



## CAN MEDICAL MARIJUANA CARD HOLDERS BUY FIREARMS?

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### BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (ATF) MEMORANDUM

In 2011, the ATF issued a memorandum to gun dealers in which it stated that "Any person who uses . . . marijuana, regardless of whether his or her state has passed legislation authorizing marijuana for medicinal purposes, is an unlawful user of or addicted to a controlled substance and is prohibited by federal law from possessing firearms or ammunition."

In August 2016, the Ninth U.S. Circuit Court of Appeals upheld the federal law, despite Nevada's legalization of marijuana for medical use.

The case is not binding on Connecticut.

### ISSUE

Can medical marijuana card holders buy firearms legally under federal law?

### SUMMARY

In August, a three-judge panel of the Ninth Circuit Court of Appeals affirmed a decision by the U.S. District Court of Nevada, which held that the holder of a medical marijuana card could not purchase a firearm (*Wilson v. Lynch*, F.39---(2016), (2016 WL 4537376)).

The case involved a state marijuana registry cardholder whose request to purchase a firearm was denied because ATF had instructed gun dealers that they should assume that medical marijuana cardholders use marijuana and not sell firearms to them. (Selling firearms in violation of the law is a felony, punishable by up to 10 years imprisonment.)

The woman sued in federal district court, challenging the federal statutes, regulations, and ATF guidance on

several constitutional grounds. The district court dismissed the claims, noting, with regard to her 2<sup>nd</sup> Amendment claim, that the Ninth Circuit had previously upheld the federal ban on gun ownership by illegal drug users.

On appeal, the Ninth Circuit upheld the federal law, ruling that it "furthers the Government's interest in preventing gun violence" because marijuana users "are more likely to be involved in violent crimes." The Court held that banning medical



marijuana card holders from buying firearms does not violate the 2<sup>nd</sup> Amendment. And it does not violate due process rights because “there is no constitutionally protected liberty interest in simultaneously holding a registry card and purchasing a firearm.” The Court also held that the ATF letter does not violate the Administrative Procedure Act (APA) because it is interpretive and thus exempt from APA notice and comment requirements.

## **BACKGROUND**

### ***Federal Law***

Federal law classifies marijuana as a Schedule I controlled substance under the Controlled Substances Act (21 U.S.C. § 812). As a Schedule I controlled substance, marijuana is deemed, under federal law, to have “no currently accepted medical use in treatment” and “there is a lack of accepted safety for use of the . . . substance under medical supervision” (*id.* § 812(b)(1)(B) & (C)).

Under federal law, it is illegal for anyone who is an “unlawful user of or addicted to any controlled substance” [to] “possess . . . or receive any firearm or ammunition” (18 U.S.C. § 922(g)(3)). It is also illegal for anyone “to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . is an unlawful user of or addicted to any controlled substance” (*id.* at 922(d)(3)).

### ***ATF Regulations***

ATF has adopted regulations implementing the federal law. On September 21, 2011, ATF issued a letter to gun dealers stating in part that:

Any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition. . . . if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have “reasonable cause to believe” that the person is an unlawful user of a controlled substance. As such, you may not transfer firearms or ammunition to the person. . . . (Open Letter to all Federal Firearms Licensees dated Sept. 21, 2011).

## **CASE FACTS AND PROCEDURAL HISTORY**

Nevada law exempts the holder of a valid marijuana registration identification card from state prosecution for marijuana-related crimes (Nev. Rev. Stat. § 453A.200). Pursuant to the law, Wilson was issued a marijuana registration identification card. In 2011, she attempted to buy a firearm from a gun dealer who knew she had obtained this card. The dealer refused to sell the firearm to her, in light of the federal law and ATF open letter.

Wilson filed suit in federal district court, alleging (in part) that the ban on firearm sales to illegal drug users in 18 U.S.C. § 922(d)(3), as interpreted by the ATF, violated her right to keep and bear arms under the 2<sup>nd</sup> Amendment, which states that “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” (U.S. Cons. Amend. II).

