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State Legalization of Recreational Marijuana: Selected Legal Issues

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Summary

May a state authorize the use of marijuana for recreational purposes even if such use is forbidden by federal law? This novel and unresolved legal question has vexed judges, politicians, and legal scholars, and it has also generated considerable public debate among supporters and opponents of "legalizing" the recreational use of marijuana.

Under the federal Controlled Substances Act (CSA), the cultivation, distribution, and possession of marijuana are prohibited for any reason other than to engage in federally approved research. Yet 18 states and the District of Columbia currently exempt qualified users of medicinal marijuana from penalties imposed under state law. In addition, in November 2012, Colorado and Washington became the first states to legalize, regulate, and tax small amounts of marijuana for nonmedicinal (so-called "recreational") use by individuals over the age of 21. Thus, the current legal status of marijuana appears to be both contradictory and in a state of flux: as a matter of federal law, activities related to marijuana are generally prohibited and punishable by criminal penalties; whereas at the state level, certain marijuana usage is increasingly being permitted. Individuals and businesses engaging in marijuana-related activities that are authorized by state law nonetheless remain subject to federal criminal prosecution or other consequences under federal law.

The Colorado and Washington laws that legalize, regulate, and tax an activity the federal government expressly prohibits appear to be logically inconsistent with established federal policy toward marijuana, and are therefore potentially subject to a legal challenge under the constitutional doctrine of preemption. This doctrine generally prevents states from enacting laws that are inconsistent with federal law. Under the Supremacy Clause, state laws that conflict with federal law are generally preempted and therefore void and without effect. Yet Congress intended that the CSA would not displace all state laws associated with controlled substances, as it wanted to preserve a role for the states in regulating controlled substances. States thus remain free to pass laws relating to marijuana, or any other controlled substance, so long as they do not create a "positive conflict" with federal law, such that the two laws "cannot consistently stand together."

This report summarizes the Washington and Colorado marijuana legalization laws and evaluates whether, or the extent to which, they may be preempted by the CSA or by international agreements. It also describes and analyzes the U.S. Department of Justice's (DOJ's) response to these legalization initiatives as set forth in a memorandum sent to all federal prosecutors in late August 2013. The report then identifies certain noncriminal consequences that marijuana users may face under federal law. Finally, the report closes with a description of selected legislative proposals introduced in the 113th Congress relating to the treatment of marijuana under federal law, including H.R. 499 (Ending Federal Marijuana Prohibition Act of 2013); H.R. 501 (Marijuana Tax Equity Act of 2013); H.R. 689 (States' Medical Marijuana Patient Protection Act); H.R. 710 (Truth in Trials Act); H.R. 784 (States' Medical Marijuana Property Rights Protection Act); H.R. 964 (Respect States' and Citizens' Rights Act of 2013); H.R. 1523 (Respect State Marijuana Laws Act of 2013); H.R. 1635 (National Commission on Federal Marijuana Policy Act of 2013); and H.R. 2652 (Marijuana Businesses Access to Banking Act of 2013).

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Introduction

Supreme Court Justice Louis Brandeis famously praised the division of sovereign powers included within America's constitutional structure for its capacity to encourage states to "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[1] This legislative freedom is constrained, however, by various constitutional restrictions including the Supremacy Clause, which provides that federal law "shall be the supreme Law of the Land."[2] Pursuant to this established principle of federal legal preeminence, any state law that conflicts with federal law is generally considered preempted and therefore void. Although simple in theory, the task of determining whether a state law is "in conflict" with federal law can be incredibly complex in practice.

The ongoing national debate over marijuana provides a clear example of the confusion associated with the states' ability to pursue policies that deviate from those advanced by the federal government. In addition to the 20 states and the District of Columbia that currently exempt qualified users of medicinal marijuana[3] from penalties imposed under state law, Colorado and Washington in late 2012 became the first states to legalize,[4] regulate, and tax small amounts of marijuana for personal (i.e., nonmedicinal) use by individuals over the age of 21.[5] These broad legalization initiatives stand in stark contrast to federal law, which makes the cultivation, distribution, or possession of any amount of marijuana—for any purpose other than bona fide, federally approved scientific research—a criminal offense.[6]

Therefore, the possession, cultivation, or distribution of marijuana remains a *federal* crime within Colorado, Washington, and every other state. As a result, individuals who grow, possess, use, sell, transport, or distribute marijuana, even when done in a manner consistent with state law or pursuant to a state-issued license, are nonetheless in violation of the federal Controlled Substances Act (CSA) and remain subject to federal criminal prosecution or other consequences under federal law.[7] Given the federal government's continued ability to enforce its own prohibition, it cannot be said that the Washington and Colorado laws create a right to use

[1] New State Ice Co. v. Liebmann, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting).

[2] U.S. CONST., Art. VI, cl. 2.

[3] For a discussion of state medical marijuana laws, *see* CRS Report R42398, *Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Laws*, by Todd Garvey.

[4] It is important to distinguish between two common terms that have been used to describe state marijuana laws: legalization and decriminalization. For purposes of this report, a state "legalizes" conduct when an individual who engages in that conduct is not subject to any state penalty. A state decriminalizes conduct when criminal penalties are removed, but civil penalties remain. This report characterizes the Washington and Colorado laws as legalization initiatives because each state has removed all state-imposed penalties for qualified marijuana activities. The legalization initiatives are to be distinguished from state marijuana decriminalization measures, like that of Massachusetts, which remove criminal penalties for possession of small amounts of marijuana, but retain civil penalties. It is important to note, however, that the term legalization is itself misleading, as a state cannot fully "legalize" conduct that constitutes a crime under federal law.

[5] Reports suggest that the number of jurisdictions that have legalized either medicinal or recreational marijuana will likely continue to grow. *See, e.g.*, Tim Dickinson, *The Next Seven States To Legalize Pot*, ROLLING STONE, December 18, 2012.

[6] 21 U.S.C. §841(b); 21 U.S.C. §844(b).

[7] For a discussion of how federal law enforcement may be affected by state-level positions on marijuana, *see* CRS Report R43164, *State Marijuana Legalization Initiatives: Implications for Federal Law Enforcement*, by Lisa N. Sacco and Kristin Finklea.

marijuana. Nor does compliance with state law provide a defense to a prosecution brought under federal law.[8]

Nevertheless, President Obama expressed to Barbara Walters on ABC's *Nightline* program in a December 2012 television interview that in the hierarchy of federal drug enforcement priorities, his Administration has "bigger fish to fry" than arresting recreational marijuana users in jurisdictions where such use is authorized by state law.[9] His personal views on this topic were later reflected in an August 2013 memorandum authored by the Deputy Attorney General, which instructed all federal prosecutors to use their "limited investigative and prosecutorial resources" toward certain specified marijuana-related criminal activities that the Obama Administration wants most to prevent, such as the distribution of marijuana to minors, the growing of marijuana on public lands, and the flow of revenue from marijuana sales to criminal enterprises, gangs, and cartels.[10] The memorandum implied that the federal government's drug enforcement priorities would likely not include prosecuting individuals or organizations engaged in marijuana activities that are conducted in clear compliance with state laws that permit and regulate them. The memorandum noted, however, that "Congress has determined that marijuana is a dangerous drug" that remains illegal under federal law. The memorandum is an example of the doctrine of prosecutorial discretion, which gives the U.S. Department of Justice (DOJ) great leeway in choosing whether, and to what extent, to bring criminal prosecutions for violations of the Controlled Substances Act. However, a new Administration in the White House could easily change this federal approach toward marijuana.

Washington Initiative 502

Approved by a majority of Washington voters in November 2012, Washington Initiative 502 legalizes marijuana possession by amending state law to provide that the possession of small amounts of marijuana "is not a violation of this section, this chapter, or any other provision of Washington law."[11] Under the Initiative, individuals over the age of 21 may possess up to one ounce of dried marijuana, 16 ounces of marijuana infused product in solid form, or 72 ounces of marijuana infused product in liquid form.[12] However, marijuana must be used in private, as it is unlawful to "open a package containing marijuana ... or consume marijuana ... in view of the general public."[13]

In addition to legalizing possession, the Initiative provides that the "possession, delivery, distribution, and sale" by a validly licensed producer, processor, or retailer, in accordance with the newly established regulatory scheme administered by the state Liquor Control Board (LCB),

[8] *See, e.g.,* United States v. Stacy, 734 F. Supp. 2d 1074, 1079 (S.D. Cal. 2010) ("[T]he fact that an individual may not be prosecuted under [state] law does not provide him or her with immunity under federal law."); United States v. Rosenthal, 454 F.3d 943 (9th Cir. 2006) (holding that state medical marijuana law could not act as a shield to federal prosecution).

[9] Devin Dwyer, *Marijuana Not a High Obama Priority*, ABC Nightline, December 14, 2012, *available at* http://abcnews.go.com/Politics/OTUS/president-obama-marijuana-users-high-priority-drug-war/story?id=17946783#.UVmtVVE4gpV.

[10] Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding Marijuana Enforcement*, August 29, 2013, *available at* http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

[11] Washington Initiative 502 at §20, amending RCW 69.50.4013 and 2003 c 53 s 334, *available at* http://sos.wa.gov/_assets/elections/initiatives/i502.pdf.

[12] *Id*. at §15.

[13] *Id*. at §21.

"shall not be a criminal or civil offense under Washington state law."[14] The Initiative establishes a three-tiered production, processing, and retail licensing system that permits the state to retain regulatory control over the commercial life cycle of marijuana. Qualified individuals must obtain a producer's license to grow or cultivate marijuana, a processor's license to process, package, and label the drug, or a retail license to sell marijuana to the general public.[15] The Initiative establishes various restrictions and requirements for obtaining the proper license and directs the state LCB to adopt procedures for the issuance of such licenses. On October 16, 2013,[16] the LCB adopted detailed rules for implementing Initiative 502. These rules describe the marijuana license qualifications and application process, application fees, marijuana packaging and labeling restrictions, recordkeeping and security requirements for marijuana facilities, and reasonable time, place, and manner advertising restrictions.[17]

According to the adopted rules, Washington will impose an excise tax of 25% of the selling price on each marijuana sale within the established distribution system.[18] The state excise tax will, therefore, be imposed on three separate transactions: the sale of marijuana from producer to processor, from processor to retailer, and from retailer to consumer. All collected taxes are deposited into the Dedicated Marijuana Fund and distributed, mostly to social and health services, as outlined in the Initiative.[19]

The Initiative also specifically provides that operation of a motor vehicle while under the influence of marijuana remains a crime.[20]

As of the date of this report, recreational marijuana retail stores have yet to open in Washington,[21] although the LCB has received well over 3,000 applications to grow, process, or sell marijuana.[22] The LCB has estimated that the application review process may take approximately 90 days to complete and that the state may begin issuing licenses by the end of February 2014.[23]

Colorado Amendment 64

Unlike the relatively specific Initiative 502, Colorado Amendment 64 provides only a general framework for the legalization, regulation, and taxation of marijuana in Colorado—leaving regulatory implementation to the Colorado Department of Revenue.

