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**HOOPS, GRIDIRON, AND MEDICAL MARIJUANA: A BLUNT  
ANALYSIS OF HOW A HALF-BAKED NCAA REGULATION  
MAY SOON GO UP IN SMOKE**

KELSEY MISSELDINE<sup>∞</sup>

**INTRODUCTION**

The National Collegiate Athletic Association (“NCAA”) generates over a billion dollars in revenue each year; this billion-dollar business grants the NCAA significant power. The NCAA permits colleges to participate in its lucrative organization; both parties subsequently profit millions of dollars.<sup>1</sup> This contractual relationship binds participating institutions and their student-athletes to the NCAA’s rules and regulations. Accordingly, student-athletes are deprived of their constitutionally-guaranteed due process rights to question these regulations.

The NCAA, as a private association, has thus far been allowed to enact bylaws contradicting public policy. The policies significantly affect athletes’ lives, including their wellness and preferences for medical treatment.<sup>2</sup> Collegiate institutions, and by extension their student-athletes, consent to this governance as the price to participate in the organization. Although the NCAA lacks legal recourse as enforcement, it may impose sanctions or revoke schools’ ability to participate in the NCAA entirely. Schools and student-athletes are therefore left with no meaningful opportunity and little bargaining power to alter the NCAA’s regulations if they wish to profit from participating.

NCAA regulations reach further than a football field’s sidelines and the 94 feet of a basketball court. For example, medical marijuana is currently banned as a medical treatment option for those who elect to participate in the NCAA, even if that

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<sup>∞</sup> J.D. Candidate, Class of 2021, Sandra Day O’Connor College of Law at Arizona State University

<sup>1</sup> Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

<sup>2</sup> *Id.*

treatment is legal within the state.<sup>3</sup> Although this restriction is within the NCAA's purview, the NCAA should not have the unfettered power to dictate medical treatment options for athletes, specifically treatments that do not improperly enhance performance.<sup>4</sup> Ultimately, collegiate institutions and state governments are ceding too much power to the NCAA. A student-athlete lacks meaningful bargaining power and subsequently must abide by the NCAA's rigid ban on medical marijuana. Intervention, whether through legislative efforts, contractual limits, or personal rights regarding medical choices, needs to be considered.

The NCAA medical marijuana ban is based on insufficient data and outdated public sentiment.<sup>5</sup> Because the government has strictly controlled marijuana over the past century, marijuana's medicinal benefits have not been properly analyzed. In the past decade, numerous states have passed laws allowing medical marijuana use.<sup>6</sup> Subsequently, further testing and data have slowly become available. The ban was originally enacted in response to the United States' "War on Drugs," an arguably minority-focused program.<sup>7</sup> The basis for such an intrusive rule should be grounded in the protection of student-athletes, not perpetuation of an outdated and racially discriminatory federal focus.

Federal and state governments have the power and obligation to protect citizens from exposure to severely unhealthy practices that could affect the user or those around them.<sup>8</sup> Laws are enacted to ensure these protections. Implementing new laws is

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<sup>3</sup> Abby Schnable, Tim Edmonds, Lu Calzada & Nick Schultz, *Even with Legal Pot, Student-Athletes Face Sober Future*, LOYOLA PHOENIX, (Apr. 16, 2019, 9:50 AM), <http://loyolaphoenix.com/2019/04/even-with-legal-pot-student-athletes-face-sober-future/>.

<sup>4</sup> *Performance-Enhancing Drugs*, NCAA, <https://www.ncaa.org/sport-science-institute/performance-enhancing-drugs> (last visited Apr. 11, 2021). The NCAA bans specific drugs to protect athletes' health and promote fair play.

<sup>5</sup> *A Brief History of the Drug War*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/issues/brief-history-drug-war> (last visited Mar. 5, 2021).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *See generally What Does the FDA Regulate*, U.S. FOOD AND DRUG ADMINISTRATION, <https://www.fda.gov/about-fda/fda-basics/what-does-fda-regulate> (last visited Mar. 5, 2021).

necessary when, based on reliable data, individuals have inadequate bargaining power to protect choices regarding their own health. This type of protective legislation is presently evidenced by restrictions on using certain medications while driving, accreditation requirements for physicians, and seat belt laws. However, the NCAA should not play a protective role without rational justification and limits. Medical diagnoses and treatments are private matters.<sup>9</sup> An amateur sports organization should not have the power to unilaterally deprive student-athletes the right to use a legally permissible medical treatment supported by qualified medical professionals. Further, as public sentiment and state laws regarding medical marijuana continue to develop and advance, the NCAA should be required to reconsider its ban and to develop workable guidelines. Student-athletes are citizens endowed with certain rights, including making their own medical decisions. Compelling athletes to give up a decision-making right regarding medical treatments that do not impact athletic performance as the price for their participation in college athletics needs to be re-examined.

This Note analyzes the NCAA conduct rules prohibiting student-athletes' medical marijuana use when participating in NCAA-sanctioned athletics. The first section focuses on the history of medical marijuana usage in the United States. The next section discusses medical marijuana use's legal history and presents the current laws, which shape the modern landscape for this emerging and controversial issue. Subsequently, this Note will focus on the specific rules, regulations, and implications of the NCAA controlling medical marijuana usage by student-athletes. The legal protections and reasoning both for and against the NCAA ban on medical marijuana are debated and resolved. Ultimately, a proposal for state action, specifically by California and its powerhouse schools, is presented as a prototype means of abolishing this overreaching NCAA rule currently depriving student-athletes the right to obtain legal medical treatment.

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<sup>9</sup> 42 U.S.C. § 1320D (2010)

## I. HIGH TIMES: MEDICAL MARIJUANA'S HISTORIC USAGE IN THE UNITED STATES

### A. MARIJUANA'S DEEP ROOTS IN AMERICAN HISTORY

The debate over marijuana legalization is long-standing and deals with major concerns regarding federalization.<sup>10</sup> Federal and state legislation allowed legal marijuana cultivation and consumption for a majority of American history.<sup>11</sup> The cannabis plant played a significant role in the United States' early economy.<sup>12</sup> The hemp industry accounted for a large portion of United States exports and created numerous jobs.

In the mid-1800s, American botanists and physicians realized marijuana's medicinal effects and started actively researching its medical potential.<sup>13</sup> Subsequently, medical marijuana was commonly prescribed throughout the United States for almost a century. In the late 19th century, a United States medical agency published hemp extracts' medical benefits and commonly prescribed uses, encouraging widespread public use.<sup>14</sup> At this time, cannabis extracts were prescribed openly and produced by leading pharmaceutical manufacturers, such as Eli Lilly and Squibb.<sup>15</sup> These pharmaceutical companies marketed marijuana products as miracle drugs, sparking further interest and research.<sup>16</sup> By the 1840s, pharmaceutically produced cannabis products were readily available at local drug stores and pharmacies across the United States. Researchers were free to use cannabis plants in determining their beneficial medical uses. Further, the government implemented taxes based on marijuana

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<sup>10</sup> MARK EDDY, CONG. RESEARCH SERV., RL33211, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES 1 (2010).

<sup>11</sup> *Id.*

<sup>12</sup> Adam Rathge, *Pondering Pot: Marijuana's History and the Future of the War on Drugs*, ORGANIZATION OF AMERICAN HISTORIANS, <https://www.oah.org/tah/issues/2015/august/pondering-pot/> (last visited Jan. 26, 2020).

<sup>13</sup> *Id.*

<sup>14</sup> H. C. Wood, Joseph P. Remington & Samuel P. Sadtler, THE DISPENSATORY OF THE UNITED STATES OF AMERICA 341 (15th ed. 1885).

<sup>15</sup> Adam Rathge, *supra* note 12.

