the End of the United States' Longest War*, CNN (Aug. 31, 2021), https://www.cnn.com/2021/08/30/politics/us-military-withdraws-afghanistan/index.html.

complete departure from historical norms.[44] The truth is, since its inception 245 years ago, the U.S. has only been at peace for a total of fifteen years.[45] Thus, for 230 years Americans have been fighting and dying in wars in places that many of us have only read about in books.[46] The human cost of war is often immeasurable, but it *is* quantifiable in many ways.

Since the start of war in Afghanistan in 2001, nearly 2.5 million Americans served in the wars on terror in Iraq and Afghanistan.[47] In total, there are more than seventeen million total veterans in the U.S., including veterans of previous conflicts.[48] Of those seventeen million veterans, nearly 4.7 million—approximately 28 percent—suffer from disabilities as a result of their military service.[49] Healing the wounds of war requires a substantial investment from the government. In 2019, the VA spent $218.39 billion on veterans' benefits, including health care.[50]

For veterans with service-connected disabilities, the VA health care system is often their primary source of health care.[51] In fact, in 2016, 25.8 percent of working age veterans (732,000) did not have private health insurance and were solely dependent on the VA for all health care.[52] As a result, in 2016, 2.8 million working-age veterans used or were enrolled in VA health care systems,[53] and approximately 62 percent of all Iraq and Afghanistan veterans have used VA health care since October 1, 2001.[54] The most common diagnoses for treatment by the VA include musculoskeletal ailments and mental disorders, though most veterans have more than one diagnosis.[55]

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44. Charles Beuck, *Only 15 Years of Peace in the History of the United States of America*, MEDIUM (Jan. 8, 2020), https://medium.com/traveling-through-history/only-15-years-of-peace-in-the-history-of-the-united-states-of-america-c479193df79f.

45. *Id.*

46. *Id.*

47. *Veterans in the United States – Statistics & facts*, STATISTA RSCH. DEP'T (Dec. 3, 2021), https://www.statista.com/topics/3450/veterans-in-the-united-states/#dossierKeyfigures.

48. *Id.*

49. *Id.*

50. *Veterans in the United States supra*, note 47.

51. Kelly Ann Holder & Jennifer Cheeseman Day, *Health Insurance Coverage of Veterans*, U.S. CENSUS BUREAU (Sept. 14, 2017), https://www.census.gov/newsroom/blogs/random-samplings/2017/09/health_insurancecov0.html.

52. *Id.*

53. *Id.*

54. *VA Health Care Utilization by Recent Veterans*, U.S. DEP'T OF VETERANS AFFS., https://www.publichealth.va.gov/epidemiology/reports/oefoifond/health-care-utilization/ (last visited Dec. 16, 2021).

55. *Id.* Musculoskeletal ailments account for 759,850, or 62.3%, of all Iraq and Afghanistan veterans and mental disorders account for 708,062, or 58.1%.

Though the physical toll that war takes is devastating, costs do not end there.

In 2019, 2.7 million veterans were either unemployed or not participating in the labor force.[56] For those who were employed, 1.14 million had an income at or below the poverty level.[57] Homelessness is also endemic amongst veterans, with nearly 40,000 homeless veterans on the street at any given time.[58] Veterans account for 11 percent of the homeless population in the U.S.,[59] though veterans only make up 7 percent of the population.[60] There is room for optimism on this front, though, as the number of veterans experiencing homelessness is down 40 percent since 2011.[61] That said, it must be noted that the leading causes of homelessness among veterans includes PTSD.[62] Most importantly, though, for indigent veterans, the VA health care system is often their *only* source of health care, mental health counseling, and addiction treatment, and veterans who rely solely on VA health care receive *all* of their prescription medications through the VA free of charge.[63]

In sum, it cannot be overstated that the U.S. has a large population of veterans who, by virtue of their personal choice to volunteer to support and defend the Constitution of the U.S., are hurt, disabled, aging, and in need of medical and mental health care to help heal the wounds they incurred in service to their country.[64] These wounds include physical ones that can be seen and often cause a lifetime of chronic pain and suffering.[65] Though these physical wounds can often be mended with surgery or other treatment, they still require daily medication to manage the pain and allow veterans to function.[66] Combat-related wounds also include invisible wounds that cannot be seen and more frequently result in a lifetime of emotional angst and suffering.[67] Of all the wounds that veterans suffer, invisible wounds are perhaps the worst type of wound because

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56. *See Veterans in the United States*, *supra* note 47.
57. *Id.*
58. Smiljanic Stasha, *How Many Veterans Are Homeless in the US 2021*, POL'Y ADVICE (Mar. 23, 2021), https://policyadvice.net/insurance/insights/homeless-veterans-statistics/.
59. *Id.*
60. Alex Dopico, *What Percentage of the US Population are Military Veterans?*, JANETPANIC.COM (May 5, 2021), https://janetpanic.com/what-percentage-of-the-us-population-are-military-veterans/#What_percentage_of_the_US_population_are_military_veterans.
61. *See* Stasha, *supra* note 58.
62. *Id.*
63. *Health Care*, U.S. DEP'T OF VETERANS AFFS., https://choose.va.gov/health (last visited Dec. 16, 2021).
64. *See supra* notes 47–50 and accompanying text.
65. *See supra* note 55 and accompanying text.
66. *See generally supra* notes 51–55 and accompanying text.
67. *Id.*

the etiology is complicated, and the treatment is even more so.[68] Veterans who are able and lucky enough to get help for their invisible wounds often require years of therapy and treatment, which typically requires a myriad of psychopharmaceuticals.[69]

While many of these veterans are at least partially dependent on the VA for their healthcare, it must be acknowledged that millions of veterans are *solely* dependent on the VA for healthcare, including hundreds of thousands without health insurance, millions who are unemployed or employed below the poverty level, and tens of thousands who are homeless due to conditions like PTSD.[70] Thus, by virtue of the large correlation between conditions like PTSD, unemployment, and poverty and being solely dependent on the VA for healthcare—including treatment, counseling, and medications—it must be noted that the veterans most in need are beholden to the VA and the rules by which the VA provides healthcare services.[71]

Against that backdrop, despite the relative acceptance of medical marijuana as an alternative medical treatment in the U.S. over the last several decades,[72] many veterans are trapped in a healthcare purgatory by the fact that they are beholden to the VA.[73] According to the VA's official website, "The U.S. Department of Veterans Affairs is required to follow all federal laws including those regarding marijuana. As long as the Food and Drug Administration classifies marijuana as Schedule I VA health care providers may not recommend it or assist Veterans to obtain it."[74] The VA clarifies further that, "VA clinicians may not complete paperwork/forms required for Veteran patients to participate in state-approved marijuana programs."[75] Thus, even in a state where medical marijuana is legal, a veteran who is solely dependent on the VA for all of their healthcare and likely cannot afford to see a private physician, cannot even get assistance from their VA healthcare providers to obtain a legal prescription for medical marijuana.[76]

The VA goes on to explain that, though veterans are "encouraged to discuss marijuana use with their VA providers," notably, VA providers "may not recommend medical marijuana" and may only prescribe medications that have been approved by the U.S. Food and

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68. *See* Shad Meshad, *Treating PTSD: Maybe it's Time for Another Look at our Options*, HUFFPOST (Nov. 3, 2014), https://www.huffpost.com/entry/treating-ptsd-maybe-its-t_b_5738136.