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[14] *Id*. at §4.

[15] *Id*.

[16] Joel Millman, *Washington State Sets Pot-Sales Rules,* WALL ST. JOURNAL, October 16, 2013.

[17] Washington State Liquor Control Board, Marijuana Licenses, Application Process, Requirements, and Reporting, *at* https://lcb.app.box.com/adopted-rules.

[18] *Id.* at 20-21.

[19] Washington Initiative 502 at §26.

[20] *Id*. §31.

[21] Steve Elliot, *Toke Signals: Washington Waits While Colorado Buys,* SEATTLE WEEKLY, December 30, 2013.

[22] *See* Bob Young, *In Washington, Pot Business Applications Surpass 3,000,* SEATTLE TIMES, December 24, 2013 (noting that "[s]tate investigators plan to evaluate growing licenses first, so crops can be started as soon as possible in hopes of supplying retail stores by May [2014]".).

[23] Jake Ellison, *Where Legal Marijuana Stands on the Brink of the New Year,* SEATTLE POST INTELLIGENCER, December 30, 2013, *at* http://blog.seattlepi.com/marijuana/2013/12/30/where-legal-marijuana-stands-on-the-brink-of-the-new-year/#14194101=0; *see also* Jack Healy, *Up Early and in Line for a Marijuana Milestone in Colorado,* N.Y. TIMES, January 1, 2014 ("While Colorado has incorporated the existing medical marijuana system, Washington is starting from scratch, with all production and sale of legal recreational marijuana linked to a new system of licenses, which will not be issued until late February or early March.").

In November 2012, Colorado voters approved an amendment to the Colorado Constitution to ensure that it "shall not be an offense under Colorado law or the law of any locality within Colorado" for an individual 21 years of age or older to possess, use, display, purchase, consume, or transport one ounce of marijuana; or possess, grow, process, or transport up to six marijuana plants.[24] Unlike Initiative 502, which permits only state-licensed facilities to grow marijuana, Amendment 64 allows any individual over the age of 21 to grow small amounts of marijuana (up to six plants) for personal use.[25] Marijuana may not, however, be consumed "openly and publicly or in a manner that endangers others."[26]

In addition, the amendment also provides that it shall not be unlawful for a marijuana-related facility to purchase, manufacture, cultivate, process, transport, or sell larger quantities of marijuana so long as the facility obtains a current and valid state-issued license.[27] However, the amendment expressly permits local governments within Colorado to regulate or prohibit the operation of such facilities.[28] By comparison, Washington's Initiative 502 does not expressly allow Washington cities to ban marijuana stores from opening within their borders, and there is uncertainty about the degree to which such local prohibitions or moratoriums on the operation of recreational marijuana businesses may be enforced.[29]

Amendment 64 appears to envision a three-tier distribution and regulatory system, similar to that established in Washington, involving the licensing of marijuana cultivation facilities, marijuana product manufacturing facilities, and retail marijuana stores.[30] In December 2012, Governor John Hickenlooper established the Amendment 64 Implementation Task Force (Task Force) to "identify the legal, policy and procedural issues that need to be resolved, and to offer suggestions and proposals ... that need to be taken" to effectively implement Amendment 64.[31] The Task Force issued a final report on March 13, 2013, consisting of 58 recommendations. Of those recommendations, the most significant include establishing a "vertical integration" model in which "cultivation, processing and manufacturing, and retail sales must be a common enterprise under common ownership";[32] imposing the required 15% excise tax while preserving the option for a future marijuana sales tax;[33] restricting commercial licenses to grow, process, or sell marijuana to state residents only;[34] and permitting both residents and nonresidents to purchase

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[24] Colorado Amendment 64, Amending Colo. Const. Art. XVIII §16(3), *available at* http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251834064719&ssbinary=true.

[25] *Id*.

[26] *Id*.

[27] *Id*. at §16(4).

[28] *Id.* at §16(5)(f). *See also* Dan Frosch, *Colorado Localities Make Own Rules Before Final Decision on Marijuana Sales*, N.Y. TIMES, June 12, 2013; John Ingold, *Colorado Marijuana Stores Likely to be Concentrated in Few Cities*, THE DENVER POST, July 25, 2013.

[29] *See* Jake Ellison, *City/County Bans, Moratoriums, and Zoning Approvals for Marijuana Businesses in Washington*, SEATTLE POST INTELLIGENCER, December 12, 2013, *at* http://blog.seattlepi.com/marijuana/2013/12/12/bans-moratoriums-and-zoning-approvals-for-marijuana-businesses-as-far-as-we-know/#18853101=0&18413103=0; Gene Johnson, *No Welcome Yet for Pot Shops in Many Wash. Cities*, SEATTLE POST INTELLIGENCER, January 1, 2014.

[30] The licensing and regulatory systems envisioned by both Colorado and Washington are modeled on similar state alcohol distribution schemes found across the country.

[31] Task Force Report on the Implementation of Amendment 64, March 13, 2013 at 9, *available at* http://www.colorado.gov/cms/forms/dor-tax/A64TaskForceFinalReport.pdf.

[32] *Id.* at 16-19.

[33] *Id*. at 28-31.

[34] *Id*. at 33.

marijuana, but imposing more restrictive limits on the quantity of marijuana that may be purchased by out-of-state consumers (a quarter ounce versus an ounce for individuals with a Colorado state-issued identification card).[35]

To implement Amendment 64, the Colorado General Assembly passed three bills that were signed into law by Governor Hickenlooper on May 28, 2013.[36] On September 9, 2013, the Colorado Department of Revenue and State Licensing Authority adopted regulations to implement licensing qualifications and procedures for retail marijuana facilities.[37] The regulations establish procedures for the issuance, renewal, suspension, and revocation of licenses; provide a schedule of licensing and renewal fees; and specify requirements for licensees to follow regarding physical security, video surveillance, labeling, health and safety precautions, and product advertising.[38]

On November 5, 2013, Colorado voters approved a 25% tax on retail marijuana (a 15% excise tax that would raise revenues to be used for public school capital construction, and an additional 10% sales tax that would generate revenues to fund the enforcement of the retail marijuana regulations).[39] On December 23, 2013, the Colorado Marijuana Enforcement Division issued its first recreational marijuana licenses to 348 businesses (136 retail stores, 31 product companies, 178 growing facilities, and 3 testing laboratories).[40] While these businesses have been granted state approval to produce and sell marijuana, they may also have to gain the licensing approval from local governments prior to their operation.[41] On January 1, 2014, 40 licensed retail marijuana stores opened their doors to sell marijuana to anyone 21 years of age or over.[42]

Federal Law

Congress enacted the Controlled Substances Act (CSA)[43] as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[44] The purpose of the CSA is to regulate and facilitate the manufacture, distribution, and use of controlled substances for legitimate medical, scientific,

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[35] *Id*. at 49-51.

[36] *See* Colorado Dep't of Revenue, *Permanent Rules Related to the Colorado Retail Marijuana Code,* September 9, 2013, *available at* http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22Retail+Marijuana+Rules%2C+Adopted+090913%2C+Effective+101513.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251888487553&ssbinary=true.

[37] *Id.*

[38] *Id.*

[39] Colorado Legislative Council Staff, *Fiscal Impact Statement: Proposition AA, Retail Marijuana Taxes,* September 24, 2013, *available at* http://www.leg.state.co.us/LCS/Initiative%20Referendum/1314initrefr.nsf/b74b3fc5d676cdc987257ad8005bce6a/e3e37fa33a36873887257b6c0077ac93/$FILE/Retail%20Marijuana%20Taxes_FN.pdf.

[40] John Ingold, *Colorado Issues First Licenses for Recreational Marijuana Businesses,* DENVER POST, December 23, 2013.

[41] *Id.*

[42] Jack Healy, *Up Early and in Line for a Marijuana Milestone in Colorado,* N.Y. TIMES, January 1, 2014.

[43] 21 U.S.C. §§801 et seq. In *Gonzales v. Raich,* the U.S. Supreme Court ruled that Congress had the constitutional authority under the Commerce Clause to prohibit the wholly intrastate cultivation or possession of marijuana for medical purposes, despite state laws that permit such activity. 545 U.S. 1 (2005); for more information about this decision, *see* CRS Report RL32844, *The Power to Regulate Commerce: Limits on Congressional Power*, by Kenneth R. Thomas.

[44] P.L. 91-513, 84 Stat. 1236 (1970).

research, and industrial purposes, and to prevent these substances from being diverted for illegal purposes. The CSA places various plants, drugs, and chemicals (such as narcotics, stimulants, depressants, hallucinogens, and anabolic steroids) into one of five schedules based on the substance's medical use, potential for abuse, and safety or dependence liability;[45] Schedule I substances are deemed to have no currently accepted medical use in treatment and can only be used in very limited circumstances, whereas substances classified in Schedules II, III, IV, and V have recognized medical uses and may be manufactured, distributed, and used in accordance with the CSA. The CSA requires persons who handle controlled substances (such as drug manufacturers, wholesale distributors, doctors, hospitals, pharmacies, and scientific researchers) to register with the Drug Enforcement Administration (DEA) in the U.S. Department of Justice, the federal agency that administers and enforces the CSA.[46] Such registrants are subject to strict requirements regarding drug security, recordkeeping, reporting and production quotas, in order to minimize theft and diversion.[47] Federal civil and criminal penalties are available for anyone who manufactures, distributes, imports, or possesses controlled substances in violation of the CSA (both "regulatory" offenses as well as illicit drug trafficking and possession).[48]

Because controlled substances classified as Schedule I drugs have "a high potential for abuse" with "no currently accepted medical use in treatment in the United States" and lack "accepted safety for use of the drug [] under medical supervisions,"[49] they may not be dispensed under a prescription, and such substances may only be used for bona fide, federal government-approved research studies.[50] Under the CSA, only DEA-licensed doctors are allowed to prescribe controlled substances listed in Schedules II-V to patients.[51] Federal regulations stipulate that a lawful prescription for a controlled substance may only be "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."[52]

The CSA establishes an administrative mechanism for substances to be controlled (added to a schedule); decontrolled (removed from the scheduling framework altogether); and rescheduled or transferred from one schedule to another.[53] Federal rulemaking proceedings to add, delete, or change the schedule of a drug or substance may be initiated by the DEA, the U.S. Department of Health and Human Services (HHS), or by petition by any interested person.[54] Congress may also change the scheduling status of a drug or substance through legislation.

