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## Get a Medical Marijuana Card, Lose Your Second Amendment Rights

The Bureau of Alcohol, Tobacco, Firearms and Explosives wants to prohibit patients from protecting themselves.

*Brian Doherty* | December 16, 2011

If you are a medical marijuana patient in one of the 16 states (plus the District of Columbia) that allow for it, you've got reason to believe lately that the government has it in for you.

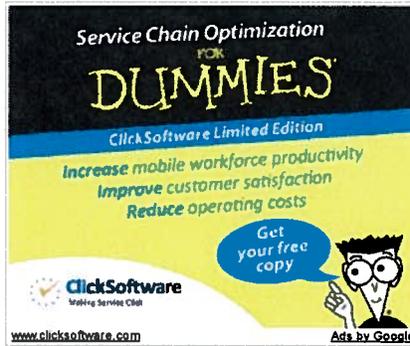
You've got federal raids on the places where you can conveniently buy your medicine, the governor of Arizona trying to overturn in court her citizens' choice to institute a medical marijuana system, and Michigan's attorney general trying to make life as hard as he can for those using the system his state's voters approved by 63 percent in 2008. And while it isn't directly the government's fault, doctors are taking people off liver transplant waiting lists for using medical pot.

It isn't just that the government on both the federal and state level doesn't want you to be able to legally and conveniently obtain your medicine, if that medicine is pot. The Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) insists you inherently lose a key constitutional right merely by letting your state know you might want to take pot medicinally.

Merely having a state medical marijuana card, BATFE insists, means that you fall afoul of Sect. 922(g) of the federal criminal code (from the 1968 federal Gun Control Act), which says that anyone "who is an unlawful user of or addicted to any controlled substance" is basically barred from possessing or receiving guns or ammo (with the bogus assertion that such possession implicates interstate commerce, which courts will pretty much always claim it does).

Nevada licenses medical pot users. Rowan Wilson, a Carson City-area woman who works as a medical technician in residential care homes, believes pot might be useful for her painful menstrual cramps. After going through a seven-month process to obtain a medical marijuana card, she attempted in October to purchase a gun from a gun dealer, Fred Hauseur, who was also a personal acquaintance.

The Form 4473 that the BATFE requires every gun purchaser to fill out asks, "Are you an unlawful user of, or addicted to, marijuana...or any other controlled substance?" Wilson, not considering herself an unlawful user or addict but aware, as she says in a deposition in the case, that BATFE "has set down a policy whereby it is presumed that any person holding a medical marijuana registry card is



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automatically considered an unlawful user of, or addicted to marijuana " left that line blank.

Hauseur, the dealer from whom Wilson was trying to buy a Smith & Wesson .357 Magnum, knew Wilson, and knew she was a card holder. He also knew about the contents of a [September 2011 memo](#) sent out by BATFE to federally licensed gun dealers.

The memo says that "there are no exceptions in federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by State law...any person who uses...regardless of whether his or her state has passed legislation authorizing marijuana for medicinal purposes, is an unlawful user...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...may not transfer firearms or ammunition to the person." And indeed, Hauseur did not.

Wilson thinks that this BATFE policy violates her Second Amendment rights. With the help of Nevada lawyer Chaz Rainey of Rainey Devine, she [filed suit in October](#) in federal district court in Nevada against Department of Justice chief Eric Holder, the BATFE, and its acting director and assistant director.

As the suit says, "Ms. Wilson has never been charged with or convicted of any drug-related offense, or any criminal offense....Indeed, no evidence exists that Ms. Wilson has ever been 'an unlawful user of, or addicted to, marijuana....' Ms. Wilson maintains that she is not an unlawful user of or addiction to marijuana....Nonetheless, Ms. Wilson was denied her Second Amendment right to keep and bear arms based solely on her possession of a valid State of Nevada medical marijuana registry card." The suit argues the BATFE policy also violated her Fifth Amendment right to due process since it presumes she is a prohibited drug user arbitrarily.

The federal government is expected to file a reply before the end of the year, and Wilson's lawyer Rainey says he hopes the Feds "don't engage in long drawn-out lengthy discovery process, deposing everyone involved." Rainey notes a case intersecting guns and drugs could roll either way—a pro-Second Amendment judge could be uncomfortable with the marijuana part, and a pro-medical marijuana judge uncomfortable with the gun part.

Rainey doesn't have experience in the gun law field, but he has some civil rights experience and has found other lawyers and activists in the Second Amendment field helpful in thinking the case through (although most of the bigger gun rights organizations don't like touching this pot-related case). Wilson had trouble finding a lawyer excited about the case—"some lawyers didn't want to touch a cannabis case, period." She finds the existence of any state registry of marijuana users troublesome on general medical privacy grounds. One of her reasons for shouldering the burden of plaintiff is that patients she encounters in her elderly care field are afraid to get a medical card and use pot because of the extra problems that arise—like losing gun possession rights.

While the BATFE has not yet announced any concerted program to go after people who may have had legally purchased weapons *before* getting a marijuana card, Morgan Fox of the Marijuana Policy Project says that it's common practice in medical marijuana-related busts that "if weapons are present, there will be gun charges added on as well."

Rainey expects the results of the initial trial to be appealed whoever wins, and is prepared to take it all the way to the Supreme Court. (Montana's Attorney General Steve Bullock [has informed the BATFE](#) that he thinks the policy oversteps federal bounds.)

As Independence Institute gun rights scholar David Kopel explains, some lower courts have decided that while the legal prohibition on felons owning handguns is not inherently unreasonable or unconstitutional, the application of that law to felons of certain types—say, nonviolent ones in the distant past—isn't always reasonable. While the Wilson case as filed is challenging the very constitutionality of classifying drug users as outside the pale of the Second Amendment, Rainey is also prepared, he says, to argue more narrowly that it is unreasonable to apply that category specifically to Wilson merely on the basis of her possessing the marijuana card.