<sup>16</sup> *Id.*

distribution and required detailed recordkeeping—similar to the practices used today by states that have legalized marijuana.<sup>17</sup>

## B. BREAKING BUD: THE DARK AGE OF MARIJUANA IN THE UNITED STATES

Government influenced change in public sentiment halted medical marijuana use and research. Widespread use was terminated, sending medical marijuana into a dark age where little progress in research and understanding of its medicinal properties were thoroughly explored. In the early 1900s, states began to criminalize marijuana. Scholars have noted this change in policy was strongly influenced by prevalent racism.<sup>18</sup> Marijuana was commonly associated with crime and migrant workers of color.<sup>19</sup> The then-Commissioner of the Federal Bureau of Narcotics, Henry Anslinger, heavily pushed a campaign against marijuana.<sup>20</sup> Anslinger claimed marijuana incited minority unrest, and blamed the drug for heinous crimes committed by minorities.<sup>21</sup>

Criminalization's effects exemplify this dubious intent through the disparate impact on racial minorities.<sup>22</sup> Most charges for marijuana possession and usage are against racial minorities.<sup>23</sup> Additionally, proponents supporting criminalization believed

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<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., Martin D. Carcieri, *Obama, the Fourteenth Amendment, and the Drug War*, 44 AKRON L. REV. 303, 325 (2011) (“U.S. marijuana prohibition has long been motivated largely by racism”).

<sup>19</sup> See, e.g., THE NATIONAL COMMISSION ON MARIJUANA DRUG ABUSE, *Marihuana: A Signal of Misunderstanding* 16 (1972), available at <http://babel.hathitrust.org/cgi/pt?id=mdp.39015015647558;view=1up;seq=5> (“As the Mexicans spread throughout the West and immigrated to the major cities, some of them carried the marihuana habit with them. The practice also became common among the same urban populations with whom opiate use was identified.”).

<sup>20</sup> *Taxation of Marihuana: Hearing on H.R. 6385 Before the H. Comm. on Ways & Means*, 75th Cong. 14 (1937).

<sup>21</sup> *Id.*

<sup>22</sup> Carcieri, *supra* note 18, at 325.

<sup>23</sup> *Marijuana Arrests by the Numbers*, ACLU, <https://www.aclu.org/gallery/marijuana-arrests-numbers>.

other superior alternatives existed, even though research and case studies available at the time did not support this reasoning.<sup>24</sup>

In 1937, the United States government attempted to regulate marijuana usage through the Marijuana Tax Act.<sup>25</sup> The Act removed marijuana from the list of federally encouraged medical treatments.<sup>26</sup> Marijuana use was taxed and regulated, but the legislation did not make medical marijuana use illegal.<sup>27</sup> However, the legislation discouraged doctors from prescribing the drug because significant taxes were levied on its distribution. These taxes led to a rapid decline in prescribing and using medical marijuana in the United States.<sup>28</sup> The stringent regulations and skewed public perception started the decline in researching marijuana's potential medical benefits and its true effects on users. This decline marked the beginning of the Dark Age for medical marijuana research.

### C. MARIJUANA FEDERAL DRUG CLASSIFICATION: BUZZ KILL

New major marijuana regulations did not appear until the 1970s.<sup>29</sup> President Richard Nixon initiated the infamous United States “War on Drugs,” which the modern government still perpetuates.<sup>30</sup> The Controlled Substance Act of 1970 (“CSA”) was

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<sup>24</sup> Martin A. Lee, *SMOKE SIGNALS: A SOCIAL HISTORY OF MARIJUANA-MEDICAL, RECREATIONAL AND SCIENTIFIC*, 3—5, 13—14, 20—21 (2012).

<sup>25</sup> Lisa N. Sacco & Kristin Finklea, *CONG. RSCH SERV.*, R43164, *STATE MARIJUANA LEGALIZATION INITIATIVES: IMPLICATIONS FOR FEDERAL LAW ENFORCEMENT* 3 (2013) (“Until 1937, the growth and use of marijuana was legal under federal law. The federal government unofficially banned marijuana under the Marihuana Tax Act of 1937. . . .”).

<sup>26</sup> *MARIJUANA TAX ACT OF 1937* § 6(b)(1)–(2), 50 Stat. 551 (1937).

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

<sup>28</sup> Martin A. Lee, *supra* note 25.

<sup>29</sup> *CONTROLLED SUBSTANCES ACT OF 1970*, Pub. L. No. 91–513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 812 (2012)).

<sup>30</sup> *A Brief History of the Drug War*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/issues/brief-history-drug-war> (last visited Nov. 10, 2019).

passed during this “war” and is still in effect today.<sup>31</sup> The CSA classified drugs in a tiered system, containing five drug “schedules,” each with their own regulations. The Drug Enforcement Agency (“DEA”) created this tiered system based on a drug’s potential for abuse and medical value.<sup>32</sup> A drug’s potential for abuse is determined according to personal health hazards and the potential to create risks to society.<sup>33</sup> The medical value is based on reliable research into the substance’s medical uses.<sup>34</sup> A major flaw in this classification scheme is medical marijuana research had essentially ceased over the past few decades. Furthermore, the research available at the time was incomplete, primarily due to the government-induced negative public sentiment, rendering available research outdated and essentially useless.<sup>35</sup>

In this system, a Schedule I narcotic is deemed to be the most dangerous and faces the strictest limitations.<sup>36</sup> A Schedule I classification means no medical uses for the substance exist, and it has a high potential for abuse.<sup>37</sup> Schedule II-V drugs are deemed to have some beneficial medical uses, but range in classification because the substance has the potential to be abused.<sup>38</sup> Marijuana was classified as a Schedule I drug along with serious narcotics such as heroin and LSD.<sup>39</sup> Marijuana is classified as Schedule I because of high likelihood of addiction, no safe dosage, and *no accepted medical use*.<sup>40</sup> It is questionable how the DEA concluded

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<sup>31</sup> CONTROLLED SUBSTANCES ACT OF 1970, Pub. L. No. 91–513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 812 (2012)).

<sup>32</sup> German Lopez, *The Federal Drug Scheduling System, Explained*, VOX, <https://www.vox.com/2014/9/25/6842187/drug-schedule-list-marijuana> (last updated Aug. 11, 2016).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Drug Scheduling*, UNITED STATES DRUG ENFORCEMENT ADMIN., <https://www.dea.gov/drug-scheduling> (last visited April 11, 2021).

<sup>38</sup> *Id.*

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

<sup>40</sup> 21 U.S.C. §§ 812(b)(1), 812(c)(c)(10) (2012); *see also Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131, 1133 (D.C. Cir. 1994) (“A drug is placed in Schedule I if (1) it ‘has a high potential for abuse,’ (2) it has ‘no currently accepted medical use in treatment in the United States,’ and (3) ‘there is a lack of

marijuana had no medical use considering medical marijuana's robust history in the United States. The factors and influences leading to marijuana's classification were based primarily on the unsubstantiated negative public and government sentiment as opposed to the drug classification scheme that bases determinations on benefits versus harm.

Because marijuana was classified as a Schedule I narcotic, doctors could no longer prescribe marijuana as a medical treatment. Schedule I drugs are only available for research.<sup>41</sup> Unfortunately, researchers must go through complicated bureaucratic processes to obtain marijuana for research, which inhibits progress in testing and understanding marijuana's potential medical benefits.<sup>42</sup> Accordingly, research and testing of medical marijuana was stagnant for many decades. Until the past few years, only one location, a University of Mississippi farm, had federal authorization to cultivate marijuana, and it was limited to specific research.<sup>43</sup> This Dark Age period in marijuana's history has allowed for public opinion and criminalization to run awry from the truth.

Numerous attempts to modify the laws and misinformed Schedule I classification have been pursued, but all have failed.<sup>44</sup> Congress can pass a law to change marijuana's scheduling, but has declined to exercise its power. The United States attorney general also has the power to initiate a review process to reconsider

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accepted safety for use of the drug . . . under medical supervision.”) (quoting 21 U.S.C. § 812(b)(1) (1988)).