When Congress enacted the CSA in 1970, marijuana was classified as a Schedule I drug.[55] Today, marijuana is still categorized as a Schedule I controlled substance and is therefore subject to the most severe restrictions contained within the CSA. Pursuant to the CSA, the unauthorized

[45] 21 U.S.C. §§811-812.

[46] The Attorney General delegated his authority under the CSA to the DEA Administrator pursuant to 21 U.S.C. §871(a); 28 C.F.R. §0.100(b).

[47] For more information about these requirements, *see* CRS Report RL34635, *The Controlled Substances Act: Regulatory Requirements*, by Brian T. Yeh.

[48] For a detailed description of the CSA's civil and criminal provisions, *see* CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh.

[49] 21 U.S.C. §812(b)(1).

[50] 21 U.S.C. §823(f).

[51] *See* 21 C.F.R. §1306.03 (persons entitled to issue prescriptions).

[52] 21 C.F.R. §1306.04; United States v. Moore, 4223 U.S. 122 (1975).

[53] The procedures for these actions are found at 21 U.S.C. §811.

[54] 21 U.S.C. §811(a).

[55] 21 U.S.C. §812(c).

cultivation, distribution, or possession of marijuana is a federal crime.[56] Although various factors contribute to the ultimate sentence received, the mere possession of marijuana generally constitutes a misdemeanor subject to up to one year imprisonment and a minimum fine of $1,000.[57] A violation of the federal "simple possession" statute that occurs after a single prior conviction under any federal or state drug law triggers a mandatory minimum fine of $2,500 and a minimum imprisonment term of 15 days (up to a maximum of two years); if the defendant has multiple prior drug offense convictions at the time of his or her federal simple possession offense, the sentencing court must impose a mandatory minimum fine of $5,000 and a mandatory minimum imprisonment term of 90 days (up to a maximum term of three years).[58] On the other hand, the cultivation or distribution of marijuana, or the possession of marijuana with the intent to distribute is subject to more severe penalties. Such conduct generally constitutes a felony subject to as much as five years imprisonment and a fine of up to $250,000.[59]

Federal Preemption of State Law

The Colorado and Washington laws, which legalize, regulate, and tax an activity the federal government expressly prohibits, appear to be logically inconsistent with established federal policy and are therefore likely subject to a legal challenge under the constitutional doctrine of preemption. The principal that states cannot enact laws that contradict federal law is grounded in the Supremacy Clause of Article VI, cl. 2, which states that "[t]he Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made ... under the Authority of the United States, shall be the supreme Law of the Land."[60] The Supremacy Clause, therefore, "elevates" the U.S. Constitution, federal statutes, federal regulations, and treaties[61] above the laws of the states.[62] As a result, where federal and state law are in conflict, the state law is generally preempted, leaving it void and without effect.[63]

The Supreme Court has established three general classes of preemption: express preemption, conflict preemption, and field preemption.[64] Express preemption exists where the language of a federal statute explicitly states the degree to which related state laws are superseded by federal law.[65] In contrast, where Congress does not articulate its view as to a statute's intended impact on state laws, a court may *imply* preemption if there is evidence that Congress intended to supplant state authority.[66] Preemption is generally implied in two situations. First, under field preemption,

[56] Very narrow exceptions to the federal prohibition do exist. For example, one may legally use marijuana if participating in an FDA-approved study or participate in the Compassionate Investigational New Drug program.

[57] 21 U.S.C. §844(a).

[58] 21 U.S.C. §844(a).

[59] 21 U.S.C. §841(b).

[60] U.S. CONST., Art. VI, cl. 2.

[61] See discussion of preemptive effect of treaties *infra*.

[62] Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1145 (8th Cir. 1971).

[63] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 124 (1942)("[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress").

[64] Hines v. Davidowitz, 312 U.S. 52, 67 (1941); *See also*, English v. General Elec. Co., 496 U.S. 72, 79 (1990) ("By referring to these three categories, we should not be taken to mean that they are rigidly distinct.").

[65] *See, e.g.*, English v. General Elec. Co., 496 U.S. 72, 79 (1990).

[66] There is, however, a presumption against federal preemption when it comes to the exercise of "historic police powers of the States." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Where Congress legislates within an area of traditional state control, courts generally imply preemption only where it is the "clear and manifest purpose of Congress." *Id*. State laws defining criminal conduct and regulating drugs are generally accorded this presumption.

a state law is preempted where a "scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.... "[67] Second, under conflict preemption, a state law is preempted "where compliance with both federal law and state regulations is a physical impossibility ... *or* where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[68]

Regardless of the type of preemption at play, the task of evaluating the preemptive effect of a federal law is "one of determining congressional intent."[69] By making its intent clear, Congress may choose to preempt all related state laws, no state laws, or only select state laws.

Preemption Under the Controlled Substances Act

In Section 708 of the CSA (21 U.S.C. §903), Congress specifically articulated the degree to which federal law was to preempt state drug laws. This *express* preemption[70] provision recites language that evokes the principles of *conflict* preemption, stating,

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, *unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together*.[71]

Notably, the provision clarifies that Congress did not intend to entirely occupy the regulatory field concerning controlled substances or wholly supplant traditional state authority in the area. Indeed, Congress expressly declined to assert *field* preemption as grounds for preempting state law under the CSA. The Supreme Court has stated that this provision suggests that Congress "explicitly contemplate[d] a role for the States in regulating controlled substances."[72] As such, the preemptive effect of the CSA is not as broad as congressional authority could have allowed. States remain free to pass laws relating to marijuana, or other controlled substances, so long as they do not create a "positive conflict" with federal law, such that the two laws "cannot consistently stand together."

In attempting to give effect to Congress's intent, courts have differed in the proper standard to be applied in determining whether a state law is in "positive conflict" with the CSA. Most courts have established that a state law is preempted by the CSA if it meets either prong of the conflict preemption test. Under this interpretation a state law is preempted if

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[67] *Santa Fe Elevator Corp*., 331 U.S. at 230 (1947).

[68] *See* Gade v. National Solid Waste Management Assn., 505 U.S. 88, 98 (1992)(emphasis added).

[69] Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1240 (10th Cir. 2004) (*citing* Wardair Canada, Inc. v. Florida Dep't of Revenue 477 U.S. 1 (1986)).

[70] A number of courts have held that the CSA does not contain an "express preemption" provision. *See, e.g.,* Ter Beek v. City of Wyoming, 2012 Mich. App. LEXIS 1510 (July 31, 2012) (stating that "express preemption is inapplicable because there is no express preemption provision in the CSA"). It is not entirely clear why 21 U.S.C. §903 would not constitute such a provision. Although not imperative to the preemption analysis, it would seem that an express preemption provision includes any provision in which Congress expressly articulates the preemptive effect of a federal statute. English v. General Elec. Co., 496 U.S. 72, 79 (1990) (observing that express preemption exists when Congress "define[s] explicitly the extent to which its enactments pre-empt state law."). 21 U.S.C. §903 would appear to meet that definition as it describes what state laws Congress did, and did not, intend to preempt.

[71] 21 U.S.C. §903 (emphasis added).

[72] Gonzales v. Oregon, 546 U.S. 243, 251 (2006).

1. it is "physically impossible" to comply with both the state and federal law ("impossibility preemption"); *or*
2. the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"[73] ("obstacle preemption").

This dual-prong interpretation of the CSA is further supported by a 2009 Supreme Court opinion that applied both impossibility and obstacle preemption in interpreting the effect of a similar preemption provision found within the Food Drug and Cosmetic Act (FDCA).[74] That provision provided that a state law would be preempted only where it was in "direct and positive conflict" with federal law.[75]

In contrast however, at least two lower state courts—including a Colorado court—have held that by adopting language displacing only those state laws in "positive conflict" with the CSA, without including any reference to those state laws that pose an obstacle to the CSA, Congress expressed its intent to preempt state laws only under impossibility preemption and *not* under obstacle preemption.[76] In *People v. Crouse*, which involved the Colorado medical marijuana law, the Court of Appeals of Colorado determined that Section 903 "demands more than that the state law 'stands as an obstacle to the accomplishment and execution' of the federal law.'"[77] As a result, the court held that the language of the CSA "cannot be used to preempt a state law under the obstacle preemption doctrine."[78] The decision in *Crouse* adopted[79] the reasoning of *County of San Diego v. San Diego NORML*, a California state court decision that also determined that obstacle preemption should not be applied in determining whether a state marijuana law is preempted by the CSA.[80] Under this line of reasoning, a state marijuana law is only in "positive conflict" with the CSA when it is "physically impossible" to simultaneously comply with the state and federal law.

The importance of this threshold interpretation cannot be overstated. The reasoning adopted in *Crouse* and *County of San Diego* significantly narrows the CSA's preemptive effect and, if adopted by other courts, would likely lead to a conclusion that the CSA does *not* preempt state recreational legalization measures like those adopted in Colorado and Washington. Courts have only rarely invalidated a state law as preempted under the impossibility prong of the positive conflict test.[81] Pursuant to the generally adopted standard, unless state law *requires* what federal law *prohibits*, or state law *prohibits* what federal law *requires*, it is not "impossible" to comply with both laws.[82] In the medical marijuana context, for example, courts have generally asserted

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[73] *See, e.g.*, Emerald Steel Fabricators, Inc., v. Bureau of Labor and Industries, 348 Ore. 159 (2010); Qualified Patients Assoc. v. City of Anaheim, 187 Cal. App. 4th 734 (2010); Ter Beek v. City of Wyoming, 2012 Mich. App. LEXIS 1510 (July 31, 2012).

[74] Wyeth v. Levine, 555 U.S. 555 (2009).

[75] *Id*. at 1195-96.

[76] *See, e.g.*, County of San Diego v. San Diego NORML, 165 Cal. App. 4th 798 (2008)(holding that a state law conflicts with the CSA only where it is impossible to comply with both the state and federal law.)

[77] 2013 Colo. App. LEXIS 1971 (December 19, 2013). *Crouse* involved an argument by state prosecutors that the state medical marijuana return provision, which requires the state officials to return marijuana improperly seized by the state from a medical marijuana patient, was preempted by the CSA.

[78] *Id*. at 11.

[79] *Id*. ("We consider County of San Diego well-reasoned and follow it here.")

[80] County of San Diego v. San Diego NORML, 165 Cal. App. 4th 798 (2008).

[81] The impossibility prong of the conflict preemption test has been characterized as "vanishingly narrow." Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 (2000).