69. *Id.*

70. *See supra* notes 51–54, 56–60 and accompanying text.

71. *Id.*

72. *See supra* Subpart II.B.

73. *See supra* notes 51–54 and accompanying text.

74. *VA and Marijuana – What Veterans need to know*, U.S. DEP'T OF VETERANS AFFS., https://www.publichealth.va.gov/marijuana.asp (last visited Dec. 16, 2021).

75. *Id.*

76. *Id.*

Drug Administration ("FDA") for medical use.[77] While the encouragement of veterans to "discuss marijuana use with their VA providers" does seem promising at first blush, the fact that VA clinicians cannot recommend medical marijuana serves as a substantial barrier to any meaningful conversation on the subject.[78] Thus, though well-meaning, the gesture ultimately rings very hollow for veterans in need.

Finally, the VA makes clear that, regardless of the legal status of medical marijuana in a particular state, it will not pay for medical marijuana prescriptions from any source, nor will VA pharmacies fill prescriptions for medical marijuana.[79] Based on the status of marijuana as a Schedule I substance under the CSA and the VA's subsequent stance on medical marijuana, these seem like reasonable restrictions by a government agency. However, it is still worth noting that indigent veterans who might stand to benefit from medical marijuana and are solely dependent on the VA for their healthcare, including their prescriptions, have very few other viable legal options for obtaining or filling a medical marijuana prescription.[80]

On a positive note, the VA notes that "VA scientists may conduct research on marijuana benefits and risks, and potential for abuse, under regulatory approval."[81] Additionally, the VA notes that veterans will not be denied benefits because of marijuana use.[82] This assurance likely serves as a good peace of mind for veterans who *are* able to obtain a medical marijuana prescription on their own or, regrettably, are self-medicating. However, anecdotal feedback from veterans shows that the VA's directives and actual patient experiences sometimes differ with policies occasionally enforced more strictly or arbitrarily, depending on the location or the provider. [83]

Most importantly, though, while benefits cannot be denied, marijuana use—recreational or medical—can have other effects on veterans' treatment by the VA.[84] Though the VA advertises a positive and accepting environment, it is worth noting that a veteran's treatment plan is entirely at the discretion of the treating doctor.[85] In many cases, although doctors cannot deny treatment upon discovering that a veteran is using marijuana, they will taper patients off other scheduled substances, including painkillers, psychotropics,

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77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*; *see also supra* notes 70–71 and accompanying text.
81. *VA and Marijuana – What Veterans need to know*, *supra* note 74.
82. *Id.*
83. *Medical Cannabis supra*, note 38.
84. Bill Barlow, *5 Facts Veterans Need to Know About the VA and Cannabis*, WEEDMAPS (Nov. 7, 2019), https://weedmaps.com/news/2019/11/5-facts-veterans-need-to-know-about-the-va-and-cannabis/.
85. *Id.*

and sleeping medications, or even cut off the supply altogether.[86] This is often done out of a personal hostility and usually under the guise of guarding against "addictive behavior."[87] Though the changes are not supposed to be punitive, they often have the look, feel, and effect of punishment, especially when the tapered or restricted medications were a necessary part of the veteran's treatment.[88]

In some cases, the potential effects can extend beyond the veteran's treatment. For example, veterans who use marijuana and even work within all of the rules of their state's medical cannabis program, can suffer unintended consequences.[89] A veteran who works in the cannabis industry, such as a state-licensed dispensary, could be disqualified for a VA home loan, a valuable VA benefit.[90] Beyond that, marijuana use might also result in veterans' disqualification for firearms permits or otherwise limit their ability to purchase a firearm.[91]

With so many veterans reliant on VA healthcare, the VA's position poses several problems for veterans. First, veterans who rely solely on VA healthcare are also solely dependent on the VA for filling their prescriptions.[92] But even where medical marijuana is legal, a veteran cannot get medical marijuana—even if already prescribed for service-connected disabilities—through the VA, which means they cannot get a medical marijuana prescription at all.[93] Second, in cases where a prescription for medical marijuana *is* deemed medically necessary by a doctor, many veterans have to pay out of pocket for a prescription, while many of their civilian counterparts may not have to.[94] Moreover, this is particularly problematic if the medical marijuana is prescribed for a service-connected disability because any other prescriptions prescribed for a service-connected disability is paid for by the VA.[95]

Finally, even where legal, and even though the use of marijuana is not supposed to result in a loss of care or coverage, it can still result in indirect changes to treatment that have a detrimental effect on the veteran when physicians taper or cut off other medications because they view marijuana use as a risk factor for addiction or substance abuse issue.[96] And since individual doctors have absolute discretion over their patients' treatment plans, veterans are often at the mercy of the whims and personal beliefs or biases of their treating

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *See supra* note 63 and accompanying text.
93. *VA and Marijuana – What Veterans need to know*, *supra* note 74.
94. *See supra* note 63 and accompanying text.
95. *Id.*
96. *See supra* notes 85–88 and accompanying text.

physician.[97] Though the doctor's mantra is to "do no harm," some doctors may inadvertently do harm to their patients as a result of a misguided attempt to safeguard their patient from "harm" they subjectively perceive.[98] Though that harm is often in the form of changes to their treatment, the harm can take the form of other effects, such as losing eligibility for valuable benefits like the VA home loan program or the loss of Second Amendment rights.[99]