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

<sup>42</sup> See Lindsay Stafford Mader, *The State of Clinical Cannabis Research in the United States*, 85 HERBALGRAM J. AM. BOTANICAL COUNCIL 64, 64–67 (2010) (describing the DEA and NIDA's obstruction of medical marijuana research).

<sup>43</sup> German Lopez, *The Federal Drug Scheduling System, Explained*, VOX, <https://www.vox.com/2014/9/25/6842187/drug-schedule-list-marijuana> (last updated Aug. 11, 2016).

<sup>44</sup> See, e.g., Marijuana Revenue and Regulation Act, S 776, 115th Cong. (2017) (requiring the decriminalization of marijuana); Ending Federal Marijuana Prohibition Act of 2017, H.R. 1227, 115th Cong. (2017) (proposing the federal deregulation of marijuana and removal from drug schedules); H.R. 2020 115th Cong. (2017) (reclassifying marijuana from Schedule I to Schedule III, thus permitting medical use).



marijuana's classification as a Schedule I narcotic.<sup>45</sup> In such a case, evidence could be submitted regarding more accurate and updated research into marijuana and its medical value. This process has been successfully used in the past. In 2014, this exact process led to hydrocodone products, or opioid-based prescription painkillers, to be rescheduled from a Schedule III drug to a Schedule II drug. Updated research showed the increased potential for abuse and thus led to its reclassification. Thus, if modern research regarding marijuana's medical benefits were presented, marijuana could be properly reclassified.<sup>46</sup> However, this research is dependent on scientists and health professionals obtaining enough marijuana to perform proper research; this ability is hindered as a result of the Schedule I classification and subsequent bureaucratic limitations. Marijuana is stuck in limbo due to the overreaching restrictions enacted by the federal government.

#### D. BUDDING LEGISLATION: THE EVOLUTION OF UNITED STATES MARIJUANA LAWS IN THE PAST TEN YEARS

In the past ten years, numerous states have legalized medicinal and recreational marijuana.<sup>47</sup> Thirty-four states and the District of Columbia passed legislation permitting medical marijuana use.<sup>48</sup> Additionally, fifteen states and the District of Columbia have extended marijuana reform to allow for recreational marijuana use.<sup>49</sup> Medical marijuana is currently recognized as a treatment for decreasing pain and inflammation, muscle control issues, epileptic seizures, glaucoma, mental illness, and addiction.<sup>50</sup>

The Food and Drug Administration ("FDA") has not approved marijuana as a medicinal plant, but it has approved two

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<sup>45</sup> German Lopez, *The Federal Drug Scheduling System, Explained*, VOX, <https://www.vox.com/2014/9/25/6842187/drug-schedule-list-marijuana> (last updated Aug. 11, 2016).

<sup>46</sup> *Id.*

<sup>47</sup> *Cannabis Policy in the United States*, MARIJUANA POLICY PROJECT <https://www.mpp.org/issues/legalization/map-of-state-marijuana-laws/> (last visited Mar. 5, 2021).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Marijuana as Medicine*, NATIONAL INSTITUTE ON DRUG ABUSE, <https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine> (last revised July 2019).

medications containing cannabinoids based on modern research.<sup>51</sup> Research continues to help determine more viable medical uses for marijuana. The National Institutes of Health (“NIH”), one of the world’s foremost medical research centers, is currently funding and conducting such research. New studies have shown success in utilizing marijuana to treat cancer, immune diseases like HIV and multiple sclerosis, and further address mental disorders.<sup>52</sup>

There is a common stigma in America that marijuana users seek medical marijuana for illegitimate illnesses.<sup>53</sup> This stigmatization should not prevent individuals who will legitimately benefit from marijuana use from obtaining necessary medical treatment. The same argument could be used regarding legal opioids and their abuse by patients; this should not discount all the people who legitimately need the medical treatment.<sup>54</sup> The argument for potential abuse and illegitimately obtaining marijuana is not enough to impose a complete ban on a potentially beneficial medical treatment.

Despite federal limitations, states have recognized the benefits medical marijuana can provide to its citizens and have worked hard to allow its usage. The decriminalization process in each state is not simple or cheap.<sup>55</sup> States have invested millions of dollars through legislation, drafting, research, voting, and implementation processes to ensure its citizens have access to medical marijuana.<sup>56</sup> The great lengths taken by state governments speak to the importance and value citizens and states place in medical marijuana use. Many medical marijuana critics claim the costs to the state far outweigh the tax benefit and revenues generated for the state.<sup>57</sup> Even if those claims are true, it is further

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See generally James G. Hodge, Jr. et al., *Redefining Public Health Emergencies: The Opioid Epidemic*, 58 *Jurimetrics J.* 1—15 (2017).

<sup>55</sup> CENTENNIAL INSTITUTE, *ECONOMIC AND SOCIAL COSTS OF LEGALIZED MARIJUANA* 3—4 (2018), <https://centennial.ccu.edu/wp-content/uploads/2019/03/Economic-and-Social-Costs-of-Legalized-Marijuana-v1.3.pdf>

<sup>56</sup> *Id.*

<sup>57</sup> Kenny Chan, *The Highs and Lows of the Marijuana Industry: Weeding Through the Legal History, Financial, and Bankruptcy Issues That Marijuana Businesses Face*, 4 *Bus. & Bankr. L.J.* 115 (2016-2017).

evidence that while costs increased, the state and its citizens find legalization worth the cost due to marijuana's medicinal value.

Although medical marijuana has been legalized by certain states, employers and private organizations may still prohibit employees from using marijuana and enforce these policies through random drug testing.<sup>58</sup> Thus, medical marijuana users are put in a tough situation. At the state level, their medical use is protected, but federally they have no protection. As more states begin to legalize marijuana, the impact on private associations will increase and these changes must be addressed, particularly in sports.

## II. NCAA RULES AND REGULATIONS REGARDING MEDICAL MARIJUANA

### A. NCAA'S HALF-BAKED HANDBOOK POLICIES REGARDING MEDICAL MARIJUANA

In 1986, following the United States' policy implementing a "War on Drugs," the NCAA passed legislation requiring its student-athletes to submit to drug testing.<sup>59</sup> Walter Byers, the then-NCAA Executive Director, strongly advocated for the new legislation. During the 1986 NCAA Convention, Byers quoted Attorney General Edwin Meese's statement that the Justice Department was losing the "War on Drugs."<sup>60</sup> Evidently, the NCAA's marijuana ban was more related to the federal government's new focus on combating drugs than protecting student-athletes. Thus, as public sentiment regarding medical marijuana changes, the NCAA must adjust its policies to reflect these changes.

To participate in an NCAA sport, every student-athlete is required to sign the Student-Athlete Statement.<sup>61</sup> By signing the

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<sup>58</sup> *State-By-State Workplace Drug Testing Laws*, AMERICAN CIVIL LIBERTIES UNION ("ACLU"), <https://www.aclu.org/other/state-workplace-drug-testing-laws> (last visited Mar. 7, 2021).

<sup>59</sup> Tracy Dodds, *NCAA Ratifies Drug Tests for Championship Events*, LOS ANGELES TIMES (Jan. 15, 1986, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1986-01-15-sp-28305-story.html>.

<sup>60</sup> *Id.*

<sup>61</sup> NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2019-2020 NCAA MANUAL 10 (2019), <http://www.ncaapublications.com/product/downloads/D120.pdf> [hereinafter NCAA MANUAL].

Statement, student-athletes verify they meet NCAA eligibility requirements and consent to NCAA bylaws. Each school year, students are also required to sign a drug testing consent form.<sup>62</sup> If a student fails to sign the Student-Athlete Statement or the drug testing consent form, he or she is ineligible to participate.<sup>63</sup>

The NCAA bylaws ban cannabinoid uses.<sup>64</sup> Cannabinoids are defined to include marijuana, tetrahydrocannabinol (“THC”), and synthetic cannabinoids.<sup>65</sup> The ban is not limited to an athlete’s respective NCAA-scheduled season. Many sports require student-athletes to participate in off-season conditioning and training.<sup>66</sup> Accordingly, the NCAA authorizes student-athletes to be drug tested year-round to ensure compliance with its regulations.<sup>67</sup> Ultimately, students are required to abstain from using prescribed medical marijuana year-round if they wish to participate in an NCAA sport.