[82] *See* Barnett Bank v. Nelson, 517 U.S. 25 (1996).

that an individual can comply with the CSA and a state medical marijuana exemption by refraining from the use of marijuana altogether.[83] As a general matter, it is clear that the principle provisions of the Colorado and Washington laws do not *require* individuals to engage in activity prohibited by federal law, but rather only permit such activity, and thus likely do not make it physically impossible to comply with both federal and state law.[84]

Notably, after concluding that obstacle preemption was inapplicable, both the Colorado court in *Crouse* and the California court in *County of San Diego* nevertheless proceeded to an obstacle preemption analysis because their interpretation of Section 903 had not been adopted by other courts. Moreover, in light of the Supreme Court's interpretation of the FDCA preemption provision in *Wyeth v. Levine* and the fact that most lower courts have applied both impossibility *and* obstacle preemption in determining whether state drug laws are in "positive conflict" with the CSA, it would appear that the preemptive effect of Section 903 may reasonably be interpreted to extend to both those state laws that make it impossible to comply with federal law and those that create an obstacle to the accomplishment of Congress's objectives.

Given that the Colorado and Washington laws would likely survive the impossibility prong of the conflict preemption test, most of the following analysis will focus on whether the Washington and Colorado laws represent an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Application of Obstacle Preemption Principles to Washington and Colorado Legalization Measures

The extent to which a state law that legalizes, regulates, and taxes marijuana for recreational purposes may be preempted by the CSA is a novel and unresolved legal question. The federal courts, for instance, have not engaged in any substantial analysis of whether federal law preempts state marijuana laws.[85] Existing applicable precedent, which has arisen as a result of challenges to state *medical* marijuana laws, has been developed almost exclusively by state courts, and even then, mostly by lower court decisions that range widely in their approach to the preemption question.[86] This divergent body of precedent, in conjunction with the general preemption principles previously outlined, would appear to be the most likely source for the standards upon which the validity of the Washington and Colorado laws may be judged.

Before proceeding, it is important to note the structural similarities of both the Washington and Colorado laws. Each law seeks to achieve three different but interrelated objectives: the

[83] *See, e.g., Emerald Steel*, 348 Ore. at 175 ("[A] person can comply with both laws by refraining from any use of marijuana, in much the same way that a national bank could comply with state and federal law in *Barnett Bank* by simply refraining from selling insurance.").

[84] One provision of the Washington law may be construed as "requiring" an individual to violate federal law. Under §11 of the Initiative, "every licensed marijuana producer and processor must submit representative samples of marijuana ... produced or processed by the licensee to an independent, third party testing laboratory ..." Washington Initiative 502 §11. In *Pack v. City of Long Beach,* 199 Cal. app. 4th 1070, 1090-91 (2011) a California court held that a city ordinance that required marijuana collectives to submit samples of analysis appeared "to *require* that certain individuals violate the federal CSA."

[85] Although the Supreme Court has issued two decisions relating to the CSA's marijuana provisions, neither case discussed the preemption question. *See* Gonzales v. Raich, 545 U.S. 1 (2005)(holding that the CSA's prohibition on the local cultivation and use of marijuana was within Congress's authority); United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001)(holding that there is no medical necessity exception to the CSA).

[86] The Oregon Supreme Court appears to be the only state supreme court to directly consider the extent to which the CSA preempts state marijuana laws.

legalization of marijuana, the regulation and licensing of marijuana producers, processors, and retailers, and the taxation of marijuana sales. Because each of these objectives conflicts with federal law to a different degree, for purposes of a preemption analysis each aspect of the state laws must be considered separately.

The Supreme Court has emphasized "two cornerstones of pre-emption jurisprudence," that will likely play a significant role in any review of the Washington or Colorado laws.[87] First, "the purpose of Congress is the ultimate touchstone in every pre-emption case."[88] Thus, in considering the preemptive scope of the CSA, it is necessary to establish Congress's "purpose" in enacting the law. The Supreme Court has previously identified the "main objectives" of the CSA as "conquer[ing] drug abuse" and "control[ing] the legitimate and illegitimate traffic in controlled substances."[89] Second, "[i]n all pre-emption cases ... we 'start with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress."[90] State drug laws, including those connected to marijuana cultivation, distribution, or possession have generally been considered to be within "the historic police powers of the States."[91] Consequently, the Washington and Colorado laws would likely be accorded a presumption of validity.

Legalization

Both Colorado and Washington have provided that the possession of marijuana in accordance with certain restrictions[92] shall not be a violation of state law. It would appear unlikely that these aspects of both state laws—which only exempt certain individuals who possess marijuana from penalties under state law—would be preempted by federal law. It is important to reiterate however, that even if otherwise valid, permitting the possession, distribution or production of marijuana under state law does not alter the fact that the conduct remains a crime under federal law.

Under the police power, states are generally free to criminalize any conduct (within the bounds of state and federal constitutional protections) which they wish to deter.[93] Although the federal government may use its power of the purse to encourage states to adopt certain criminal laws, it is limited by the Tenth Amendment—which prevents the federal government from directing states to enact specific legislation—in its ability to directly influence state policy or requiring state officials to enforce federal law.[94] As such, the fact that the federal government has criminalized

[87] Wyeth v. Levine, 555 U.S. 555, 565 (2009).

[88] *Id*.

[89] Gonzales v Raich, 545 U.S. 1, 12 (2005). Moreover, in a case addressing whether the CSA prohibited physician assisted suicide, the court appears to have characterized the CSA "as a statute combating *recreational* drug abuse ..." It is clear, however, that with respect to marijuana, the CSA prohibits both recreational and medical uses.

[90] *Wyeth*, 555 U.S. at 565.

[91] Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). In these areas, a more "significant" conflict may be required before a state law constitutes an obstacle to the achievement of the federal goal. County of San Diego v. San Diego NORML, 165 Cal. App. 4th 798 (2008) (*citing* Boyle v. United Technologies Corp., 487 U.S. 500, 507 (1988)); People v. Crouse, 2013 Colo. App. LEXIS 1971 (2013) ("[F]ederal law generally does not supersede 'the historic police powers' of the state, unless Congress has expressed a 'clear and manifest' purpose to do so.")(citations omitted).

[92] Both state laws legalize only the possession of one ounce or less by individuals 21 years of age or older.

[93] As opposed to the federal government, which is one of limited and enumerated power, the states have retained "inherent police power," Newberry v. United States, 256 U.S. 232 (1921). This includes the power to legislate for the "health, safety, and morals" of the citizenry. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991).

[94] *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992). In *Reno v. Condon*, the Supreme Court held that a federal law does not "commandeer" state resources so long as it "does not

conduct does not mean that the state, in turn, must also criminalize or prosecute that same conduct. It has generally been recognized that the states and the federal government operate as two distinct sovereigns, enacting separate and independent criminal regimes with separate and independent enforcement mechanisms, in which certain conduct may be prohibited under one sovereign and not the other.[95] If prohibiting certain conduct under federal law had the effect of barring any state attempt to permit that same conduct, the result would be a legal environment in which states were compelled to adopt criminal measures that mirrored federal law. The Tenth Amendment prohibits such a requirement.[96] In situations where states are unwilling to voluntarily prohibit conduct that Congress has determined should be deterred "the proper response—according to [the Tenth Amendment]—is to ratchet up the *federal* regulatory regime, *not* to commandeer that of the state."[97]

These principles of federalism would appear to both inform and restrict the reach of federal preemption. Under both Tenth Amendment and preemption principles, federal and state courts have previously held that a state's decision to simply *permit* what the federal government *prohibits* does not create a "positive conflict" with federal law.[98] As discussed above, under the impossibility prong of conflict preemption, the Supreme Court has specifically held that so long as an individual is not compelled by state law to engage in conduct prohibited by federal law, then simultaneous compliance with both laws is not "impossible."[99]

Nor have courts generally found that simply permitting conduct that the federal government prohibits stands as an "obstacle to the execution of Congress's objectives." The Supreme Court has interpreted this prong relatively narrowly, holding that a state law is preempted where the obstacle is of such a degree that "the purpose of the [federal] act cannot otherwise be accomplished."[100] In the medical marijuana context, courts have generally found that exempting individuals from state penalties has only a limited impact on the federal government's ability to combat the use of marijuana because an exemption under *state law* does not obstruct the federal government's ability to investigate and prosecute violations of *federal law*.[101] It is well established that compliance with state medical marijuana laws is no defense, and provides no

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require the States in their sovereign capacities to regulate their own citizens," but rather regulates state activities directly. 528 U.S. 141, 151 (2000). See also, Gonzales v. Oregon, 546 U.S. 243, 270 (2006) ("the structure and limitations of federalism ... allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.")(citations omitted).

[95] *See, e.g.,* United States v. Lanza, 260 U.S. 377, 382 (1922)("We have here two sovereigns, deriving power from different sources, capable of dealing with the same subject matter within the same territory ... Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.").

[96] For a broader discussion of the principles of federalism embodied within the Tenth Amendment, *see* CRS Report RL30315, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, by Kenneth R. Thomas. For a specific discussion of the Tenth Amendment's application to state and federal marijuana laws, *see* CRS Report R42398, *Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Laws*, by Todd Garvey.

[97] Qualified Patients Assoc. v. City of Anaheim, 187 Cal. App. 4th 734 (2010) (*citing* Conant v. Walters, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring)

[98] *See* Wyeth v. Levine, 555 U.S. 555 (2009); Barnett Bank v. Nelson, 517 U.S. 25 (1996).

[99] *Barnett Bank*, 517 U.S. at 31 (holding that a federal statute that permitted national banks to sell insurance and a state statute that prohibited banks from selling insurance did not "impose directly conflicting duties").

[100] Crosby v. National Foreign Trade Council, 530 U.S. 363, 373-74 (2000).

[101] *See, e.g.,* People v. Crouse, 2013 Colo. App. LEXIS 1971 (2013) ("The [medical marijuana] Amendment does not require patients to do anything ... For this reason, we conclude that the [medical marijuana] Amendment is not preempted merely because it permits patients to engage in conduct involving marijuana which the CSA prohibits.")

immunity to a federal criminal prosecution under the CSA.[102] The federal government remains free to expend its own resources to implement and enforce its own law, regardless of whether the state chooses to criminalize that same conduct. The fact that a state does not wish to expend its resources to implement a policy similar to that of the federal government, though likely making overall enforcement less effective,[103] has not, in the past, created an obstacle to the federal law sufficient to trigger preemption.[104]

In light of this dynamic, it would appear that those aspects of the Colorado and Washington laws that remove state penalties for possession of marijuana may properly be characterized as an exercise of the state's "power to decide what is criminal and what is not."[105] Neither law purports to shield its residents from the legal consequences of violating federal law. Given both the limitations on congressional power imposed by the Tenth Amendment and preemption precedent arising from challenges to state medical marijuana laws, it would appear unlikely that a reviewing court would invalidate either Colorado or Washington's decision to simply exempt certain marijuana-related conduct from state penalties under state law.