She also claimed violation of the 1<sup>st</sup> Amendment; 5<sup>th</sup> Amendment’s equal protection, procedural due process, and substantive due process clauses; and Administrative Procedure Act (APA). She sought a permanent injunction barring enforcement of the federal law and derivative regulations, as well as the ATF open letter.

The federal district court dismissed Wilson’s claims, noting that the Ninth Circuit had upheld the federal ban on gun ownership by illegal drug users in *United States v. Dugan* (657 F.3d 998 (9<sup>th</sup> Cir. 2011)), ruling that the 2<sup>nd</sup> Amendment does not protect the right of unlawful drug users to bear arms.

Wilson appealed and the Appeals Court decided to hear most of the claims de novo (as if the court were considering the question for the first time). The case was heard by a three-judge panel of the Ninth District Appeals Court.

## **THE OPINION**

### ***Issue on Appeal***

The central question before the Appeals Court was the constitutionality of barring gun sales to someone based on an assumption that the person is an unlawful drug user because he or she has a medical marijuana card.

Wilson claimed that (1) she was not an unlawful drug user, a convicted felon, a mentally ill person, or someone historically prohibited from possessing firearms under the 2<sup>nd</sup> Amendment and (2) although she had obtained a registry card, she chose not to use medical marijuana and this was her way of making a political statement (*Wilson* at 5).

The court decided at the outset that Wilson lacked standing to challenge the provision of the federal law criminalizing the possession or receipt of a firearm by an unlawful drug user or a person addicted to a controlled substance, because she did not fit into any of the categories. But she had standing to raise her remaining claims challenging provisions banning firearm sales to individuals whom sellers have reasonable cause to believe are drug users (18 U.S.C. § 922(d)(3)), as well as the implementing regulations (27 C.F.R. § 478.11), and ATF open letter and guidance (*id.* at 4).

### **Holding**

**2<sup>nd</sup> Amendment Claim.** The Court acknowledged that 18 U.S.C. § 922(d)(3), the implementing regulations, and the ATF letter burdened Wilson’s core right to possess firearms to defend herself, but not severely, because they bar only the sale of firearms to Wilson—not her possession of firearms. She could have amassed legal firearms before acquiring a card, and the Open Letter would not prevent her from keeping her firearms or using them to protect herself and her home. Also she “could acquire firearms and exercise her right to self-defense at any time by surrendering her registry card, thereby demonstrating to a firearms dealer that there is no reasonable cause to believe she is an unlawful drug user” (*id.* at 6).

Because of this, the Court applied “intermediate scrutiny to determine whether these laws and guidance pass constitutional muster” (*id.* at 6). The “intermediate scrutiny test” requires “(1) the government’s stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective” (*id.* at 6, citing *United States v. Chovan* 735 F.3d 1127, 1139 (9<sup>th</sup> Cir. 2013)).

The Court wrote that “legislative determinations . . . support the link between drug use and violence. . . and it is beyond dispute that illegal drug users, including marijuana users, are likely as a consequence of that use to experience altered or impaired mental states that affect their judgment and that can lead to irrational or unpredictable behavior” (*id.* at 7). The court also noted that “they are also more likely to have negative interactions with law enforcement officers because they engage in criminal activity” (*id.* at 7).

The Court wrote that the government’s evidence linking violence and drug use failed to consider that not all registry card holders are drug users.

The Court continued as follows:

The degree of fit between [the federal law, regulations, and ATF letter] and the aim of preventing gun violence is still reasonable, which is sufficient to survive intermediate scrutiny. The connection between these laws and that aim requires only one additional logical step: individuals who firearms dealers have reasonable cause to believe are illegal drug users are more likely actually to be illegal drug users (who, in turn, are more likely to be involved with violent crimes). With respect to marijuana registry cards, there may be some small population of individuals who—although obtaining a marijuana registry card for medicinal purposes—instead hold marijuana registry cards only for expressive purposes. But it is eminently reasonable for federal regulators to assume that a registry cardholder is much more likely to be a marijuana user than an individual who does not hold a registry card (*id.* at 7).