Either the NCAA or the academic institution can implement random drug testing.<sup>68</sup> When players sign the Student-Athlete Statement, they waive the right to refuse a drug test.<sup>69</sup> From the outset, student-athletes forfeit any ability to question the NCAA regulations or implementation processes.

Pursuant to NCAA Bylaw 18.4.1.4.2, a student-athlete is ineligible to compete in any sport for at least 50% of the season if they test positive for a cannabinoid.<sup>70</sup> Thereafter, the student-athlete remains ineligible until he or she tests negative for a cannabinoid.<sup>71</sup> Studies show marijuana can remain at a detectable level in a person’s system for more than thirty days, depending on

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<sup>62</sup> *Id.* at 80.

<sup>63</sup> *Id.*

<sup>64</sup> NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2019-2020 NCAA BANNED SUBSTANCES (2019), <http://www.ncaa.org/sport-science-institute/topics/2019-20-ncaa-banned-substances> [hereinafter NCAA BANNED SUBSTANCES].

<sup>65</sup> *Id.*

<sup>66</sup> NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA COUNTABLE ATHLETICALLY RELATED ACTIVITIES (2019), <https://www.ncaa.org/sites/default/files/20-Hour-Rule-Document.pdf>.

<sup>67</sup> NCAA MANUAL, *supra* note 61, at 332.

<sup>68</sup> *Id.*

<sup>69</sup> NCAA MANUAL, *supra* note 61, at 8.

<sup>70</sup> *Id.* at 351-52.

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

usage rates.<sup>72</sup> Student-athletes using legal medical marijuana thus must suspend their use for up to a month before a season begins to qualify for participation. However, many sports are “in-season” for most of the year, including the summer recess. Therefore, student-athletes cannot freely use their medical prescriptions without fearing consequences.<sup>73</sup>

A student-athlete is permitted to appeal a positive drug test.<sup>74</sup> However, the appeal process takes several months, during which the student-athlete remains ineligible to participate in his or her respective sport. The NCAA does allow a student-athlete to apply for a medical exception to use banned drugs.<sup>75</sup> However, the Board of Governors can grant or deny an exception.<sup>76</sup> Notably, no medical professionals are required to be on the Board of Governors. Therefore, whether the Board has the qualifications to make medical determinations for student-athletes is questionable at best.

Further, the concern regarding unqualified decision-makers is essentially void in relation to medical marijuana appeals because the Bylaw specifically disallows medical exemptions for cannabinoids.<sup>77</sup> Student-athletes will not be granted a medical marijuana exemption. The medical exception rule, 18.4.1.4.7, was revised in January 2019.<sup>78</sup> At the time, more than half of the states already legalized medical marijuana usage, yet the NCAA knowingly failed to adjust its policies.<sup>79</sup> To date, student-athletes cannot participate in the NCAA while simultaneously using medical marijuana.

The NCAA bylaws reach into many health aspects aside from medical marijuana. For example, the bylaws technically require a student-athlete to report the use of over-the-counter cold

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<sup>72</sup> Zawn Villines, *How Long Can You Detect Marijuana in the Body*, MED. NEWS TODAY (Jan. 29, 2019), <https://www.medicalnewstoday.com/articles/324315.php#marijuana-detection-windows>.

<sup>73</sup> NCAA MANUAL, *supra* note 61, at 332.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 353.

<sup>79</sup> *State Marijuana Laws - U.S. Map*, GOVERNING (June 25, 2019), <https://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html>.

medicine.<sup>80</sup> Additionally, under the current bylaws, a player may not receive anesthesia without consent, as it is classified as a “drug.”<sup>81</sup> In practice, a student-athlete is technically required to inform the NCAA about an upcoming surgery and obtain an exemption before undergoing the operation. This bylaw oversteps the boundaries typically maintained by private organizations. Overall, these restrictions are particularly concerning, as the restrictions affect teenagers and young adults who are unable to properly advocate for themselves. Student-athletes deserve the opportunity to make informed medical decisions without having to consult with a private athletic organization.

The NCAA’s medical marijuana policy was created decades ago, based on an outdated government-focus on drugs in the United States. A policy with such wide-reaching implications should be rooted in protecting student-athletes, modern laws, and public policy.

## B. INAPPROPRIATE POSITIONS OF POWER INDICATE IMPROPRIETY IN NCAA

The marijuana ban was established by the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports.<sup>82</sup> Twenty-three members comprise the Committee; only three of whom are medical professionals. The Committee also includes an expert in drug testing and another in drug education. Less than 25% of the Committee is comprised of professionals with any medical understanding or rationale for the marijuana ban. Further, none of the required medical professionals or other committee members are scientists, researchers, or doctors with specialized knowledge regarding marijuana’s medical effects on a student-athlete.<sup>83</sup> Thus, what authority does this committee have to be making medical decisions on the student-athletes’ behalf?

The NCAA’s legislation requires a student-athlete check with the athletic training staff before using any substance,<sup>84</sup> yet another inappropriate exercise of power over the student-athlete’s

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<sup>80</sup> Karen E. Crummy, *Urine or You’re Out: Student-Athletes’ Right of Privacy Stripped in Hill v. NCAA*, 29 U.S.F. L. Rev. 197, 224 (1994-1995).

<sup>81</sup> NCAA MANUAL, *supra* note 61, at 332.

<sup>82</sup> NCAA MANUAL, *supra* note 61, at 80.

<sup>83</sup> *Id.*

<sup>84</sup> NCAA BANNED SUBSTANCES, *supra* note 64.

health. Physical therapists usually comprise an NCAA institution's athletic training staff.<sup>85</sup> A primary physician should be on-staff or contracted, but it is not required. Therefore, the medical professionals most likely to be advising the student about medical marijuana use are Doctors of Physical Therapy ("DPT"), not Doctors of Medicine ("MD"). While physical therapists have some understanding of pain management, they are not situated to question a doctor's proscribed treatment for a student. It is inappropriate and unreasonable for the NCAA to expect underqualified staff to make recommendations regarding unfamiliar treatment options.

### C. NCAA'S HIGH-HANDED INTEREST IN CREATING THE MEDICAL MARIJUANA BAN

As a private trade association, the NCAA has the right to create bylaws banning substances they deem harmful.<sup>86</sup> Therefore, the NCAA, as a private entity, does not need to support its bylaws with legal rationale. However, NCAA policies may more easily be applied and enforced if they mesh with legitimate legal principles. The NCAA's power to make and enforce regulations is limited by federalism, ethical concerns, and required due process.

The NCAA has no power to enforce a regulation contrary to federal or state law.<sup>87</sup> When a state law legalizes medical marijuana, the NCAA should not have the power to enforce their ban against students in that state. States are in a better position to enact regulations in their citizens' best interests; citizens, not private associations with an ulterior agenda, vote on state regulations. The NCAA's ban mimics existing federal medical marijuana legislation, which legitimizes the NCAA's policy to

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<sup>85</sup> *Athletics Health Care Administration Best Practices*, NATIONAL COLLEGIATE ATHLETICS ASSOCIATION, <http://www.ncaa.org/sport-science-institute/athletics-health-care-administration-best-practices-0> (last visited Nov. 11, 2019).

<sup>86</sup> Marc Edelman, *Why NCAA Likely Can't Keep California Schools From Allowing Athletes to Profit from Their Names and Likeness*, FORBES (Jun. 25, 2019, 11:10 AM), <https://www.forbes.com/sites/marcedelman/2019/06/25/ncaa-cant-legally-ban-california-schools-for-allowing-athletes-to-profit-from-their-names-images-and-likenesses/#79874476273f>.

<sup>87</sup> *Id.*

some extent but not entirely. No legal basis permits the NCAA's regulations to transcend state law.