Regulation and Licensing

Although the legalization aspects of both the Washington and Colorado laws would likely survive a legal challenge, the regulation and licensing aspects of each law may raise more substantial preemption concerns. In addition to removing state penalties relating to certain marijuana-related activities, both states envision comprehensive, state implemented regulatory and licensing regimes to control the cultivation, distribution and sale of marijuana within the state. These provisions can arguably be distinguished from the legalization provisions in two key ways, both of which appear to support a finding of preemption. First, the regulatory and licensing provisions potentially create an increased "obstacle" to the accomplishment of federal objectives by "authorizing" conduct federal law prohibits. Second, the affirmative act of regulating and licensing marijuana cultivation and distribution may not invoke the same Tenth Amendment protections enjoyed by the states' initial decision to simply remove marijuana-related penalties under state law.

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[102] *See, e.g.*, United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001)(holding that there is no medical necessity defense under the CSA, even where state law recognizes such a defense.); United States v. Rosenthal, 454 F.3d 943 (9th Cir. 2006) (holding that state medical marijuana law could not act as a shield to federal prosecution.); United States v. Stacy, 734 F. Supp. 2d 1074, 1079 (S.D. Cal. 2010) ("[T[he fact that an individual may not be prosecuted under [state] law does not provide him or her with immunity under federal law."); United States v. Lynch, 2010 U.S. Dist. LEXIS 53011(C.D. Cal. 2010).

[103] This is especially true within the marijuana context. *See* Ter Beek v. City of Wyoming, 2012 Mich. App. LEXIS 1510 (July 31, 2012) ("99 out of every 100 marijuana-based arrests in the United States are made under state law.").

[104] Although state medical marijuana exemptions have typically not been found to create an unacceptable obstacle to federal law, an argument could be forwarded that recreational legalization measures, such as those in Colorado and Washington that permit marijuana use on a larger scale, could represent a more substantial barrier to the accomplishment of federal objectives. As a practical matter, even if a court were to adopt this reasoning and strike down the legalization provisions, neither the federal government nor a court can compel a state to make marijuana possession a criminal offense under state law. The potentially bizarre result may be that if prohibited from enacting an express provision of state law ensuring that "it shall not be unlawful to possess one ounce of marijuana," a state could simply choose to repeal all criminal provisions that apply to the possession of marijuana. The result as to the legality of marijuana possession under state criminal law would appear to be substantially the same whether the state affirmatively permits, or fails to proscribe certain conduct.

[105] City of Garden Grove v. Superior Ct. of Orange County, 157 Cal. App. 4th 355 (2007) (*citing* Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting).

To the contrary, arguments can also be made in opposition to preemption. The regulation and licensing provisions could be viewed as a necessary implementation mechanism through which the states may efficiently identify those individuals who have met the requirements of the state marijuana law without impeding the enforcement of federal law. Moreover, the regulatory and licensing provisions could be characterized as imposing additional *restrictions* on marijuana access—an objective consistent with the purposes of the CSA—and thus are not subject to conflict preemption. These contrasting views, either of which could be invoked in a court's review of the Colorado and Washington laws, are discussed in greater detail below.

The Exemption/Authorization Distinction in Obstacle Preemption

Where the federal government has prohibited specific conduct, the Supreme Court appears to have expressed concern over state laws that go beyond exempting that conduct from state penalties, and instead attempt to actively "authorize" conduct in violation of federal law. In *Michigan Canners & Freezers v. Agricultural Board*, the Court held that a state law that permitted a state board to authorize a food producers association to act as an exclusive bargaining agent for all producers of a certain commodity was in conflict with a federal law that prohibited associations from interfering with an individual food producer's decision to sell its products on its own or through an association.[106] The Court determined that although it was possible to simultaneously comply with both the federal and state law, because the state board was empowered to "*authorize[]* producers' associations to engage in conduct that the federal act forbids, it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[107] Although the Court did not adopt an express distinction, the possibility that state "authorizations" may create a more substantial obstacle to the accomplishment of federal objectives than a state "exemption" from state penalties, could play a significant role in a court's evaluation of the Colorado and Washington laws.

Consider, for example, the Oregon Supreme Court decision in *Emerald Steel Fabricators v. Bureau of Labor and Industries*.[108] In that case the Oregon Supreme Court heard a challenge to the state identification card provisions of the Oregon Medical Marijuana Act. Under Oregon law, the state issued identification cards that permitted qualified individuals to "engage in the medical use … of marijuana" without the threat of state prosecution.[109] In evaluating the state law, the Oregon Supreme Court first affirmed that it was not invalidating Oregon's decision to simply exempt medical marijuana users from criminal liability under state law—suggesting that such measures were within the states' authority and beyond the reach of Congress under the Tenth Amendment.[110] The licensing provisions, however, which authorized an individual with an

[106] 467 U.S. 461 (1984).

[107] *Id*. at 477 ("The Michigan Act, however, empowers producers' associations to do precisely what the federal Act forbids them to do.").

[108] Emerald Steel Fabricators, Inc., v. Bureau of Labor and Industries, 348 Ore. 159, 230 P.3d 518 (2010).

[109] *Id*. at 525. The challenge to the law arose in the context of an employment discrimination claim in which an employee, who had obtained an identification card due to a medical condition, was allegedly discharged for admitting that he used marijuana. Oregon law requires that employers "make reasonable accommodations" for an employee's disability as long as such an accommodation does not impose an undue hardship upon the employer. However, the law is to be interpreted consistently with the federal Americans with Disabilities Act, which does not afford protections for employees "currently engaged in the illegal use of drugs."

[110] *Id*. at 526 n.12 ("The only issue that employer's preemption argument raises is whether federal law preempts ORS 475.306(1) to the extent that it authorizes the use of medical marijuana. In holding that federal law does preempt that subsection, we do not hold that federal law preempts the other sections of the Oregon Medical Marijuana Act that exempt medical marijuana use from criminal liability.")

identification card to engage in the use of marijuana, were distinguishable.[111] The Court held that by "affirmatively authorizing a use that federal law prohibits," the Oregon law stood "as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act, " and was therefore preempted.[112] "[T]here is no dispute," the court concluded, "that Congress has the authority under the Supremacy Clause to preempt state laws that affirmatively authorize the use of medical marijuana."[113]

Most California courts, however, have not adopted the exemption/authorization distinction, and have instead generally upheld California medical marijuana identification card provisions. These cases have generally stressed that the Tenth Amendment protects California's decision to permit medicinal marijuana and that the state's medical marijuana law in no way affects the federal government's ability to prosecute for violations of federal law. For example, in *County of San Diego v. San Diego NORML*, and *Qualified Patients Association v. City of Anaheim*, an intermediate California appellate court twice upheld the identification card provisions of the California Medical Marijuana Program Act (MMPA).[114] Like the Oregon law, the MMPA provides that persons with valid identification cards shall not be subject to criminal sanctions under state law.

In both cases, the California appellate court held that the state law did not impose a significant obstruction to the federal objectives embodied within the CSA. In *County of San Diego*, the court relied principally on a determination that the identification cards did not "insulate the bearer from federal laws," nor did the card "imply the holder is immune from prosecution for federal offenses."[115] The identification cards, the court reasoned, instead represented a "mechanism" by which California law enforcement officers could efficiently identify those individuals who are exempt from prosecution under California law for possessing marijuana.[116] In *Qualified Patients*, the court relied more heavily on the Supreme Court's statement in *Crosby v. National Foreign Trade Council*[117] that a state law presents a sufficient obstacle to the accomplishment of federal objectives only where "the purpose of the [federal] act cannot otherwise be accomplished," as well as the anti-commandeering principles of the Tenth Amendment.[118] In determining that the

[111] The court specifically noted that "the validity of the exemptions and the validity of the authorization turn on different constitutional principles." *Id*. at 530 Although Congress may "lack authority to require states to criminalize conduct that the states choose to leave unregulated ... [b]y contrast, there is no dispute that Congress has the authority under the Supremacy Clause to preempt state laws that affirmatively authorize the use of medical marijuana." *Id*.

[112] *Id*. at 529-30.

[113] *Id*. In a subsequent case evaluating whether the Oregon concealed handgun licensing statute was preempted by the Federal Gun Control Act, the Oregon Supreme Court arguably confined the authorization/exemption distinction, warning that "*Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as "affirmatively authorizing" what federal law prohibits is preempted. Rather, it reflects this court's attempt to apply the federal rule and the logic of the most relevant federal cases to the particular preemption problem that was before it. And particularly where, as here, the issue of *whether* the statute contains an affirmative authorization is not straightforward, the analysis in *Emerald Steel* cannot operate as a simple stand-in for the more general federal rule." Willis v. Winters, 350 Or. 299, 253 P.3d 1058 (2011).

[114] 165 Cal. App. 4th 798 (2008), review denied 2008 Cal. LEXIS 12220 (Cal. 2008); 187 Cal. App. 4th 734 (2010).

[115] *Id*. at 825.

[116] *Id*. at 827. The court also noted that "[a]lthough California's decision to enact statutory exemptions from state criminal prosecution for such persons arguably undermines the goals or is inconsistent with the CSA—a question we do not decide here—any alleged 'obstacle' to the federal goals is presented by those California statutes that create the exemptions, not by the statutes providing a system for rapidly identifying exempt individuals.").

[117] 530 U.S. 363 (2000).

[118] 187 Cal. App. 4th 734, 761-63 (2010).

state law did not create a sufficient conflict with federal law, the court noted that "preemption theory [] is not a license to commandeer state or local resources to achieve federal objectives."[119]

Decisions in Michigan and Colorado have adopted similar lines of reasoning. In *Ter Beek v. City of Wyoming*, the Court of Appeals of Michigan held that a Michigan statute which provided immunity from state prosecution to individuals with an identification card did not create an obstacle to the accomplishment of federal objectives and was not preempted by the CSA.[120] Likewise in *Crouse*, the Colorado court held that a state law which required the return of marijuana seized from a medical marijuana patient if the patient is acquitted of state charges did not create an obstacle to the CSA.[121]

However, in a ruling that was later dismissed as moot by the California Supreme Court after the city ordinance in question was repealed, one California appellate court deviated from *County of San Diego* and *Qualified Patients* in striking down a marijuana regulatory scheme that had been implemented by the City of Long Beach, California. *Pack v. City of Long Beach* involved a preemption challenge to a city ordinance that established a "comprehensive regulatory scheme by which medical marijuana collectives" were to be governed.[122] Pursuant to the ordinance, the city issued permits to marijuana collectives and adopted regulations that restricted their operation. In applying the obstacle prong to determine whether the local ordinance was preempted by the CSA,[123] the court clearly addressed the exemption/authorization distinction, reasoning that "there is a distinction, in law, between not making an activity unlawful and making the activity lawful ... The state law does not present an obstacle to Congress's purposes simply by not criminalizing conduct that Congress has criminalized."[124] However, the court concluded that the city ordinance "goes beyond decriminalization into authorization."[125] By establishing a permit scheme that "determines which collectives are permissible and which collectives are not," the city was affirmatively authorizing individuals to engage in conduct barred by federal law.[126] Citing *Michigan Canners*, the court held that such an action "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' and is therefore preempted."[127]

In light of these varying approaches, it is apparent that the extent to which state marijuana provisions (whether medicinal or recreational) are preempted by the CSA is unsettled. However, if a reviewing court were to adopt the exemption/authorization distinction applied in *Emerald*

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[119] *Id*. at 761.