III. THE CASE FOR MEDICAL MARIJUANA AS AN ALTERNATIVE TREATMENT FOR VETERANS

With all the talk of veterans and medical marijuana, it begs the question: why is it such a big deal? As we have already established, the last several decades of war has resulted in hundreds of thousands of veterans returning home carrying the visible and invisible wounds of war.[100] Victims of chronic pain and mental disorders, such as anxiety, depression, and PTSD, are beholden to a VA system that primarily treats their conditions with opioid drugs and powerful psychotropics as a result of a backlogged system that lacks the manpower or resources to treat many of these conditions with anything else.[101] Unfortunately, rather than accomplishing their intended purpose, the over-reliance on these powerful drugs often leads to addiction, to overdose, and to being a large contributing factor to the veteran suicide endemic.[102]

According to the FDA, there is increasing interest in the use of marijuana to treat a variety of medical conditions.[103] Most of the conditions include alleviation of chronic diseases, such as cancer and the associated symptoms.[104] However, many states that allow for medical marijuana prescribe it for several conditions that are highly relevant to veterans, including chronic pain, traumatic brain injury, and PTSD.[105] In fact, many veterans have found marijuana preferable to opioids in helping them cope with the nightmares, flashbacks, depression, and pain stemming from their wartime experiences.[106] However, the federal government's unwillingness to allow veterans access to medical marijuana compounds tragedies such as veteran opioid addiction, overdose, and suicide by denying them access to a potentially safer and more effective alternative treatment.[107]

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97. *Id.*
98. *Id.*
99. *See supra* notes 97–89 and accompanying text.
100. *See supra* Subpart II.C.
101. Representative Dina Titus, *supra* note 1, at 45.
102. *Id.*
103. *Medical Cannabis supra*, note 38.
104. *Id.*
105. *Id.*
106. Representative Dina Titus, *supra*, note 1, at 45.
107. *See supra* Subpart II.C; *infra* Subparts III.A, III.B.

A. Veterans and the Opioid Crisis

Veterans are twice as likely to die from an opioid overdose than their civilian counterparts because they are more likely to suffer from chronic pain.[108] Additionally, complicating conditions like PTSD and other mental health problems exacerbate the risk by making them more likely to abuse drugs and self-medicate.[109] Risk factors for opioid addiction specific to veterans include multiple deployments, combat exposure and the resulting stress and trauma, and collateral injuries.[110] Particularly as it relates to collateral injuries, the frequency with which strong painkillers such as Vicodin and Oxycontin are prescribed for combat-related and chronic injuries post-service—often by the VA—contributes greatly to this risk of opioid addiction and overdose.[111]

Even the VA recognizes that "a mounting body of research detailing the lack of benefit and potentially severe harm of long-term opioid therapy," and "there has been a growing epidemic of opioid misuse and opioid use disorder in America."[112] To that end, the VA openly acknowledges that the opioid epidemic has forced them to explore better ways to manage veterans' chronic pain in a way that minimizes the risk of opioids.[113] Yet, it refuses to actively pursue alternative treatments like medical marijuana.[114]

With the federal government's primary agency for veterans' advocacy asleep at the wheel while the veteran opioid crisis plows full steam ahead, other advocates, researchers, and "veterans are looking for alternatives to highly addictive and potentially dangerous opioid medications—like medical marijuana."[115] These groups believe that legal access to medical marijuana could provide veterans with the much-needed reprieve to the opioid addiction crisis.[116]

While arguing in support of medical marijuana in lieu of opioids, Dr. Don Teater, medical advisor at the National Safety Council from 2013 to 2016 opined, "[c]ompared to marijuana, opioids are much riskier, much more dangerous."[117] He explained further that the

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108. Priscilla Henson, MD, *Opioid Addiction in Veterans: Signs, Risks & Treatment*, AM. ADDICTION CTRS. (Nov. 19, 2021), https://americanaddictioncenters.org/veterans/opioid-addiction.

109. *Id.*

110. *Id.*

111. *Id.*

112. *VHA Pain Management*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/PAINMANAGEMENT/Opioid_Safety/index.asp (last visited Dec. 16, 2021).

113. *Id.*

114. *VA and Marijuana – What Veterans need to know*, *supra* note 74.

115. *Medical Cannabis*, supra note 38.

116. *Id.*

117. Matt Schneiderman & David Mills, *Marijuana vs Opioids: Which is More Dangerous?*, J. OF NURSING (Apr. 1, 2017), https://www.asrn.org/journal-nursing/1697-marijuana-vs-opioids-which-is-more-dangerous.html.

issue with prescribing opioids for pain is that they bring fast relief and an accompanying sense of calm.[118] However, as quickly as the relief comes, the relief wears off, and a higher dose becomes necessary and more frequent to maintain the same effects as the patient develops an increased tolerance to the drug.[119] As a result, while opioids are effective for short term pain relief, they are not a good choice for improving chronic pain.[120]

The real problem in the debate for medical marijuana as an alternative to opioids is that "officially" marijuana is more dangerous.[121] As already stated previously, the DEA classifies marijuana as a Schedule I drug with "no accepted medical use" and a high potential for abuse.[122] Other Schedule I drugs include LSD and heroin.[123] On the other hand, prescription opioids, which include morphine, Vicodin, and Oxycontin, are Schedule II drugs: legal when prescribed by medical personnel.[124] It is worth pointing out that crystal methamphetamine and cocaine are also Schedule II drugs with apparently accepted medical uses in the U.S., though it remains unclear what, if any, medical personnel are prescribing them.[125]

The disparity in these classifications accentuates the ridiculousness of the distinction between marijuana and opioids. It is even more absurd when you consider that thirty-six states widely accept marijuana as a valid medical treatment and eighteen have legalized it for recreational use.[126] Reality does not square with the law.

Since 1999, the CDC reports that overdose deaths from opioids have quadrupled.[127] In 2015, more than 15,000 Americans died from overdoses involving prescription opioids.[128] Prescription pill overdoses now account for nearly half of all U.S. overdoses from opioids, and 1,000 Americans are treated in emergency rooms every day for misusing prescription pills.[129] On the other hand, while marijuana can cause health problems if used in excess, there are no known cases of somebody dying from a marijuana overdose.[130] The same cannot be said for opioids, yet the use of prescription medication continues to outpace the use of marijuana even in states where it is legal for medical purposes.[131]

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118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *See* Yakowicz, *supra* note 36.
127. Schneiderman & Mills, *supra* note 117.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*