A trade association must enact regulations in good faith.<sup>88</sup> Good faith is a common expectation in contracts and business law.<sup>89</sup> Generally, "good faith" requires parties to participate in fair dealing, and maintain an honest purpose, faithful performance of duties, and observing fair dealing standards.<sup>90</sup> The NCAA's ban on medical marijuana does not entirely adhere to the good faith standard.

The medical marijuana ban's purpose is questionable. The NCAA alleges the marijuana ban exists because marijuana is classified as a Schedule I banned substance, but this rationale neglects evolving state laws.<sup>91</sup> The NCAA policy should aim to protect student-athletes, not take away their right to make medical decisions.

The NCAA Board of Governors, the highest governance body in the NCAA, is responsible for ensuring the NCAA operates in a manner consistent with its stated purposes, policies, and principles.<sup>92</sup> Any legislation enacted by the NCAA must be designed to advance one of their stated sixteen principle objectives.<sup>93</sup> The stated principles include student-athlete well-being (specifically including health and safety),

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<sup>88</sup> *Id.*

<sup>89</sup> *Good Faith*, Legal Information Institute: CORNELL LAW SCHOOL, [https://www.law.cornell.edu/wex/good\\_faith](https://www.law.cornell.edu/wex/good_faith) (last visited Mar. 5, 2021).

<sup>90</sup> Catherine Pastro Kelly, *What You Should Know about the Implied Duty of Good Faith and Fair Dealing*, AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2016/duty-of-good-faith-fair-dealing>.

<sup>91</sup> NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA SUBSTANCE ABUSE PREVENTION AND INTERVENTION: AN ATHLETICS TOOL KIT, 22 (2017), [https://www.ncaa.org/sites/default/files/Substance%20Abuse%20Prevention%20Tool%20Kit\\_WEB\\_20170720.PDF](https://www.ncaa.org/sites/default/files/Substance%20Abuse%20Prevention%20Tool%20Kit_WEB_20170720.PDF).

<sup>92</sup> *NCAA Board of Governors*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaa.org/governance/committees/ncaa-board-governors> (last visited Nov. 13, 2019).

<sup>93</sup> *The 16 Principles of Conduct for Intercollegiate Athletics*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaa.org/about/16-principles-conduct-intercollegiate-athletics> (last visited Nov. 13, 2019).



nondiscrimination, sportsmanship and ethical conduct, and competitive equity.

It is not in the student-athletes' best interests to prohibit the use of medical marijuana legally prescribed by a doctor. Moreover, restricting marijuana use is discriminatory. If the NCAA is truly concerned with student-athletes' health and well-being, it should not deny them the ability to receive treatments prescribed by a doctor.

A former NCAA athlete, Treyous Jarrells, was required to make the difficult decision between participating in the NCAA or continuing medical marijuana use.<sup>94</sup> Jarrells decided to no longer participate in the NCAA and continue to receive the medical treatment he required. In an interview, Jarrells noted his teammates would take ten ibuprofen pills a day, destroying their livers. The NCAA accepts this questionable medical decision that could severely impact athletes' health, while Jarrells's legal medical marijuana usage is still prohibited.

Ethically, the NCAA is overstepping its bounds and doing a disservice to their student-athletes. The NCAA is an athletic association, not a medical association. If the NCAA is truly concerned about its students' health and well-being, it would not deny them the right to a doctor's prescribed medical treatment.

## II. LEGAL CONSIDERATIONS ADD STRAIN ON NCAA'S MEDICAL MARIJUANA BYLAW

### A. FEDERAL LAW

Marijuana is a Schedule I banned substance in the United States,<sup>95</sup> designating it as one of the most highly dangerous and regulated illegal substances. Marijuana's Schedule I drug classification means the federal government recognizes no medical marijuana uses. The United States Drug Enforcement Administration is charged with determining medical drug uses and

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<sup>94</sup> Javier Hasse, *From NCAA Outlaw to Medical Marijuana Entrepreneur: Treyous Jarrells Talks Opioids, Weed and Changing the Stigma*, BENZINGA (April 20, 2017, 9:53 AM), <https://www.benzinga.com/news/17/04/9318859/from-ncaa-outlaw-to-medical-marijuana-entrepreneur-treyous-jarrells-talks-opioids>.

<sup>95</sup> Drug Enforcement Agency & U.S. Dep't. of Just., DRUGS OF ABUSE: A DEA RESOURCE GUIDE 74, 74—77 (2017), [https://www.dea.gov/sites/default/files/sites/getsmartaboutdrugs.com/files/publications/DoA\\_2017Ed\\_Updated\\_6.16.17.pdf](https://www.dea.gov/sites/default/files/sites/getsmartaboutdrugs.com/files/publications/DoA_2017Ed_Updated_6.16.17.pdf).

has yet to issue an official policy or statement favoring medical marijuana.<sup>96</sup> However, numerous states across the United States have exercised their right to pass legislation and govern their own state via conflicting laws regarding medical marijuana usage.<sup>97</sup>

The United States was established with federalism as a guiding force.<sup>98</sup> Federalism creates a government where power is divided between the national government and other governmental entities.<sup>99</sup> It aimed to avoid granting absolute power to one central governmental authority.<sup>100</sup> Thus, state and federal governments' powers are separate, but unequal.<sup>101</sup> Accordingly, the federal government is the superior power and federal law preempts state law.<sup>102</sup> However, the federal government is confined to enforcing its own laws and cannot use states or state employees to that effect.<sup>103</sup> The federal government cannot force states to enact laws that would further enforce federal laws. Similarly, the federal government cannot prohibit states from repealing federal legislation because the government would essentially be commandeering the state legislature for federal purposes.<sup>104</sup> Therefore, states may enact their own legislation, even if contrary to federal law.

Through this power delineation, states have the right, power, and duty to enact laws they see fit and in their citizens' best interests. States can create laws contrary to federal laws, including the federal ban on medical marijuana.<sup>105</sup> State governments can more readily enact laws reflecting their smaller populous. The federal government may have the power to

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<sup>96</sup> *Id.*

<sup>97</sup> *State Marijuana Laws Map*, GOVERNING (June 25, 2019), <https://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html>.

<sup>98</sup> THE FEDERALIST NO. 45, at 256 (James Madison) (Clinton Rossiter ed., 1999) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Printz v. United States*, 521 U.S. 898, 935 (1997).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

supersede these laws, but that does not limit the state's duty to actively protect its citizens' wills and desires.<sup>106</sup>

## B. CITIZENS' RIGHTS: FLOWER TO THE PEOPLE

### 1. *BODILY AUTONOMY*

United States citizens have a fundamental right to bodily autonomy.<sup>107</sup> A fundamental right can only be limited based on a justifiable "compelling state interest."<sup>108</sup> The Supreme Court has held legislation limiting citizens' fundamental right to control their own bodies is unlawful.<sup>109</sup> The NCAA regulation banning marijuana is a private association's bylaw, thus holding even less weight and no compelling state interest—particularly in states where medical marijuana is legal.

The Constitution does not explicitly grant citizens the right to personal privacy, but implicitly does so through the Due Process Clause of the Fourteenth Amendment.<sup>110</sup> The term "liberty" includes personal rights that are "fundamental" or "implicit in the concept of ordered liberty."<sup>111</sup> Personal privacy was extended to decisions affecting a person's right to control their body and decisions affecting their body. Accordingly, choosing to use medical marijuana is also reasonably protected as personal privacy; a private association should not have the power to thwart this right.

Only one person in the United States has been granted an exception to the federal ban on medical marijuana.<sup>112</sup> In *United States v. Randall*, a Washington D.C. speechwriter was charged

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<sup>106</sup> *Federalism*, LEGAL INFORMATION INSTITUTE: CORNELL LAW SCHOOL, <https://www.law.cornell.edu/wex/federalism> (last visited Apr. 1, 2021).

<sup>107</sup> *See generally*, *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>108</sup> *Id.* at 155.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 152. *See also*, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>111</sup> *Roe*, 410 U.S. at 152; *Griswold*, 381 at 500 (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.)).