Page: 1 2 >

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(Page 2 of 2)

"Taking it to the Supreme Court" isn't just outrageous hubris on Rainey's part. Since the [2008 Heller case](#) and the [2010 McDonald case](#), the Supreme Court has opened up a new world of Second Amendment jurisprudence. Now we know that handgun possession in the home is a protected right. But the legality of other government gun regulations remains uncharted territory. In his *Heller* opinion, Justice Antonin Scalia made it explicit: "The Second Amendment right is not unlimited.... The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."



Many, many cases trying to set those new parameters are moving through the courts, slowly. As Alan Gura, the star Second Amendment lawyer who won both *Heller* and *McDonald* says, we need to wait to see where the Second Amendment is going. "We're just waiting for decisions in District Courts—in some cases, waiting for a very long time now. These things take a lot longer to get resolved than people would like.... I disagree with those who say that the Court is done for a while with the Second Amendment. I have no idea which case they'll take next, but the issue is not going away."

One very good district court decision came out this summer, also thanks to Gura. In *Ezell v. Chicago*, he challenged the city's ban on gun ranges. According to Chicago, a legal weapon permit holder needed to have a signed affidavit from a firearms instructor affirming that he or she completed a training course, including at least one hour of gun range training. Yet the city simultaneously banned gun ranges within city limits. The Seventh Circuit Court of Appeals overturned the range ban, and began laying out a complicated set of review standards for the Second Amendment that largely map [existing First Amendment doctrine](#), where "a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end." That leaves plenty of room for, well, judgment on the part of judges. The fate of any given challenge to gun regulations short of handgun bans can't be predicted precisely until we see more federal district court decisions and eventual Supreme Court rulings.

One case already waiting at the Supreme Court for a [decision about certiorari](#), however, has staked out the same territory as Wilson's suit: the area between the Second Amendment and a state's medical marijuana licensing system.

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The case is *Winters v. Willis*, out of Oregon. It involves two consolidated cases in which Oregon sheriffs tried to deny a state concealed carry permit for weapons to citizens because they had Oregon medical marijuana cards, even though state law would otherwise compel issuance of the permit.

The Oregon Supreme Court agreed with the citizens (as did all the lower courts) that the sheriffs had no good reason to deny the carry permit, even if the possession of the marijuana card might, as the sheriffs insisted, mean that the permitted citizens would fall afoul of *federal* gun possession law, being (presumptively) drug users.

As the Oregon Supreme Court's May [decision read in part](#):

it appears that the sheriffs *also* wish to enforce the federal policy of keeping guns out of the hands of marijuana users by using the state licensing mechanism to deny CHLs [concealed handgun licenses] to medical marijuana users. The problem that the sheriffs have encountered is that Congress has not enacted a law requiring license denial as a means of enforcing the policy that underlies the federal law, and the state has adopted a licensing statute that manifests a policy decision *not* to use its gun licensing mechanism for that purpose: State law *requires* sheriffs to issue concealed gun licenses without regard to whether the applicants use medical marijuana.

The sheriffs [have appealed the case](#) to the Supreme Court, which has not yet decided on whether to hear it, but the very fact the Court asked for reply briefs from both parties means the Court "at least thinks something is worth looking into there," says Kopel. While the Wilson suit in Nevada and this Oregon case both involve medical marijuana and guns, they don't address the same issues. Wilson's is a straight Second Amendment rights case involving how decisions are properly made as to when a citizen falls under one of the prohibited categories in Sect. 922; the Oregon case involves whether federal gun law properly pre-empts a state licensing scheme. The Oregon Supreme Court thought that the federal law's purpose regarding *possession* of firearms had no direct effect on the state law, which merely involved the *concealment* of firearms.

Even if the Supreme Court takes up *Winters v. Willis* and decides that the sheriffs can deny the CHLs, that would not settle whether denying gun possession rights to someone strictly for having a state medical marijuana card stands up to Second Amendment scrutiny. As Rainey sees it, "it's only good for us if *Winters* goes before the Supreme Court, regardless of the outcome" since a *Winters* loss for medical marijuana card holders would not necessarily guarantee a *Wilson* loss. One possible connection from this non-lawyer's perspective: Just as the Oregon CHL does not mean that you *are* in possession of a gun, a Nevada medical marijuana card does not mean you *are* using marijuana.

Second Amendment scholar Eugene Volokh of UCLA says regarding Wilson's case that "barring everyone from selling a weapon to her because she has a card denies her her Second Amendment rights without actually showing she is an illegal user. That is a plausible claim, but as to whether the Court will buy it, I'm not at all sure. Courts have been open to some Second Amendment claims but obviously they've been skeptical of most, so it's not clear to me how it will come out. But it is a credible claim. What remedy she might get, I assume, will be [not overturning the prohibition entirely but] a declaratory judgment that she is entitled to get a gun so long as there is no other evidence she is a marijuana user."

Kopel has enough doubts about the way courts react to cases that involve drugs that he isn't confident her case will succeed on Second Amendment merits. He offers instead that "the ideal solution would be, have a president who keeps his campaign promises. If Obama were keeping his campaign promises in the first place, he could have had his BATFE *not write* this new policy statement, and it is within their discretion to say that we interpret 'unlawful user' to not cover someone regulated and lawful under state law. But the Barack Obama who ran such a good campaign for president was apparently kidnapped and replaced with a body double who is a drug war nut."

Senior Editor Brian Doherty is author of *This is Burning Man* (BenBella), *Radicals for Capitalism* (PublicAffairs), and *Gun Control on Trial* (Cato Institute).

Page: < 1 2

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