Research on marijuana as an alternative to opioids continues to show promise. The National Organization for the Reform of Marijuana Laws ("NORML") touts two studies involving marijuana and opioids in support of their campaign for the therapeutic use of marijuana.[132] In the first study, reports revealed that states with legislation allowing the use of marijuana experienced a reduction in opioid-related hospitalizations.[133] Though correlation does not necessarily equal causation, the implication remains promising. The second study showed a bit more direct promise on the issue at hand, stating that "patients with legal access to medicinal marijuana reduce their use of opioids."[134] Thus, Paul Armentano, deputy director of NORML, concluded that, "[t]he data is clear. Cannabis is effective at treating pain, including hard-to-treat pain conditions like neuropathy, and arguably represents a safer alternative to opioids."[135]

In another article examining the efficacy of marijuana as a safer alternative to opioids, the author took a very scientific approach to the problem, comparing the lethal dose of each as well as the therapeutic index. The author cited three key findings before ultimately concluding, "[i]f anything, cannabis is a vitally important and incredibly safe medicine that could provide relief for thousands of people who currently risk addiction or death from overuse of opioids for pain control."[136] Her key findings included: (1) no one has ever died from cannabis but tens of thousands of people die per year from opioids; (2) the lethal dose for cannabis is extremely high while the lethal dose for opioids is extremely low; and (3) the therapeutic index for cannabis is fourteen times higher than morphine.[137]

In conclusion, while studies are not determinative, the results are fairly clear on several key issues. First, the classification of marijuana as a Schedule I substance while opioids remain a Schedule II substance is undeserved.[138] Rather than a classification based on science and hard data, marijuana's designation as a Schedule I substance under the CSA appears to stem more from historical and political motivations.[139] This seemingly unwarranted over-classification of marijuana is supremely ironic because the classification itself stands as a substantial barrier to the research needed to advance the data and science on it.[140] Dr. Marie

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132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. Deb Tharp, *Is Cannabis Really Safer Than Opiates, or Just as Dangerous?*, NUGG (Apr. 11, 2018), https://getnugg.com/blog/cannabis-safer-opiates/.
137. *Id.*
138. *See supra* notes 127–31, 136–37 and accompanying text.
139. Schneiderman & Mills, *supra* note 117.
140. *Id.*

McCormick, a professor of pediatrics at the Harvard Medical School, noted that it is hard to substantiate any negative effects of marijuana because "[t]he classification of cannabis as a Schedule I drug makes it very difficult to acquire research-grade samples," which makes it hard to attain reliable data.[141]

Second, and perhaps most important, medical marijuana does not have the severe side effects that opioids have, such as severe risk of addiction and overdose, and its use as an alternative reduces those risks in opioid users.[142] At a minimum, it is no worse than opioids, and, at best, it is a safer alternative.[143] Thus, medical marijuana is an effective alternative therapeutic for use in treating issues like chronic pain and is likely a safer and equally effective alternative for veterans suffering from these ailments.[144]

Given the fact that veterans are more likely to suffer from chronic pain and, as a result, twice as likely to die from an opioid overdose than their civilian counterparts,[145] the debate over offering marijuana to veterans as an alternative to opioids should not be a difficult one. As the leading treatment provider and prescriber of opioids to veterans, the VA is acutely aware of the emerging need for the medical marijuana alternative and should be veterans' biggest advocate.[146] But they are not. And while the VA's current prohibitive position on medical marijuana remains plausibly justified by current federal law,[147] the science not only does not support this position, but practically begs for a different result.[148]

B. Veterans and the Mental Health Endemic

The wounds of war are not limited to the physical wounds that can be seen with the naked eye or identified by conventional understandings of pain. PTSD is the invisible wound of war.[149] The precise number of veterans with PTSD is truly unknown because veterans are likely to underreport their symptoms,[150] but what is known about the percentages of veterans who suffer from PTSD is staggering: "almost 31 percent of Vietnam veterans; as many as 10 percent of Gulf War veterans; 11 percent of veterans who fought in Afghanistan; and 20 percent of Iraq War veterans."[151] Aside from the

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141. *Id.*
142. *See supra* notes 127–137 and accompanying text.
143. *Id.*
144. *Id.*
145. Henson, *supra* note 108.
146. *VHA Pain Management*, *supra* note 112.
147. *VA and Marijuana – What Veterans need to know*, *supra* note 74.
148. *See supra* notes 127–137 and accompanying text.
149. Representative Dina Titus, *supra*, note 1, at 45.
150. Haley P. Johnson & Mark Agius, *A Post-Traumatic Stress Disorder Review: The Prevalence of Underreporting and the Role of Stigma in the Military*, PSYCHIATRIA DANUBINA, Nov. 2018, at 508–10.
151. *Id.*

emotional torment that PTSD causes to the suffering veteran, veterans with PTSD are at high risk for a number of other problems, including many that have already been discussed: drug addiction, unemployment, and homelessness.[152] The most alarming risk to veterans as a result of PTSD, however, is suicide.[153]

In the last twenty years, the U.S. has lost more veterans to suicide than in war.[154] Since September 11, 2001, just over 30,000 veterans have committed suicide.[155] That number is four times more than the number of U.S. military personnel who died in the wars in Iraq and Afghanistan combined.[156] In 2019, the most recent year for which the VA has data, 6,261 veterans committed suicide.[157] Most alarming, the VA reports that veterans commit suicide at *twice* the rate of their civilian counterparts, but the rate for veterans aged 18-34—the core of the veteran population from our most recent wars—is *three times* higher.[158]

Among a variety of risk factors associated with veteran suicide, the VA cited mental health conditions like PTSD and high doses of opioid medications for pain control among the largest.[159] In support of the VA's findings, there is a growing body of evidence that suggests veterans are being "bombarded with prescription drugs."[160] In fact, a March 2012 study in the Journal of the American Medical Association concluded that veterans of the Iraq and Afghanistan conflicts who reported chronic pain and PTSD were significantly more likely to be prescribed opioids than veterans with chronic pain but without a diagnosis of PTSD.[161] The VA has already acknowledged this "growing epidemic" of opioid addiction and a need to find an alternative.[162] But, despite the answer staring them directly in the face, they remain handcuffed by federal law and the CSA.[163] Worse

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152. *Id.*
153. *Id.*
154. Anna Richardson & Sarah Roxburgh, *More Veterans Die by Suicide Than in Combat. But It's Preventable*, WBUR (Sept. 28, 2021), https://www.wbur.org/cognoscenti/2021/09/28/veterans-suicide-prevention-afghanistan-anna-richardson-sarah-roxburgh.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. Charles R. Hooper, *Suicide Among Veterans*, AM. ADDICTION CTRS. (Jan. 21, 2022), https://americanaddictioncenters.org/veterans/suicide-among-veterans.
160. Representative Dina Titus, *supra*, note 1, at 47–48.
161. *Id.*
162. *VHA Pain Management*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/PAINMANAGEMENT/Opioid_Safety/index.asp (last visited Dec. 16, 2021).
163. *VA and Marijuana – What Veterans need to know*, *supra* note 74.