Because the degree of fit between [18 U.S.C. § 922\(d\)\(3\)](#), [27 C.F.R. § 478.11](#), and the Open Letter and their purpose of preventing gun violence is reasonable but not airtight, these laws will sometimes burden—albeit minimally and only incidentally—the Second Amendment rights of individuals who are reasonably, but erroneously, suspected of being unlawful drug users. However, the Constitution tolerates these modest collateral burdens in various contexts, and does so here as well (*id.* at 8).

***First Amendment Claim.*** In determining whether the ATF open letter and the federal law and regulations violated the 1<sup>st</sup> Amendment, the court applied the intermediate scrutiny test because it determined that “any burden the Government’s anti-marijuana and anti-gun violence efforts place on Wilson’s expressive conduct is incidental . . . .” (*id.* at 8).

Wilson alleged that she “intended to convey a particularized message in support of medical use of marijuana and argued that in the midst of a hotly contested debate over the legalization of marijuana, viewers of the card would understand the message” (*id.* at 8). While the court agreed that the conduct falls within the scope of the 1<sup>st</sup> Amendment, it said “other actions that could give a firearms dealer reasonable cause to believe that Wilson or another individual, was an unlawful drug user are not necessarily expressive. For that reason, Wilson’s 1<sup>st</sup> Amendment claim rests only on her acquisition of a registry card” (*id.* at 8).

According to the court, the ATF open letter does not violate the 1<sup>st</sup> Amendment for the following reasons:

1. The government may constitutionally regulate gun sale and possession (*id.* at 9).
2. The Open Letter furthers the aim of preventing gun violence. "Registry cardholders are more likely to be marijuana users, and illegal drug users, including marijuana users, are more likely to be involved in violent crimes. Accordingly, preventing those individuals who firearm dealers know have registry cards from acquiring firearms furthers the Government's interest in preventing gun violence" (*id.* at 9).
3. "Neither the Government's efforts to reduce gun violence nor its efforts to curtail marijuana use are related to the suppression of free expression" (*id.* at 9).
4. "The Open Letter burdens only a single form of expression in support of medical marijuana use—the holding of a registry card. Otherwise Wilson may advocate vigorously and as publicly as she wishes for medical marijuana use while possessing firearms. Moreover, the burden that the Open Letter does place on this single form of expression is minimal. . . ." (*id.* at 9).

***Fifth Amendment Claim.*** Wilson argued that the law, regulations, and ATF open letter violated her 5<sup>th</sup> Amendment procedural due process and equal protection rights in that it deprived her of her liberty interest in simultaneously carrying a registry card and purchasing a firearm. She contended that the deprivation occurs without any process—only a determination that she holds a card (*id.* at 10).

The court ruled that the laws, regulations, and open letter do not violate the 5<sup>th</sup> Amendment because Wilson "does not have a constitutionally protected liberty interest in simultaneously holding a registry card and purchasing a firearm" (*id.* at 10).

They also do not violate the equal protection clause and "do not impermissibly interfere with the exercise of any fundamental rights" because when subjected to rational basis scrutiny, the statute, regulations, and open letter "are reasonably related to reducing gun violence" (*id.* at 10). (To pass the rational basis test, a law must be rationally related to furthering a legitimate government interest. This is the lowest standard of review.)

**APA Challenge.** Wilson contended that the ATF open letter violated the APA because it is a legislative rule that expands the federal definition of “unlawful user” of illegal drugs to include registry cardholders who use marijuana and therefore must go through notice and comment procedures.

The court rejected this argument, saying that:

the Open Letter does not make a blanket assertion that all registry card users are marijuana users, it simply clarifies that a firearms dealer has “reasonable cause to believe” an individual is an unlawful user if she holds a registry card. This inference falls well within the scope of 27 C.F.R. § 478.11, which states that “[a]n inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time (*id.* at 12).

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