[120] Ter Beek v. City of Wyoming, 2012 Mich. App. LEXIS 1510 (July 31, 2012) (holding that the Michigan medical marijuana law "is not preempted by the CSA because it only grants immunity from state prosecution and, therefore, does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

[121] *Crouse*, 2013 Colo. App. LEXIS 1971, at 12-27. In determining whether the Colorado requirement that state officials return marijuana to medical marijuana patients created an obstacle to the objectives of federal law, the court focused primarily on 21 U.S.C. §885(d), which creates an exemption from liability for any "duly authorized officer of any State, ... who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances."

[122] 199 Cal. App. 4th 1070, 1076 (2011) (appeal dismissed 283 P.3d 1159 (2012) ("In this case, we are concerned with a city ordinance which *goes beyond simple decriminalization*.") (emphasis in original).

[123] As with previous cases, the court first found that "[s]ince a person can comply with both the federal CSA and the City ordinance by simply not being involved in the cultivation or possession of medical marijuana at all, there is no conflict [impossibility] preemption." *Id*. at 1090.

[124] *Id*. at 1092-93.

[125] *Id*. at 1093.

[126] *Id*.

[127] *Id*. at 1093.

Steel and *Pack*, it would appear that the Colorado and Washington recreational licensing provisions would likely be invalidated. Both state initiatives involve a significantly higher degree of state involvement in the "authorizing" of marijuana activities than merely issuing identification cards. Both Colorado and Washington plan to implement a robust and comprehensive regulatory distribution scheme (akin to the ordinance at issue in *Pack*) that provides state issued licenses to marijuana producers, processors, and retailers.[128] An individual who obtains the proper license from the state would be *authorized* to grow, transport, or sell marijuana under state law. This licensing of marijuana-related activities by the state could be viewed as exceeding a decision to determine what conduct constitutes an offense under state law, and instead representing an action by the state to "affirmatively authorize" conduct prohibited under federal law.[129]

In the alternative, a reviewing court could adopt a line of reasoning similar to that in *County of San Diego*, *Qualified Patients*, *Ter Beek*, or *Crouse* and determine that the Colorado and Washington licensing provisions are a proper exercise of state power and not in conflict with the CSA.[130] Under this line of precedent, it can be argued that the state regulatory and licensing laws have no impact on the enforcement of federal law; are necessary to implement the state's decision to remove penalties for certain marijuana-related activities; do not immunize or shield the holder from federal prosecution; and, therefore, are not preempted. Moreover, it could be argued that a state license acts only as a means by which the state can impose controls on the production and distribution of marijuana under state law and to identify which individuals have been preapproved to engage in marijuana-related activities.

This appears to be the approach taken by the United States Bankruptcy Court for the District of Colorado in an opinion focusing on whether a debtor, who leased space for the purposes of growing medicinal marijuana in compliance with state law, was engaged in an ongoing criminal activity.[131] In what is perhaps the only statement by a federal court relating to preemption of the Colorado and Washington laws, in *In re: Rent-Rite Super Kegs West LTD*, a bankruptcy court

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[128] Both initiatives require licensing of marijuana producers, processers, and sellers, and empower state agencies to promulgate broad rules and regulations to implement a regulatory and licensing scheme.

[129] A reviewing court may also focus on the scope of the Colorado and Washington initiatives. In *County of San Diego* and *Qualified Patients*—cases in which the courts took an arguably less restrictive view of what constitutes an obstacle to federal objectives sufficient to trigger preemption—the court noted that the state medical marijuana laws in question related more to state medical practices than to the regulation of controlled substances. In both cases, the court asserted that the purpose of the CSA was to "combat recreational drug use, not to regulate a state's medical practices." *Qualified Patients*, 187 Cal. App. 4th at 760 (*citing County of San Diego*, 165 Cal. App. 4th at 826-27. The laws enacted in Colorado and Washington, which legalize, regulate, and license marijuana activities wholly unrelated to any medicinal purpose, cannot be characterized as a regulation of state medical practices. The reasoning applied by a California appellate court in *Garden City v. Superior Court of Orange County* may also support this concern. 157 Cal App. 4th 355 (2007). In *Garden City*, a California court held that a provision of the California medical marijuana law requiring that marijuana seized by local police be returned to qualified patients was not preempted by the CSA. The court noted that it was "unreasonable to believe" that returning seized marijuana would significantly "hinder the federal government's enforcement efforts" as "this subset of medical marijuana users is too small to make a measurable impact on the war on drugs." *Id*. at 384. If the California court found the "meager" numbers of individuals who would qualify for the return of seized marijuana to be noteworthy, it is possible that a court could alternatively be swayed by the much larger number of users that would qualify under the Colorado and Washington initiatives. Although it is impossible to identify the impact the Colorado and Washington laws will have on marijuana use, a reviewing court could find that the scope of the initiatives present a "meaningful threat to the federal drug enforcement effort." *Id*.

[130] For a discussion of limitations on the federal government's ability to preempt state medical marijuana laws, *see* Robert A. Mikos, *Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009).

[131] In re: Rent-Rite Super Kegs West Ltd., 484 B.R. 799 (Dec 19, 2012). Whether the debtor was engaged in criminal activity was an issue in the case because "a federal court cannot be asked to enforce the protections of the Bankruptcy Code in aid of a Debtor whose activities constitute a continuing federal crime." *Id*. at 805.

noted (in what was clearly dicta) that "conflict preemption is not an issue here. Colorado constitutional amendments for both medical marijuana, and the more recent amendment legalizing marijuana possession and usage generally, both make it clear that their provisions apply to state law only. Absent from either enactment is any effort to impede the enforcement of federal law."[132]

In addition, it has previously been argued that because the licensing and regulatory aspects of medical marijuana laws actually place additional *restrictions* on access to marijuana, those provisions are more consistent with the objectives of the CSA than the state decision to legalize marijuana production, distribution, possession.[133] By *limiting* marijuana and production and distribution, it could be argued that the envisioned Colorado and Washington regulatory and licensing provisions "further[] rather than obstruct[] the purposes of the CSA."[134] Under this reasoning, the Washington and Colorado regulatory and licensing aspects could be seen as supporting the federal government's objectives of "control[ing] the legitimate and illegitimate traffic in controlled substances," as opposed to creating an obstacle to that goal.

Taxation

In addition to regulating and licensing recreational marijuana use, both Colorado and Washington plan to impose a substantial excise tax on marijuana sales. In Colorado, the tax (which may not exceed 15% prior to January 1, 2017) is to be levied on sales of marijuana by cultivation facilities, product manufacturing facilities, or retail stores.[135] In Washington, a 25% tax is to be imposed at each transaction within the distribution chain, including sales from: producer to processor; processor to retailer; and from retailer to consumer.[136] Although little precedent exists relating to state-imposed taxes on medical marijuana, there is evidence to suggest that these taxes would likely be considered permissible.

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[132] *Id*. at 805 ("The fact that there is a difference in legislative philosophy creates no conflict that requires an analysis of federal preemption under the Supremacy Clause."). Part of the confusion over the proper application of obstacle preemption to state marijuana laws may stem from an apparent disagreement over the nature of the obstacle that is required to trigger preemption. As previously noted, the Supreme Court has held that a state law is preempted when it "stands as an obstacle *to the accomplishment and execution of the full purposes and objectives of Congress*." Most courts that have rejected preemption challenges to state medical marijuana laws have interpreted "the full purposes and objectives of Congress" in relation to the federal government's ability to enforce federal law. As such, these courts have generally held that because the state law does not create a shield or otherwise immunize state residents from federal criminal prosecutions, the law does not constitute an obstacle to "the enforcement of federal law." To the contrary, the Oregon Supreme Court reasoned that the fact that the state law in no way inhibited federal prosecutions did not mean that the law did not otherwise create an obstacle to the Congress's chief objective in enacting the CSA; that of curtailing drug use.

[133] *See* Brief of Amici Curiae Professors of Constitutional and Criminal Law, Pack v. City of Long Beach, 199 Cal. App. 4th 1070 (2011) at 12-18. "Given that the Tenth Amendment permits California to decriminalize all medical marijuana activities, it defies reason to suggest that Congress intended to preempt localities from limiting the production, limiting the proliferation, and reducing the potential abuse of marijuana—all of which would serve to narrow the scope of a state policy that differs from federal policy." *Id*. at 16. DOJ's most recent guidance to U.S. Attorneys appears to have acknowledged this line of argument, noting that a state with a robust regulatory system for the control of recreational marijuana "is less likely to threaten [] federal priorities ..." than a state that lacks such controls. Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding Marijuana Enforcement*, August 29, 2013.

[134] *Id*.

[135] Colorado Amendment 64, amending Colo. Const. Art. XVIII §16(5)(d).

[136] Washington Initiative 502 §27.

The Supreme Court has held that a state may "legitimately tax criminal activities."[137] Indeed, in *Department of Revenue of Montana v. Ranch*, the Court specifically suggested, in dicta, that it was within Montana's authority to tax the possession of marijuana.[138] The Montana law challenged in *Ranch* imposed a tax on the possession of illegal drugs. Although determining that the law's application to the petitioners violated the Double Jeopardy Clause of the Fifth Amendment by subjecting an individual to successive punishments for the same offense, the Court noted briefly that "Montana no doubt could collect its tax on the possession of Marijuana ... if it had not previously punished the taxpayer for the same offense."[139] The Court made clear that "as a general matter, the unlawfulness of an activity does not prevent its taxation."[140] In addition, many states already tax marijuana and other illegal or controlled substances. For example, 20 states require all possessors of marijuana to purchase "tax stamps."[141] Although some of these laws have raised questions relating to the Fifth Amendment's privilege against self-incrimination and double jeopardy clause, no court has found a state drug tax law to be preempted by federal law.