still, they remain handcuffed by their own internal policies and bureaucracy.[164]

Though multiple studies show marijuana has considerable potential to help veterans suffering from PTSD,[165] the VA has taken a much more contrary approach to marijuana as an alternative for PTSD than they have for pain.[166] In fact, the VA position actively denies the assertion that marijuana is a suitable—if not preferrable—treatment for marijuana, going so far as to state rather bluntly, "there is no evidence . . . that marijuana is an effective treatment for PTSD."[167]

The VA goes on to acknowledge that though "[c]annabis use for medical conditions is an issue of growing interest and concern," "research . . . does not support cannabis as an effective PTSD treatment, and . . . is not recommended for the treatment of PTSD."[168] Unfortunately, despite the strong link between PTSD, opioids, and suicide, and evidence that marijuana is a suitable alternative for opioid use,[169] the VA does not see medical marijuana as a viable alternative for PTSD.[170] As disheartening as that is, the VA is not alone in its assessment regarding hesitancy to treat PTSD with marijuana.

One particular study revealed that 98 percent of medical practitioners never recommend cannabis as a treatment to patients suffering from PTSD or anxiety.[171] However, it is worth noting that the study primarily explored the "attitudes, knowledge, and practices of health care professionals concerning cannabis as a therapy for PTSD and anxiety sufferers" rather than a scientific evaluation of marijuana's efficacy.[172] With 85 percent of practitioners stating that they felt "not at all" comfortable recommending or prescribing cannabis to patients, it is highly likely that these practitioners have never prescribed marijuana for their patients.[173] Thus, it is also highly likely that the results were based more on their personal biases than value of marijuana as a treatment, as they likely had

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164. *Id.*

165. *See infra* Subpart III.B.

166. Michael Walters, *How Cannabis Can Help Veterans*, POT GUIDE (Aug. 8, 2021), https://potguide.com/blog/article/how-cannabis-can-help-veterans/.

167. *Id.*

168. Melanie Hill, PhD, et al., *Cannabis Use and PTSD Among Veterans*, U.S. DEP'T OF VETERANS AFFS., https://www.ptsd.va.gov/professional/treat/cooccurring/marijuana_ptsd_vets.asp (last visited Dec. 16, 2021).

169. Hooper, *supra* note 159.

170. *See* Walters, *supra* note 166.

171. Emma Stone, *Medical Experts Remain Hesitant to Recommend Cannabis for PTSD*, Anxiety, WEEDMAPS (Apr. 26, 2019), https://weedmaps.com/news/2019/04/medical-experts-remain-hesitant-to-recommend-cannabis-for-ptsd-anxiety/.

172. *Id.*

173. *Id.*

little, if any, experience with the treatment of PTSD with marijuana.[174] However, one of the primary reasons why it is so hard to find any sort of empirical research with marijuana and test subjects is due to marijuana's classification as a Schedule I substance under the CSA.[175]

While the study is hampered by obvious drawbacks and potential biases, the researchers did note that many individuals living with PTSD already use cannabis to help alleviate many common symptoms, such as sleep disturbances.[176] The researchers also noted that PTSD patients commonly noted marijuana's efficacy in assisting sleep, reducing hypervigilance and hyperarousal, as well as decreasing aversive memories, fear, and anxiety."[177] So, despite the hesitancy of "98 percent of medical practitioners" surveyed, it appears based on at least anecdotal evidence that marijuana is potentially effective at alleviating many symptoms of PTSD.[178] Moreover, this means much of the research involving human subjects and actual marijuana use stems from individuals who already suffer from PTSD and have either acquired a prescription by some other means or are self-medicating.[179] While this anecdotal evidence has the same potential for bias as the "98 percent of medical practitioners" that would never recommend medical marijuana as a treatment for PTSD, it is progress nonetheless and cannot be immediately disregarded.[180]

In addition to anecdotal evidence, there is a growing body of empirical research that supports the safety and efficacy of medical marijuana as a safer alternative for treatment of PTSD.[181] Though it should be noted that while the research method is empirical, the researchers are still reliant on subjects who meet their parameters *and* use marijuana, resulting in small sample populations.[182] In 2019, a group of Canadian researchers published a study in the Journal of Psychopharmacology that provided preliminary epidemiological evidence that marijuana use may reduce the depression and suicidal ideations in sufferers of PTSD.[183] The study compared the incidence of depression and suicidal ideations between respondents with PTSD who used marijuana and respondents with PTSD that did not use marijuana.[184] Using multivariable analyses,

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174. *Id.*
175. Schneiderman & Mills, *supra* note 117.
176. Stone, *supra* note 171.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. Stephanie Lake et al., *Does Cannabis Use Modify the Effect of Post-Traumatic Stress Disorder on Severe Depression and Suicidal Ideation? Evidence from a Population-Based Cross-Sectional Study of Canadians*, 34 J. PSYCHOPHARMACOLOGY 181, 181 (2019).
182. *Id.*
183. *Id.*
184. *Id.*

the respondents with PTSD who did not use marijuana had a significant association with recent major depressive episodes and suicidal ideations.[185] However, among the respondents that used marijuana, neither outcome was associated.[186] Though the results of this study are very promising, the researchers acknowledge that additional investigation is needed to further validate the efficacy of marijuana for the treatment of PTSD.[187]

Like the studies related to marijuana, opioids, and chronic pain, studies on the efficacy of marijuana as an alternative treatment for PTSD are not conclusive.[188] However, there *is* growing body of evidence that medical marijuana is an effective treatment for PTSD and conclusive evidence that medical marijuana is a safer treatment than opioids currently provide.[189] Moreover, these studies, for the most part, lack any substantial, *scientific*-based arguments against the use of marijuana due to overwhelming dangers, similar to the dangers associated with opioids.[190] It is noteworthy that the studies are subject to limitations, including anecdotal evidence and relies on self-reporting subjects who already use marijuana.[191] As a result, there is potential for bias. Though there is also a high probability for bias in studies *against* the use of medical marijuana as well.[192] As such, this factor alone should not be dispositive as meaning the studies are not credible or that medical marijuana is not effective or safe. Continued research is obviously needed to develop the science. For this to happen, however, marijuana must be removed from the CSA's Schedule I table, for researchers to better study and research it.[193]