<sup>112</sup> *Randall v. United States*, 353 A.2d 12 (D.C. 1976) (Claiming his defense was the criminal theory, necessity. The defense was paralleled with the famous case *Regina v. Dudley and Stephens*. The defendants were castaways that resorted to eating one of the fellow crewmembers in to avoid starvation. This defense did not work in that case, but was persuasive in *Randall's* defense.).

with marijuana possession.<sup>113</sup> In this situation, a medical necessity existed because no less harmful alternative was practically available.<sup>114</sup> The judge determined no other reasonable alternatives to medical marijuana existed because other drugs had been ineffective and surgery would not guarantee success.<sup>115</sup> The judge weighed the medical benefits against medical marijuana's claimed, indemonstrable harm. The court held Mr. Randall had a medical necessity to use marijuana and granted his continued use.<sup>116</sup>

Although this case is limited to Mr. Randall, the same principles can and should be applied to citizens who are prescribed medical marijuana in states where it is legal. If the federal government is willing to make the exception once, under the reasoning that no equal alternatives exist, this same situation could apply to other individuals and their ailments.

## 2. *DUE PROCESS*

The United States Constitution protects its citizens' freedoms with the right to due process. Due process, as provided for in the Fifth and Fourteenth Amendments to the Constitution, requires citizens be protected from arbitrary denial of life, liberty, or property.<sup>117</sup> It ensures judges define and guarantee justice and liberty.

NCAA student-athletes are denied due process rights in fighting against the arbitrary ban on medical marijuana. Students are limited to working with the NCAA on the issue, a process through which they are unlikely to prevail. State governments and

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

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

<sup>116</sup> *Id.*

<sup>117</sup> *See also* *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, *every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation* . . . .")

judicial officers need to recognize a private organization is unnecessarily restricting their citizens from using their liberty, privacy, and right to choose.<sup>118</sup>

The concern surrounding the restriction on liberty is akin to private companies attempting to deny patronage to certain classes, such as same-sex couples. In 2018, the Supreme Court ruled it was legal to refuse to serve a gay couple because the owners' religious beliefs.<sup>119</sup> A major basis for the Court's decision was protecting a citizen's right to religious freedom. Further, in Arizona, an owner declined to create wedding invitations for a gay couple.<sup>120</sup> The Arizona Supreme Court ruled similarly to the United States Supreme Court, reasoning freedom of speech, free exercise, and religious freedom were fundamental rights. These decisions, while grounded in law and supported by the Constitution, unfortunately allow for private entities to deny other citizens the right to use something available to the public, similar to the NCAA's medical marijuana ban.

The United States Supreme Court and Arizona Supreme Court's cases can be differentiated from the NCAA medical marijuana ban because the NCAA is not implementing their ban based on a fundamental right, such as freedom of religion or freedom of speech. The NCAA decided to ban medical marijuana as a response to negative public stigma, influenced by Nixon's "War on Drugs" announcement.<sup>121</sup> When *Randall's* reasoning is combined with the due process clause's protections and the fundamental right to control one's body, a strong case can be made against the over-reaching NCAA regulations.

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<sup>118</sup> See generally D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193 (1890).

<sup>119</sup> See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

<sup>120</sup> Lynn Trimble, *Court: Phoenix Business Can Refuse to Make Invitations for Same-Sex Couples*, PHOENIX NEW TIMES (Sept. 16, 2019, 11:03 AM), <https://www.phoenixnewtimes.com/news/arizona-court-allows-business-to-refuse-lgbt-customers-11359414>; see also *Brush & Nib Studios, LC v. City of Phoenix.*, 448 P.3d 890 (Ariz. 2019).

<sup>121</sup> *A Brief History of the Drug War*, *supra* note 5.

### III. PUBLIC POLICY CONCERNS: HASHING IT OUT

A private association should not have the right to dictate how a citizen can receive a doctor's prescribed medical treatment. A private entity should not be able to infringe upon certain personal liberty with arbitrary or capricious intent.

#### A. PUBLIC INTEREST VS. PRIVATE INTEREST

##### 1. *PUBLIC INTEREST*

Citizens should have the ability to receive medical advice without seeking approval from a private organization. As a public policy, citizens should be able to rely on state law and medical professionals' advice to dictate treatment for a particular medical condition.

Current NCAA regulations limit the medical resources available to student-athletes.<sup>122</sup> By participating in an NCAA sport, students must waive their legal right to use medical marijuana.<sup>123</sup> This waiver unfairly limits NCAA student-athletes with scholarships who would likely not otherwise have the opportunity to receive a college education.<sup>124</sup> Students are forced to choose between receiving a bachelor's degree or treating a medical condition using a legally authorized medical remedy. With undergraduate degrees' increasing cost, this choice is an unfair and intrusive decision forced on the United States' youth.

If marijuana is illegal federally, some citizens will remain cautious regarding its sale and usage.<sup>125</sup> A negative public stigma has plagued the United States since the cry for unity against drugs was made in the late 1900s. However, the federal government originally criminalized marijuana to penalize minority groups.

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<sup>122</sup> NCAA MANUAL, *supra* note 61, at 332.

<sup>123</sup> NCAA SUBSTANCE ABUSE PREVENTION, *supra* note 88.

<sup>124</sup> *Athletic Scholarships: Legal Issues to Know*, FINDLAW, <https://education.findlaw.com/higher-education/athletic-scholarships-legal-issues-to-know.html> (last visited Nov. 14, 2019).

<sup>125</sup> *Federal Marijuana Laws*, FINDLAW, <https://criminal.findlaw.com/criminal-charges/federal-marijuana-laws.html> (last visited Nov. 14, 2019).

These NCAA regulations may similarly be racist. Over one-third of NCAA student-athletes are minorities.<sup>126</sup> By allowing this ban, states are allowing racial discrimination to continue to affect minorities. The public must consider this bans' true intent and effects, and seek to fix government overreach by protecting individuals' rights to legal medical treatments.

## 2. *PRIVATE INTEREST*

As non-State actors, businesses and private entities may generally establish their own rules and operate how they deem best, so long as they do not interfere with fundamental rights.<sup>127</sup> As previously discussed in the cases involving private entities denying services to certain people, federal and state governments have sided with businesses based on other fundamental rights. However, the NCAA has no fundamental right backing their bylaws. Nonetheless, this private entity has been allowed to run their businesses how they see fit.

Collegiate institutions and student-athletes willingly elect to participate in the NCAA. By doing so, both the institutions and student-athletes submit to adhere to the regulations enacted by the association.<sup>128</sup> Thus, the NCAA is free to establish bylaws as it deems necessary. Should a school disagree with the organization's bylaws, it has the right to not participate. However, the NCAA has gained such notoriety and the institutions receive great benefits from participating in the NCAA conferences. The NCAA, as a private entity, has the right to unilaterally create limitations on entry and participation.

Although participation is voluntary, if a collegiate institution wants to compete athletically in the largest, most popular arena, it must agree to the NCAA's intrusive bylaws.<sup>129</sup> The NCAA's monetary benefits are the guiding consideration for schools entering the NCAA.<sup>130</sup> Schools do not have much

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<sup>126</sup> *NCAA Demographics Database*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (Mar. 2021), <http://www.ncaa.org/about/resources/research/ncaa-demographics-database>.

<sup>127</sup> *See Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1719.

<sup>128</sup> NCAA MANUAL, *supra* note 61, at 7.

<sup>129</sup> *Id.*

<sup>130</sup> Cork Gaines, *The Difference in How Much Money Schools Make Off of College Sports is Jarring, and it is the Biggest Obstacle to Paying Athletes*, BUSINESS INSIDER (Oct. 14 2016, 9:00 AM),

bargaining power in their decision. Additionally, once schools have established a presence in the NCAA, leaving the league is an expensive and risky move. Accordingly, the NCAA can continue to modify its bylaws, without allowing participating institutions to influence the rules even though the institution is perpetually bound to the regulations.