Moreover, if analyzing state marijuana taxes within the previously discussed preemption framework, it would appear difficult to argue that by imposing a tax on marijuana the state has authorized conduct prohibited under federal law or imposed an obstacle to the achievement of federal objectives. Taxes are generally imposed to either raise revenue, deter conduct, or both. Taxes on cigarettes for example, exist both to raise revenue and to deter smoking.[142] The excise taxes envisioned by Colorado and Washington appear to be motivated by a desire to raise revenue to both pay for the regulatory and licensing controls on marijuana and to contribute to other budgetary needs, most notably health services and education. In addition, the Washington law states that the Liquor Control Board is authorized to make recommendations to adjust the tax levels "that would *further the goal of discouraging use* while undercutting illegal market prices."[143] The Colorado law does not explicitly reference any goal of deterring marijuana use, but it would appear that the envisioned tax may also have that effect. Thus, the state tax may more accurately be characterized as "interposing an economic impediment to the activity" as opposed to *authorizing* the activity.[144]

Are the Washington and Colorado Laws Preempted by International Law?

The United States is a party to various treaties that impose international obligations relating to the control of marijuana. These treaties generally seek to curb the use of controlled substances while

[137] Department of Revenue of Montana v. Ranch, 511 U.S. 767, 775 n.13 (1994) (*citing* Marchetti v. United States, 390 U.S. 39, 44 (1968)).

[138] 511 U.S. 767 (1994).

[139] *Id.* at 778.

[140] *Id.* at 788.

[141] *See* State Tax Stamp Data, *available at* http://norml.org/legal/tax-stamps. *See also* Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL F. 223 (2010).

[142] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2596 (U.S. 2012)

[143] Washington Initiative 502 §27.

[144] *Sebelius*, 132 S. Ct. at 2596 (U.S. 2012) ("To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.").

carving out exceptions for "medicinal and scientific" uses.[145] The principle governing treaty in international drug control, which has been agreed to by more than 180 nations, is the Single Convention on Narcotic Drugs (Single Convention).[146] The Single Convention imposes restrictions on the manufacturing, distribution, and trade in narcotic drugs by establishing a multi-schedule classification structure that applies varying controls for each schedule. This framework later served as the blueprint for the CSA and other foreign drug control statutes.

"Cannabis" is listed as a Schedule I substance under the Single Convention and is therefore subject to the agreement's most restrictive controls.[147] For example, parties must "take such legislative and administrative measures as may be necessary ... to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs"; limit the quantity of the drug manufactured and imported to "the quantity consumed ... for medical and scientific purposes"; and furnish the International Narcotics Control Board with information, estimates, and statistics related to the consumption and production of the drug.[148]

In addition to the Single Convention, the 1971 Convention on Psychotropic Substances requires that specific controls be placed by parties upon THC, the physiologically active chemical in marijuana,[149] while the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances requires parties to establish criminal penalties for the possession, purchase, or cultivation of marijuana for nonmedicinal consumption, but only to the extent that such action is consistent with the "constitutional principles and basic concepts of [the country's] legal system."[150]

Both the U.S. Drug Enforcement Agency (DEA) and the U.S. Department of State have determined that in order to comply with these international obligations, it is necessary that marijuana remain on either Schedule I or Schedule II of the federal CSA.[151] The DEA, for example, has cited the nation's obligations under the Single Convention as the legal justification for denying rulemaking petitions requesting that the Attorney General exercise his authority under the CSA to remove marijuana entirely from control, or to transfer marijuana to Schedule III or lower.

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[145] *See e.g.*, Single Convention on Narcotic Drugs art. 4, March 30, 1961, 18 U.S.T. 1407 ("The Parties shall take such legislative and administrative measures as may be necessary ... to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.").

[146] Single Convention on Narcotic Drugs, March 30, 1961, 18 U.S.T. 1407. The Single Convention was amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs.

[147] *Id*. at art. 2.

[148] *Id*. at art. 2, 4, 21, 28.

[149] Convention on Psychotropic Substances, February 21, 1971, 32 U.S.T. 543. The Convention directs parties to "prohibit all use except for scientific and very limited medical purposes by duly authorized persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them ..."

[150] December 20, 1988, S. Treaty Doc. No. 101-4 (1989).

[151] See 40 Fed. Reg. 44167, 44168 (September 25, 1975) (statement of the Acting Administrator of the DEA) ("The control mechanisms of the Act for Schedule I or Schedule II are sufficient to meet the obligations of the Single Convention as to the flowering or fruiting tops, seeds, and leaves when they accompany such tops, and resin.... The United States Department of State interprets the Single Convention to require U.S. control of the flowering or fruiting tops of the cannabis plant and cannabis resin in Schedule I or Schedule II of the Act."); *see also* Nat'l Org. for the Reform of Marijuana Laws v. Drug Enforcement Agency, 559 F.2d 735, 751 (D.C. Cir. 1977) (holding that, consistent with the Single Convention, "the United States could decline to restrict cannabis and cannabis resin to research purposes and could reschedule the drugs to CSA Schedule II.").

The legalization measures enacted by Washington and Colorado would appear to be inconsistent with the obligations imposed upon the United States under existing international drug control treaties. However, existing jurisprudence suggests that a reviewing court may not view these treaty obligations, in and of themselves, as sufficient to preempt and invalidate the state laws.[152]

It is well established that treaties, like federal statutes, may preempt conflicting state laws. The Supremacy Clause expressly provides that in addition to federal law, "all treaties made ... under the authority of the United States, shall be the supreme law of the land."[153] Therefore, a state law is generally preempted to the same degree whether it is in conflict with a federal statute or an international treaty obligation. However, not all treaties are accorded "automatic" preemptive effect.[154] Only where a treaty "constitute[s] binding federal law," without the "aid of any [implementing] legislative provision," does it qualify as the "Supreme law of the land" for preemption purposes.[155] Such treaties are known as "self-executing" treaties—meaning an international agreement with "automatic domestic effect as federal law upon ratification."[156]

The Supreme Court recently clarified the distinction between the preemptive effect of self-executing and non-self-executing treaties in *Medellin v. Texas*.[157] *Medellin* involved an evaluation of whether a decision of the International Court of Justice (ICJ)—and a series of underlying international agreements that required compliance with ICJ decisions—constituted enforceable federal law with the authority to preempt Texas procedural court rules. In holding that the state court rules were not preempted, the court noted that it had "long recognized the distinction between treaties that automatically have effect as domestic law, and those that ... do not by themselves function as binding federal law."[158] Although the ICJ decision had clearly represented an "international obligation," it did not "of its own force constitute binding federal law that preempts state restrictions."[159]

Like the ICJ decision at issue in *Medellin*, neither the Single Convention nor the other international drug control treaties appear to be "self-executing." Each treaty requires the signatory nation to give legal effect to the goals of the treaty through domestic implementing legislation. The provisions of the treaties do not themselves establish binding domestic law. The United States, for example, implemented the obligations of these treaties through the CSA.[160] Because

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[152] For a discussion of the interplay between international agreements and U.S. law, see CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Michael John Garcia. In addition, an international agreement that *required* states to enact certain marijuana controls may raise concerns under the 10th Amendment. Although the Supreme Court has recognized that Congress may enact legislation to implement U.S. treaty obligations that would otherwise infringe upon a state's traditional rights under the Tenth Amendment, Missouri v. Holland, 252 U.S. 416 (1920), the precise extent to which Congress may do so remains unclear. *See generally* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003). For criticism of the Supreme Court's decision in *Missouri v. Holland*, and arguments that the treaty power may not expand Congress's legislative power, see Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005).

[153] U.S. Const., Art. VI, cl. 2.

[154] Medellin v. Texas, 552 U.S. 491 (2008). For more information, *see* CRS Report RL34450, *Can the President Compel Domestic Enforcement of an International Tribunal's Judgment? Overview of Supreme Court Decision in Medellin v. Texas*, by Michael John Garcia.

[155] Foster v. Neilson, 27 U.S. 253 (1829).

[156] *Medellin*, 552 U.S. at 505.

[157] 552 U.S. 491 (2008).

[158] *Id*. at 504-05.

[159] *Id*. at 522-23.

[160] *See, e.g.*, 21 U.S.C. §801-801(a) ("The Convention[on Psychotropic Substances] is not self-executing, and the obligations of the United States thereunder may only be performed pursuant to appropriate legislation. It is the intent of

these treaties do not create binding law "of [their] own force," it would appear unlikely that a U.S. court would accord the treaties direct preemptive effect.[161] Indeed, in *County of San Diego*, the California court explicitly rejected treaty preemption arguments on the grounds that the Single convention is non-self-executing.[162] Thus it would appear unlikely that the Washington and Colorado laws would be found to be preempted by existing international obligations.[163]

DOJ Responses to State Efforts to Allow Marijuana Use for Medicinal or Recreational Purposes

The Department of Justice (DOJ) may respond in several different ways to state efforts to allow marijuana use. First, DOJ could prioritize the prosecution of certain criminal activities involving marijuana over activities that are conducted in clear compliance with state law. The doctrine of prosecutorial discretion gives DOJ considerable leeway in deciding whether, and to what extent, to bring criminal prosecutions for violations of the CSA. In addition, DOJ may utilize the CSA forfeiture provision to deter certain activities without actually engaging in criminal prosecutions. Finally, DOJ may ask the federal judiciary to directly invalidate state marijuana laws or regulatory schemes by filing a civil lawsuit.

Criminal Prosecutions

Criminal prosecutions are perhaps DOJ's most potent tool for undercutting the Washington and Colorado laws. However, DOJ is not required to zealously enforce every violation of the CSA. Indeed, pursuant to the doctrine of "prosecutorial discretion," federal law enforcement officials have "broad discretion" as to when, whom, and whether to prosecute for violations of the CSA.[164] Courts have recognized that the "decision to prosecute is particularly ill-suited to judicial review," as it involves the consideration of factors, such as the strength of evidence, deterrence value, and existing enforcement priorities, "not readily susceptible to the kind of analysis the courts are competent to undertake."[165]

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the Congress that the amendments made by this Act, together with existing law, will enable the United States to meet all of its obligations under the Convention ...").

[161] An argument may also be forwarded that the Colorado and Washington laws should be preempted on the grounds that they interfere with the federal government's ability to conduct foreign affairs. *See* American Ins. Assoc. v. Garamendi, 539 U.S. 396 (2003) (striking down the California Holocaust Victim Insurance Relief Act); Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) (invalidating a Massachusetts law targeting companies doing business in Burma). However, it would appear that a state drug law relating to the treatment of marijuana by persons within the states' jurisdiction is distinguishable from the laws at issue in *Garamendi* and *Crosby*.

[162] County of San Diego v. San Diego NORML, 165 Cal. App. 4th 798, 812 n.3 (2008) ("this treaty is not self-executing, and Counties do not explain how the treaty lends any added weight to the preemption questions presented here.").

[163] For a potential exception to the general proposition that non-self-executing treaties do not have preemptive effect *see* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714 (5th Cir. 2009). In that case, a federal appellate court gave preemptive effect to an "implemented non-self-executing treaty." For a detailed discussion of the issue, *see* Leonie W. Huang, *Which Treaties Reign Supreme? The Dormant Supremacy Clause Effect of Implemented Non-Self-Executing Treaties*, 79 FORDHAM L. REV. 2211 (2011). Additional questions relating to state and federal obligations under these international drug control treaties, including the consequences of any deviation from international obligations, are beyond the scope of this report.