That said, there *is* enough promise in the studies indicating medical marijuana is an effective alternative for PTSD to justify continued progress.[194] If nothing else, there is very little evidence that marijuana will make things worse.[195] On the contrary, a body of evidence shows using marijuana could decrease issues like depression and suicidal ideations.[196] This in turn could have a marked upside effect on the suicide epidemic that plagues veterans. Particularly, since veterans with PTSD are at a higher likelihood of being prescribed opioids, which puts them at an increased risk for addiction and overdose, marijuana appears to offer a much safer and more

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185. *Id.*
186. *Id.*
187. *Id.*
188. *See supra* Subparts III.A., III.B.
189. *Id.*
190. *Id.*
191. *See* Lake et al., *supra* note 181.
192. Stone, *supra* note 171.
193. Schneiderman & Mills, *supra* note 117.
194. *See supra* notes 172–87 and accompanying text.
195. *See supra* Subparts III.A., III.B.
196. *See* Stone, *supra* note 171; *see also* Lake et al., *supra* note 181.

effective alternative to treat their pain with definite potential for upside with their PTSD symptoms.[197] We know the risks of maintaining the status quo are devastatingly high for veterans, and we can easily discern that the risks of offering medical marijuana as an alternative treatment are relatively low, all while treating their pain effectively.[198] Therefore, it cannot be overstated that veterans deserve the option to be treated with medical marijuana. More importantly, they deserve the *choice*.

IV. THE VETERAN'S MEDICAL MARIJUANA SAFE HARBOR ACT

Senate Bill 1183— The Veteran's Medical Marijuana Safe Harbor Act—was introduced in the Senate on April 15, 2021, and remains pending before the Senate Committee on the Judiciary (the "Judiciary Committee").[199] The Safe Harbor Act was introduced by Democratic Senator Brian Schatz of Hawaii.[200] While the sheer fact that such a bill is even under consideration is cause for optimism, it is not yet cause for celebration. After all, this is Congress, and the only thing certain about Congress is uncertainty. In fact, this is not even the first time Congress has attempted comparable legislation. Several similar bills were introduced in the 116th Congress, including the VA Medicinal Cannabis Research Act of 2018 (H.R. 5520), the Veterans Medical Marijuana Safe Harbor Act (S. 3409), and the Veterans Equal Access Act (H.R. 1647), which all sought reforms concerning medical marijuana for veterans.[201] Unfortunately, though, all three bills "died on the vine" and did not ultimately make it into law.[202]

In the text of the Safe Harbor Act, the Judiciary Committee cites multiple findings in Section 2 in support of it. It is noteworthy that many of these findings mirror findings that have been expressed in this Comment. First, the Judiciary Committee acknowledges the chronic pain endemic among a veteran population with nearly 60 percent of Iraq and Afghanistan veterans and more than 50 percent of older veterans relying on the VA health care system for treatment of their pain.[203] The next finding is a stark reminder of the dangers of opioids, noting that opioids are responsible for nearly 70 percent of all drug overdose deaths in the U.S.[204] Further highlighting the danger of the opioid epidemic for veterans, Congress notes the already-cited statistic that veterans are twice as likely to die from

197. Representative Dina Titus, *supra*, note 1, at 47–48.
198. *See supra* notes 124–34 and accompanying text.
199. S. 1183, 117th Cong. (2021).
200. *Id.*
201. VA Medicinal Cannabis Research Act of 2018, H.R. 5520, 115th Cong. (2018); Veterans Medical Marijuana Safe Harbor Act, S. 3409, 115th Cong. (2018); Veterans Equal Access Act, H.R. 1647, 116th Cong. (2020).
202. *See supra* notes 124–34 and accompanying text.
203. S. 1183, 117th Cong. (2021).
204. *Id.*

opioid overdoses than their civilian counterparts.[205] So far, it seems the Judiciary Committee "gets it." Next, the Judiciary Committee cites another statistic that has already been presented above: states with medical marijuana laws have significantly fewer opioid overdose deaths than states without.[206] And finally, the Judiciary Committee notes that, much like has already been stated, medical marijuana shows promise for treating a variety of conditions that afflict veterans, including chronic pain, and "may serve as a less harmful alternative to opioids in treating veterans."[207]

Thus, with the exception of failing to explicitly address PTSD, it appears that the Judiciary Committee's finding on the utility, safety, and efficacy of medical marijuana as an alternative treatment for veterans align with those that have already been laid out in this Comment.[208] Therefore, this should be a "slam dunk" for passing into law, right? Perhaps. But before we stray too far into the discussion of what Congress would or should do, we must examine what the Safe Harbor Act would actually accomplish and what it would not.

A. "High" Expectations

Though expectations for the Safe Harbor Act are expectedly high, it is important to first ascertain what the Safe Harbor Act will actually accomplish. Section 3 would authorize three specific actions under its Safe Harbor provision.[209] First, it would authorize veterans to use, possess, or transport medical marijuana, but only in states where medical—or ostensibly recreational—marijuana is legal.[210] Second, it would authorize VA physicians to discuss medical marijuana with veterans as a treatment option in states where the law permits its use.[211] Finally, it would authorize VA physicians to "recommend, complete forms for, or register veterans for participation in a treatment program involving medical marijuana" in states where marijuana is legal.[212] Thus, while the first provision simply authorizes veterans to do something they would already be entitled to do in a state where medical marijuana is legal—possess and transport it—the last two provisions do represent forward progress for veterans at the VA. First, rather than simply talking about medical marijuana with veterans in general terms, VA physicians would be permitted to discuss it as a treatment.[213] Second, VA physicians would be permitted to recommend, register, and provide meaningful assistance to veterans seeking to participate in a medical

205. *Id.*
206. *Id.*
207. *Id.*
208. *See supra* Subparts II.A, II.B.
209. S. 1183, §3, 117th Cong. (2021).
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*

marijuana treatment plan.[214] This is particularly beneficial to veterans who are solely reliant on the VA for their healthcare for a myriad of reasons.

Section 4 of the Safe Harbor Act similarly gives good reason for optimism and progress as it directs the VA to conduct studies on the use of medical marijuana by veterans.[215] First, the Safe Harbor Act instructs the VA to "conduct a study on the effects of medical marijuana on veterans in pain" no later than two years from the date of enactment.[216] Second, the Safe Harbor Act instructs the VA to "conduct a study on the relationship between treatment programs involving medical marijuana that are approved by States, the access of veterans to such programs, and a reduction in opioid use and abuse among veterans."[217] So, in addition to opening the door to medical marijuana as an alternative treatment, Congress appears to be taking a measured approach and learning as it goes.[218] All in all, it appears to be a step forward and gives reason for optimism. Or does it?