## B. MEDICAL PRIVACY

United States citizens have the right to keep their medical diagnoses and treatments private.<sup>131</sup> Congress passed the Health Insurance Portability and Accountability Act (“HIPAA”), to protect citizens’ rights to keep medical information private from third parties and prohibit medical personnel from sharing medical information without permission.<sup>132</sup> Congress believed this right to medical privacy was so necessary that it codified it into legislation.<sup>133</sup> If Congress felt strongly enough to codify these protections, a private association should not have the right to obtain medical information without a legitimate and compelling need. A student’s medical diagnoses, prescriptions, and treatments should not concern the NCAA, as an athletic organization, unless the diagnoses affect fellow student-athletes or puts the student’s life at risk.

Generally, a collegiate institution must avoid disclosing a student’s medical history to any person or entity without the student’s consent.<sup>134</sup> Passing the Family Educational Rights and Privacy Act (FERPA) further restrained state sponsored colleges and universities from sharing a student’s medical information. One caveat in the legislation permits schools to disclose medical information, without student or parent consent, to third parties

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<https://www.businessinsider.com/ncaa-schools-college-sports-revenue-2016-10>.

<sup>131</sup> Eric K. Gerard & Brandt A. Leibe, *Supreme Dilemma: Handling Conflicts Between State Medical Privacy Laws and Federal Investigative Subpoenas*, AMERICAN BAR ASSOCIATION: THE HEALTH LAWYER, Issue 6, Aug. 2019, at 24.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 26.

<sup>134</sup> *Family Educational Rights and Privacy Act (FERPA)*, U.S. DEPT. OF EDUCATION (Dec. 15, 2020), <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>.



connected with the student's financial aid.<sup>135</sup> Accordingly, because the NCAA is a party connected to an student-athlete's financial aid, NCAA state sponsored schools are likely permitted to share a student's medical marijuana prescription and use with the NCAA, without the student's consent. Nonetheless, a private association should not be privy to medical diagnosis and treatment information; most assuredly, the NCAA should not be able to dictate medical treatment actions.

### C. HARSH IMPLICATIONS FOR NON-REGULATED MARIJUANA EXTRACTS LIKE CBD

If the NCAA bans cannabidiol ("CBD"), it can ban participants from using CBD even though the federal government does not currently regulate CBD.<sup>136</sup> With the modern trend favoring cannabis-related products, numerous companies have found a loophole around the federal ban on marijuana products. The Agriculture Improvement Act of 2018 removed hemp from the Controlled Substances Act and allowed for its commercial use.<sup>137</sup> The Act's implications spread to CBD products being mass-produced. CBD remains federally illegal if it is placed in food or drinks, as it is not yet approved by the FDA.<sup>138</sup>

CBD can be derived from hemp or cannabis; cultivating hemp is legal, but cultivating cannabis is illegal as it contains THC.<sup>139</sup> CBD products without high THC levels are readily available on the market for student-athletes to use. However, as the extract process has not yet been perfected, small THC amounts

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<sup>135</sup> *Family Educational Rights and Privacy Act (FERPA)*, U.S. DEPT. OF EDUCATION (Dec. 15, 2020), <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>.

<sup>136</sup> Gene Bruno, *Is CBD Legal in All 50 U.S. States?*, NUTRASCIENCE LABS (Apr. 20, 2020), <https://www.nutrascience.com/blog/where-is-cbd-legal-and-illegal-in-the-united-states>.

<sup>137</sup> Gene Bruno, *What You Need to Know: Farm Bill 2018 & Hemp Legalization*, NUTRASCIENCE LABS (Jan. 4, 2019), <https://www.nutrascience.com/blog/is-hemp-legal-after-farm-bill-2018>.

<sup>138</sup> Laura Reiley, *CBD-Infused Food and Beverages are Still Illegal Under U.S. Law. So Why Are They Everywhere?*, WASH. POST (June 24, 2019, 8:31 AM), <https://www.washingtonpost.com/business/2019/06/24/cbd-infused-food-beverages-are-still-illegal-under-us-law-so-why-are-they-everywhere/>.

<sup>139</sup> *Id.*

can be found in CBD extracts.<sup>140</sup> Student-athletes using CBD related products, which are legal, risk failing a drug test without intentionally using a banned substance. This allows the NCAA to further punish its athletes for using federally legal CBD-related substances. Thus, an association should not be able to have the power to ban a federally accepted substance.<sup>141</sup>

Student-athletes are punished for partaking in a federally legal substance. Should the federal government determine CBD is illegal, the NCAA's ban would be legitimized. Currently, neither the federal government nor the NCAA bans CBD, but that could change. Regardless, students are currently punished for using federally legal CBD products if it leads to a failed drug test, which is an even broader reach than overstepping a state's medical marijuana law.

#### **IV. PROPOSED ACTIONS TO SHATTER MEDICAL MARIJUANA BAN IN THE NCAA**

##### **A. JOINT EFFORT AMONG COLLEGES: PETITION FOR A CHANGE IN NCAA BYLAWS**

Students and collegiate institutions can petition the NCAA to amend its regulations.<sup>142</sup> As participating NCAA members, schools have the ability to voice their input on the rules governing the NCAA.<sup>143</sup> The challenge is schools are heavily reliant on the revenues generated through NCAA membership. Therefore, schools are forced to choose between money and student-athletes. Collegiate institutions operate as a business; they use student-athletes to garner significant money, with less consideration for the student's education or well-being.<sup>144</sup> As such, schools are not inclined to criticize the NCAA's marijuana ban because they fear losing revenue. However, as the public stigma regarding marijuana continues to change, schools are more likely to step up and advocate for their student-athletes.

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> NCAA MANUAL, *supra* note 61, at 33.

<sup>143</sup> NCAA v. Gov. of N.J., 939 F.3d 597 (3d Cir. 2019).

<sup>144</sup> See e.g., Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992) (denying a student-athlete recourse for his claim of educational malpractice because his college allowed him to graduate with the language skills of a fourth grader and a reading level of a seventh grader).

Even if an institution tried to fight the medical marijuana ban, it would likely fail. The NCAA Board of Governors is charged with determining arguments' validity and will ultimately make the decision. Although institutions can propose changes, the NCAA ultimately has the final decision-making authority to accept or reject such changes. The Board is unlikely to approve these petitions without pressure. If enough schools band together for this cause, change could occur; but again, the schools are not to succeed, as the NCAA currently has no formal pressure to change the bylaw.

## B. FEDERAL INTERVENTION: CURRENT FEDERAL LEGISLATION TAKES A HIT

The federal government can reclassify marijuana and thus change its federal legal standing.<sup>145</sup> If marijuana were no longer federally banned, the NCAA's reasoning in banning medical marijuana would hold much less weight. As most states continue to enact legislation legalizing medical marijuana, the federal government should respond and modify current legislation to mirror public sentiment and modern research.<sup>146</sup> Progress has been slow and is unlikely to come to fruition in the near future, leaving student-athletes in a tough position.

The public is slow to fully accept the modern trend toward legalization because marijuana was viewed negatively for decades.<sup>147</sup> The federal government instituted the original "War on Drugs" to rally the country against drugs. As those growing up then are still alive and voting, their sentiments are hard to change. Additionally, because medical marijuana was not highly researched after being classified as a Schedule I drug, there continues to be insufficient research and data to fully prove its healing properties and capabilities. The federal classification limited researchers' ability to explore marijuana's potential and has left the United States behind in this area.<sup>148</sup> Until more positive, conclusive research can be provided, the federal government is unlikely to change its stance on marijuana.

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<sup>145</sup> Rosalie Liccardo Pacula & Rosanna Smart, *Medical Marijuana and Marijuana Legalization*, 13 ANN. REV. CLIN. PSYCH. 397, 397—399 (2017).