B. The Big Let Down

Though the Safe Harbor Act is a step forward, it should be worth noting that it is not the wholesale legalization that many veterans and advocates have been hoping for.[219] Moreover, once the casual observer gets past the initial optimism, its shortfalls start to become readily apparent. First and foremost, the Safe Harbor Act completely fails to expand access to medical marijuana to *all* veterans.[220] Under Section 3, every provision of the Safe Harbor Act contains a limiting construction that limits the applicability of the authorization to states where marijuana is already authorized by state law.[221] Thus, Congress—as the federal government's steward of law—is passing the buck on veterans with a half-solution that accomplishes nothing for veterans who were already without the right to obtain medical marijuana.[222] And while the ability for the VA to provide some meaningful assistance to indigent veterans and veterans otherwise beholden to the states where medical marijuana is legal, it does nothing for millions of veterans who stand to benefit from medical marijuana but cannot because they are constrained by the laws of their state.[223] Thus, while Congress's deference to the state legislatures is an admirable nod to state sovereignty, it is very disappointing that it missed the opportunity to make meaningful

214. *Id.*
215. *Id.* § 4.
216. *Id.*
217. *Id.*
218. *Id.*
219. *See supra* Part IV.A.
220. S. 1183, §3, 117th Cong. (2021)..
221. *Id.*
222. *Id.*
223. *Id.*

change and instead, by some accounts, opted to mail it in with a half-measure.

Second, the substance of the Safe Harbor Act in Section 3 starts with, "[n]otwithstanding the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or any other Federal law . . . ."[224] While this disclaimer is certainly not a death knell for veterans' hopes of access to medical marijuana due to the legal loophole in which marijuana skirts by the Supremacy Clause, it certainly rings hollow the prospects of meaningful research by the VA.[225] So long as marijuana remains a Schedule I substance under the CSA, however, scientists will continue to struggle to do substantial research.[226] As it pertains to this bill in particular, the VA will be hampered in its endeavors to complete the instructed research, especially regarding marijuana's efficacy against chronic pain.[227]

The next glaring issue with the Safe Harbor Act is that it is almost entirely focused on marijuana as an alternative to opioid use.[228] Rightly citing the body of research regarding veterans, chronic pain, and their increased risk of addiction and overdose, the Judiciary Committee notes that medical marijuana shows promise as a "less harmful alternative" to opioids in treating chronic pain in veterans.[229] While this push will undoubtedly have a profound impact on the veteran opioid crisis, the Safe Harbor Act is silent as to exploring the use of medical marijuana as an alternative treatment for PTSD.[230] And while the opioid crisis certainly looms large for veterans, the veteran suicide endemic looms larger.[231] Thus, by failing to acknowledge the body of growing research that supports medical marijuana as a safe and effective treatment for PTSD,[232] the Safe Harbor Act really misses the mark here.

The Safe Harbor Act's next shortfall is that it still potentially leaves many veterans who might be eligible for medical marijuana "high and dry" —but not the kind of "high" they would like. Though the Safe Harbor Act now allows for VA physicians to assist veterans in obtaining a medical marijuana prescription in states where marijuana is legal, there are two significant shortcomings that threaten the most vulnerable among veterans.[233] First, the Safe Harbor Act does not provide for the VA to prescribe medical

224. *Id.*
225. *Id.*
226. Schneiderman & Mills, *supra* note 117.
227. *Id.*
228. S. 1183 *supra*, note 5 at § 2.
229. *Id.*
230. *Id.* §§ 2–4.
231. *See supra* Subpart III.B.
232. *Id.*
233. S. 1183 *supra*, note 5.

marijuana for veterans, only assist in the enrollment.[234] Thus, indigent veterans and veterans with no other source of healthcare are still required to pay out of pocket or otherwise provide a means by which to procure the actual prescription. This would likely require a visit to a private physician, though some public assistance programs might exist. Second, though the VA pays for or fills *all* prescriptions—including opioids—for veterans who seek treatment through the VA,[235] the Safe Harbor Act does not provide for the VA to pay for or fill a prescription for medical marijuana.[236] Thus, veterans who are solely dependent on the VA for their healthcare are in the same boat with a half measure that allows the VA to assist them but with no real means for acquiring medical marijuana, unless they are able to do so themselves.[237] When juxtaposed against the relative ease with which veterans can acquire free opioids from the VA, it actually underscores the precise nature of the real problem veterans face.[238]

Finally, with its language specifying that "it shall not be unlawful for . . . a physician to . . .," the Safe Harbor Act fails to address the potential for discretional impacts by doctors who do not feel compelled by the law to comply with its mandates.[239] By simply stating that it shall not be unlawful for a physician to do something, the government is really just alleviating the physician from liability if he or she chooses to comply.[240] Thus, VA physicians will still enjoy a considerable amount of discretion in choosing whether to openly assist veterans with medical marijuana as a treatment option or in obtaining it at all.[241] Further, those physicians still maintain the same discretion to affect veterans' treatment plans with the ability to taper or cut off altogether other prescriptions if they so choose.[242] As a result, though the Safe Harbor Act was off to a promising start, it appears that veteran's "high" expectations have been ultimately met with a big letdown.

V. MOVING FORWARD: "HIGHER" EXPECTATIONS FOR VETERANS

Though the Safe Harbor Act seemingly falls short of many veterans' high expectations and leaves a lot to be desired, it nonetheless remains a positive step forward in the fight for veterans' access to medical marijuana and, if for no other reason than that, deserves unwavering support for passage in Congress. That said, we would be remiss if this Comment did not address the many ways in

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234. *Id.* § 3.
235. *See Health Care*, *supra* note 63.
236. S. 1183 *supra*, note 5 at § 3.
237. *Id.*
238. *See supra* Subparts III.A, III.B.
239. S. 1183 *supra*, note 5 at § 3.
240. *Id.*
241. *Id.*
242. *Id.*; *see also supra* notes 85–87 and accompanying text.

which veterans' higher expectations on this issue can, and should, be met.

First and foremost, as legislation intended for the better care and treatment of veterans, a Congressional solution addressing veterans' access to medical marijuana should make the alternative treatment available to *all* veterans. As it stands, the Safe Harbor Act conditions veterans' access to medical marijuana on the legal status of medical marijuana in their home state.[243] This ostensibly places veterans at the mercy of their state legislatures, while similarly situated veterans in other states might enjoy unfettered access. Though Congress's deference to state legislatures is commendable in most respects, the VA was established by Congress as an executive department of the federal government for the specified purpose of "administer[ing] the laws providing benefits and other services to veterans . . . ."[244] Thus, it stands to reason that Congress could, in its discretion, authorize the VA to provide access to medical marijuana for *all* veterans in its capacity as the federal agency "providing benefits and other services to veterans" without trampling on state sovereignty.[245] This is particularly true given that Congress is also responsible for the federal legal status of marijuana under the CSA,[246] and medical marijuana laws do not conflict with the Supremacy Clause.[247]

An ideal piece of legislation granting veterans access to medical marijuana should also require the VA not only to prescribe the medical marijuana but also to provide the prescription to the veteran, just as it would any other prescription.[248] This is particularly important for indigent veterans, homeless veterans, and veterans who are solely dependent on the VA for healthcare.[249] Without such a provision, veterans who depend on the VA as their sole means of healthcare due to a lack of monetary resources would be unable to procure a prescription even if it was deemed medically necessary.[250] Thus, enabling the VA not only to directly prescribe medical marijuana, but also to provide it to the veteran is a necessary endeavor for such a vulnerable population.

Another area for an improvement that should be addressed by adequate legislation and associated policy is to lift the stigma of medical marijuana by highlighting it as a legitimate treatment within the VA. This can be accomplished in several ways, including creating an environment where it can be proactively discussed between veterans and their providers. Though the Safe Harbor Act provides for this, it does not go far enough. First, veterans should not be

243. S. 1183 *supra*, note 5 at § 3.
244. 38 U.S.C. § 301.
245. *Id.*
246. 21 U.S.C. §§ 801–904.
247. *See supra* notes 31–33 and accompanying text.
248. *Health Care*, *supra* note 63.
249. *See supra* notes 52–54 and accompanying text.
250. *Id.*

restricted by the personal biases or treatment preferences of their VA providers.[251] Though a VA provider should not be required to prescribe medical marijuana against their discretion, veterans should be permitted to seek out the care of a VA professional who will prescribe it to avoid this issue. Second, the VA should seek to promote a bias-free environment by providing for the education of VA medical professionals regarding the benefits of marijuana as an alternative treatment to facilitate those conversations.

In an ideal world, that training would be supported and actively subsidized by a robust research program to increase the understanding of medical marijuana as an alternative treatment for both chronic pain and PTSD. Those studies should include evaluations of long-term benefits, long term risks or side effects, and efficacies in its use as a treatment, as well as explore additional uses and treatment for it. But again, though the Safe Harbor Act would provide for the VA to conduct this research, it does not go far enough.[252] To better facilitate this research, Congress needs to reclassify marijuana as at least a Schedule II substance—legal when prescribed by medical personnel—to better facilitate the VA's research.[253] Though marijuana's classification as a Schedule I is arguably the biggest hurdle in the whole legalization debate, it is also among the least defensible positions within the argument.[254] Despite all the research to the contrary, perhaps the reason for the continued classification of marijuana as a Schedule I substance still lies in the same historical and political justifications as it did in the first instance.[255] After all, it stands to reason that the pharmaceutical industry—which was partially to blame for the prohibition of marijuana in the first instance[256]—stands to lose the most from the legalization of marijuana.[257]

Finally, Congress and the VA need to provide safeguards against other potential indirect effects that may result from veterans' medical marijuana usage. Those issues include, but are not limited to, veterans whose medical marijuana use conflicts with rules of their state or employer, disqualification from other VA benefits such as the VA home loan program, and even disqualification from owning or purchasing a firearm.[258] While solutions to these issues are not as readily apparent or as easily addressed within the limitations of this Comment, it is nonetheless necessary to point out that they must also be addressed as part of any expansive solution to the issue of veterans' access to medical marijuana.

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251. Barlow, *supra* note 84.
252. S. 1183 *supra*, note 5 at § 4.
253. *See* 21 U.S.C. §§ 801–904; *see also* Schneiderman & Mills, *supra* note 117.
254. Schneiderman & Mills, *supra* note 117.
255. *See supra* Subpart II.A.
256. *Id.*
257. *See supra* Subparts III.A, III.B.
258. Barlow, *supra* note 84.

The U.S. owes a debt to its veterans that can never be repaid. At a minimum, the nation has an unyielding obligation "to care for [those] who shall have borne the battle."[259] These words were immortalized by the VA as its official motto in 1959.[260] When we send service members off to war, we equip them with advanced training and combat equipment to ensure their safe return as best we can. That obligation remains once they return home, and while no one is arguing that the nation is wholly failing its veterans, we *are* failing to "care for [those] who shall have borne the battle" with the most advanced *medical treatments*.[261] Albert Einstein is attributed as saying, "[i]nsanity is doing the same thing over and over and expecting different results."[262] The risks associated with our current treatment methods of veterans are well documented, and the results are devastating.[263] Thus, it would be insane *not* to provide veterans with the option of medical marijuana as a safer and potentially more effective alternative treatment for chronic pain and PTSD. The Safe Harbor Act is a big first step in the right direction, and Congress should pass it without further delay. But there is more work to be done and our expectations for treating our veterans should be "higher."

Josh Plummer

259. Abraham Lincoln, President of the United States, Second Inaugural Address (Mar. 4, 1865) ("[L]et us strive on to finish the work we are in, to bind up the nation's wounds, to care for [those] who shall have borne the battle . . . and cherish a just and lasting peace among ourselves and with all nations."). When President Lincoln made his inaugural address in 1865, the nation was bracing for the final throes of a bitterly divisive civil war and preparing for the daunting task of unifying a broken country through reconciliation and reconstruction. With these words, President Lincoln affirmed the government's obligation to care for those injured during the war. As a result, "To care for him who shall have borne the battle," has been the mission statement for the Department of Veterans Affairs since 1959. *The Origin of the VA Motto*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/opa/publications/celebrate/vamotto.pdf (last visited Feb. 21, 2023).

260. *Mission, Vision, Core Values & Goals*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/about_va/mission.asp (last visited Feb. 26, 2022).

261. *Id.*

262. Frank Wilczek, *Einstein's Parable of Quantum Insanity*, SCI. AM. (Sept. 23, 2015), https://www.scientificamerican.com/article/einstein-s-parable-of-quantum-insanity/.

263. *See supra* notes 127–137 and accompanying text.