<sup>146</sup> *Id.* at 400.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

As stated by the current attorney general, the federal government is not actively prosecuting or prohibiting medical marijuana use in states where it is legal.<sup>149</sup> Determining how to reconcile these conflicting laws has created turmoil and concern across the country. Many people are afraid to invest in or participate in the marijuana industry, even in legalized states, because they fear the federal government can shut them down at any time. The attorney general's statement brings some security to this growing market, but a full reconciliation between federal and state laws is necessary.<sup>150</sup>

Additionally, in June 2019 The House of Representatives approved a measure to prohibit the Department of Justice from interfering with state marijuana laws. Representative Tom McClintock (R-CA) led the conversation asking whether the federal government has the power to dictate the policies dealing with actions taking place within a state's borders.<sup>151</sup> The Constitution established the United States as a federalist society, in which states have the authority to govern within their state. This authority is a huge step on the federal level toward a modern movement and progression in marijuana law. Legalization proponents are in the federal government, and as research progresses, the trend toward legalization will eventually reach the federal level.<sup>152</sup>

In the meantime, student-athletes in states where medical marijuana is legal are forced to choose either (1) receiving the medical treatment they need, or (2) participating in a renowned, notorious association. Therefore, eighteen-year-olds must choose whether fulfilling their dreams of becoming an NCAA athlete is worth foregoing medical marijuana prescribed for epileptic seizures, or other serious illnesses. Further, accepting a scholarship to an NCAA participant college is many athletes' only opportunity to obtain a higher education, which is unfair and unreasonable.

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<sup>149</sup> Glenn Fleishman, *States Hold Breath as Trump's Attorney General Nominee Says He Won't Prosecute Pot in Marijuana-Legal States*, FORTUNE (Jan. 15, 2019, 3:22 PM), <https://fortune.com/2019/01/15/barr-marijuana-pot-cole-memo-legal-states/>.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

## C. STATE INTERVENTION: A CHANCE TO PIPE UP AND BLAZE A NEW TRAIL

Several states have intervened as far as they can in countering the federal ban. However, NCAA bylaws should not supersede state legislation, particularly a bylaw removing individuals' right to undergo legal medical treatments to participate in athletic associations. States must act to protect citizens from this overreaching, discriminatory bylaw.

States must institute legislation rendering the NCAA's intrusive medical marijuana ban obsolete. The broad grant of state powers, according to the federalism principle, gives states the ability and duty to implement laws they see fit to protect their citizens.<sup>153</sup> To inadvertently address the NCAA issue, states could enact legislation denying private organizations the ability to create legislation impeding individual rights.<sup>154</sup> The legislation could be geared towards marijuana legislation or could be broader. This legislation would prevent employers from being able to create marijuana policies. It would need to be drafted broadly enough to allow being under the influence at work to be banned. This legislation likely has too many potential negative externalities to be a feasible means to reform overreaching NCAA policies. Narrowly tailored legislation, focusing on the NCAA and medical marijuana could be successful.

Ideally, a large, impactful state, like California, could implement such legislation and force changes in the NCAA. California has twenty-four collegiate institutions participating in NCAA Division I athletics,<sup>155</sup> the most NCAA schools in a single state. As such, California schools participating in the NCAA generate significant revenue and publicity for the NCAA.

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<sup>153</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

<sup>154</sup> Alex Johnson, *California's College Sports Pay Law Could Change NCAA as We Know It*, NATIONAL BROADCASTING COMPANY (Oct. 1, 2019, 1:43 AM), <https://www.nbcnews.com/news/sports/california-s-college-sports-pay-law-could-change-ncaa-we-n1060591>.

<sup>155</sup> *List of NCAA Division I Schools*, 1KEYDATA, <https://state.1keydata.com/ncaa-division-1-schools-by-state.php> (last visited Nov. 15, 2019).

California is therefore placed in a power position to bargain with the NCAA. California schools could participate in NCAA alternatives, like the National Association of Intercollegiate Athletics (NAIA), international leagues, and others.<sup>156</sup>

If California exercised its influence, like what it has done with the recent changes in policies regarding paying players and allowing them to use their name, image, and likeness for profit, a similar change could be made regarding medical marijuana.<sup>157</sup> In September 2019, California Governor, Gavin Newsom, signed a bill permitting college athletes in California to be compensated for endorsement deals.<sup>158</sup> This legislation explicitly counteracts the NCAA bylaws regarding amateurism.<sup>159</sup>

While this new legislation makes it legal within California for athletes to receive income, it does not automatically supersede the NCAA bylaws California schools must still abide by if they wish to continue participating in the NCAA. However, California's actions sparked a response from the NCAA. The NCAA released a statement admitting its policies must change, but that California's actions alone are not enough. The NCAA believes the proper procedure is still through the NCAA's rulemaking process.<sup>160</sup> Although the California legislature did not immediately alleviate the injustice created in the NCAA's bylaws, it is hopeful more states will follow suit and enact similar legislation to expedite the changes in NCAA policies.

The same strategy could be used for changing the medical marijuana ban. If California, a state full of NCAA power-house athletic departments, enacted legislation allowing its athletes to use doctor-prescribed medical marijuana it could influence conversation and change in the NCAA bylaws. States have proved their commitment to ensuring their citizens have access to medical marijuana through their continued investment into the cause and

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<sup>156</sup> *NCAA and NAIA Scholarships – Know the Difference!*, EXACT SPORTS, <https://exactsports.com/blog/ncaa-and-naia-scholarships-know-the-difference/2011/02/05/> (last visited Nov. 16, 2019).

<sup>157</sup> David K. Li, *Calif. Governor Signs Bill Allowing College Athletes to Sign Endorsements*, NATIONAL BROADCASTING COMPANY (Sept. 30, 2019, 8:18 AM), <https://www.nbcnews.com/news/us-news/california-governor-signs-bill-allowing-college-athletes-get-paid-n1060321>.

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

<sup>159</sup> NCAA MANUAL, *supra* note 61, at 60.

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

furtherance in legislation and legal protections. If California is concerned with a student's right to earn an income, they undoubtedly should be concerned with their inability to receive doctor-prescribed medical treatment. States can no longer sit back and allow the NCAA, a private organization, to dictate which rights it can take away from citizens.

Alternatively, or additionally, a state such as California could bring claims against the NCAA and refuse to participate in the NCAA until the policies are adjusted to accommodate state laws regarding medical marijuana. For example, California could seek an injunction against the NCAA enforcing a rule contrary to state law or through the NCAA processes.<sup>161</sup> If states do not want to enact legislation targeting NCAA, threatening to abstain from participating in the NCAA may be sufficient. However, the seemingly most effective way to elicit a change in the unfair NCAA policies would be through legislation across states to unify a voice against the policy and force the NCAA to modify its policies to reflect current trends in medical marijuana legalization.

## CONCLUSION

The NCAA does not have the authority to ban medical marijuana usage in states where it is legal. More specifically, the NCAA should refrain from dictating medical prescriptions for student-athletes. Denying legal medical treatment infringes on citizens' personal privacy rights and oversteps the NCAA's governance. Modern trends in legalizing medical marijuana should be reflected in the NCAA's policies. The policies were created in reaction to the "War on Drugs." Now that the federal government has clarified it will not stand in the states' ways in legalizing marijuana, the NCAA's interest and backing for this arcane ban are de-legitimized.

Because the NCAA's lacks a legitimate basis or constitutional right to support its bylaw policies, a change must be made. States must use their power to protect citizens from the private organizations' overreaching policies. California should continue to be the leader in this arena. California could enact legislation that either explicitly or broadly allows student-athletes to use medical marijuana while playing in college athletics. California schools may also threaten to abstain from participating in the

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<sup>161</sup> *Injunction*, LEGAL INFORMATION INSTITUTE: CORNELL LAW SCHOOL, <https://www.law.cornell.edu/wex/injunction> (last visited Apr. 4, 2021).

NCAA until the bylaw is updated. Legislation or abstention will spark a change in other states and ultimately a change in the NCAA bylaws reflecting public policy and respecting its participants' fundamental rights.