[164] United States v. Goodwin, 457 U.S. 368, 380 (1982).

[165] Wayte v. United States, 470 U.S. 598, 607 (1985).

Through the exercise of prosecutorial discretion, DOJ is free to develop a policy outlining what marijuana-related activities will receive the most attention from federal authorities. Indeed, DOJ has issued three memoranda since 2009 that explain the Obama Administration's position regarding state-authorized marijuana activities, as described in the following sections.

The 2009 Ogden Memorandum

In 2009, Deputy Attorney General David W. Ogden provided guidance to federal prosecutors in states that have authorized the use of medical marijuana.[166] Citing a desire to make "efficient and rational use of its limited investigative and prosecutorial resources," the memorandum stated that while the "prosecution of significant traffickers of illegal drugs, including marijuana … continues to be a core priority," federal prosecutors "should not focus federal resources [] on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[167] The memorandum made clear, however, that "this guidance [does not] preclude investigation or prosecution, even where there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests."[168]

The 2011 Cole Memorandum

DOJ released a subsequent memorandum in 2011 drawing a clear distinction between the potential prosecutions of individual patients who require marijuana in the course of medical treatment and "commercial" dispensaries. [169] After noting that several jurisdictions had recently "enacted legislation to authorize multiple large-scale, privately operated industrial marijuana cultivation centers," DOJ stated that

> The Ogden memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the [CSA] regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution.[170]

The 2013 Cole Memorandum

The Obama Administration's official response to the Colorado and Washington initiatives was provided on August 29, 2013, when Deputy Attorney General James M. Cole sent a memorandum to all U.S. Attorneys intended to guide the "exercise of investigative and prosecutorial discretion" when it comes to civil and criminal enforcement of the federal Controlled Substances Act within all states, including those that have legalized marijuana for medicinal or recreational use.[171] The

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[166] Memorandum for selected U.S. Attorneys from David W. Ogden, Deputy Attorney General, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, October 19, 2009 (hereinafter Ogden Memorandum) *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf.

[167] *Id*. at 1-2.

[168] *Id*. at 3.

[169] Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use*, June 29, 2011 (hereinafter Cole 2011 Memorandum), *available at* http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf.

[170] *Id*. at 2.

[171] Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding Marijuana*

memorandum expresses DOJ's position that, although marijuana is a dangerous drug that remains illegal under federal law, the federal government will not pursue legal challenges against jurisdictions that authorize marijuana in some fashion, assuming those state and local governments maintain strict regulatory and enforcement controls on marijuana cultivation, distribution, sale, and possession that limit the risks to "public safety, public health, and other law enforcement interests." This DOJ decision has received both praise[172] and criticism.[173]

The memorandum instructs federal prosecutors to prioritize their "limited investigative and prosecutorial resources to address the most significant [marijuana-related] threats" and identified the following eight activities as those that the federal government wants most to prevent: (1) distributing marijuana to children; (2) revenue from the sale of marijuana going to criminal enterprises, gangs, and cartels; (3) diverting marijuana from states that have legalized its possession to other states that prohibit it; (4) using state-authorized marijuana activity as a pretext for the trafficking of other illegal drugs; (5) using firearms or violent behavior in the cultivation and distribution of marijuana; (6) exacerbating adverse public health and safety consequences due to marijuana use, including driving while under the influence of marijuana; (7) growing marijuana on the nation's public lands; and (8) possessing or using marijuana on federal property.[174] The memorandum advises U.S. Attorneys and federal law enforcement to devote their resources and efforts toward any individual or organization involved in any of these activities, regardless of state law. Furthermore, the memorandum recommends that jurisdictions that have legalized some form of marijuana activity "provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities."[175] However, the memorandum cautions that, to the extent that state enforcement efforts fail to sufficiently protect against the eight harms listed above, the federal government retains the right to challenge those states' marijuana laws.

Two additional points made in the memorandum are worth highlighting. First, the memorandum acknowledges a change in Administration policy with respect to "large scale, for-profit commercial enterprises" that may ease the concerns of potential state-licensed marijuana distributors and retailers in Colorado and Washington.[176] In previous guidance issued to U.S. Attorneys in states with medical marijuana laws, DOJ had suggested that large-scale marijuana enterprises were more likely to be involved in marijuana trafficking, and thus could be appropriate targets for federal enforcement actions.[177] In the new guidance, DOJ directs prosecutors "not to consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities ..."[178] Although apparently acknowledging the legitimacy of the emerging for-profit marijuana industry, the memorandum makes no statements with regard to the application of various federal money laundering and banking laws that have hampered the ability of commercial

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Enforcement, August 29, 2013 (hereinafter Cole 2013 Memorandum), *available at* http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

[172] *See, e.g.,* New York Times Editorial, *A Saner Approach on Drug Laws,* N.Y. TIMES, September 1, 2013.

[173] *See, e.g.,* Wall Street Journal Editorial, *The Beltway Choom Gang,* WALL ST. J., September 5, 2013.

[174] Cole 2013 Memorandum, at 1-2.

[175] *Id.* at 2-3.

[176] *Id.* at 3.

[177] Cole 2011 Memorandum, at 1-2.

[178] Cole 2013 Memorandum, at 3.

marijuana establishments to obtain the necessary financing and financial services to establish and grow their businesses.[179]

The second point is that the memorandum suggests that a state with a robust regulatory system for the control of recreational marijuana "is less likely to threaten [] federal priorities ..." than a state that lacks such controls. This statement may inform the long-running debate over the extent to which state marijuana regulatory and licensing laws (as opposed to mere penalty exemptions) conflict with federal law. Some courts have suggested, for example, that whereas a state is generally free to remove state penalties for marijuana use, the more robust a state's licensing and regulatory program, the more likely the law is to be preempted by federal law.[180] The Oregon Supreme Court, for instance, has suggested that states may not "affirmatively authorize" an individual to participate in conduct prohibited by federal law.[181] It would appear that DOJ does not concur with this assessment, but rather supports the implementation of "strong and effective," state-run "regulatory and enforcement systems" that control who is authorized to participate in the production, distribution, and sale of marijuana.[182]

Forfeiture

Either in addition to, or in lieu of bringing criminal prosecutions, DOJ may choose to rely more heavily on the civil forfeiture provisions of the CSA in order to disrupt the operation of marijuana dispensaries and production facilities. Forfeiture is a penalty associated with a particular crime in which property is confiscated or otherwise divested from the owner and forfeited to the government, in accordance with constitutionally required due process procedures.[183] Property forfeiture is used both to enforce criminal laws and to deter crime. Forfeitures are classified as civil or criminal depending on the nature of the judicial procedure which ends in confiscation. Civil forfeiture is ordinarily the product of a civil, *in rem* (against the property) proceeding in which the property is treated as the offender. No criminal charges are necessary against the owner because the guilt or innocence of the property owner is irrelevant; it is enough that the property was involved in, or otherwise connected to, an illegal activity (in which forfeiture is authorized). Criminal forfeiture proceedings, on the other hand, are *in personam* (against the person) actions, and confiscation is only possible upon the conviction of the owner of the property and only to the extent of the defendant's interest in the property.[184] Property that is subject to forfeiture includes both the direct and indirect proceeds of illegal activities as well as any property used, or intended to be used, to facilitate that crime.[185]

Section 511 of the CSA (21 U.S.C. §881) makes a wide array of property associated with violations of the CSA subject to seizure by the Attorney General and forfeiture to the United States. Property subject to the CSA's civil forfeiture provision includes any controlled substance

[179] For more information about this topic, *see* CRS Report WSLG682, *Banking Difficulties for State-Legalized Marijuana Dispensaries*, by M. Maureen Murphy; *see also* Reuters, *Easier Pot Policy Won't Relieve Dispensaries' Banking Woes*, CNBC.com, September 5, 2013, *at* http://www.cnbc.com/id/101011966; Serge F. Kovaleski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES, January 11, 2014.

[180] *See* discussion *supra* pp. 14-19.

[181] Emerald Steel Fabricators, Inc., v. Bureau of Labor and Industries, 348 Ore. 159, 230 P.3d 518 (2010).

[182] Cole 2013 Memorandum, at 2.

[183] U.S. CONST. amend. V ("No person shall ... be deprived of ... property, without due process of law ...").

[184] For a more extensive discussion of forfeiture generally, *see* CRS Report 97-139, *Crime and Forfeiture*, by Charles Doyle.

[185] *See, e.g.*, 21 U.S.C. §881(a)(6) (proceeds), and 21 U.S.C. §881(a)(2) (products and equipment used to facilitate the offense).

that has been manufactured, distributed, dispensed, acquired, or possessed in violation of federal law, as well as any equipment, firearm, money, mode of transportation, or real property *used or intended to be used to facilitate a violation of the CSA*.[186] In order to seize the covered property, the government need only show that the property is subject to forfeiture by a preponderance of the evidence.[187] Once forfeited, the Attorney General may destroy the controlled substances seized, and sell the other property at public auction.[188] After expenses of the forfeiture proceeding are recouped, excess funds are forwarded to the DOJ Asset Forfeiture Fund.[189]

Forfeiture proceedings are generally less resource intensive than a criminal prosecution and have been used in the past against medical marijuana dispensaries.[190] In practice, DOJ would be able to seize and liquidate property, both real and personal, associated with marijuana production distribution and retail sale facilities operating in Colorado and Washington without bringing any criminal action. As explained above, a civil asset forfeiture proceeding is a civil proceeding against the property in question. Although an interested party may object to the seizure, given that such facilities are in clear violation of federal law, so long as the property is indeed being used for marijuana-related activities, it would appear unlikely that many successful challenges to these actions could be waged.[191]

Civil Lawsuit

The broadest single action DOJ could take to prevent the implementation of the Colorado and Washington laws would be to directly challenge the laws in federal court on the grounds that they are preempted by federal law.[192] Procedurally speaking, this lawsuit would look very much like the federal government's recent challenge of a controversial Arizona immigration law.[193] If the federal government chose to file such a claim, and a federal court were to reach the merits, the court would likely be forced to directly confront the preemption issues identified in the previous sections.

Additional Legal Consequences of Marijuana Use

Given the Obama Administration's informal statements and current approach to medical marijuana, it would appear unlikely that DOJ is going to expend significant resources to

[186] 21 U.S.C. §881(a) (emphasis added).

[187] 18 U.S.C. §981(b).

[188] 21 U.S.C. §881(e).

[189] 21 U.S.C. §881(e).

[190] *See, e.g.,* U.S. Dep't of Justice, *Press Release: Federal Authorities Take Enforcement Actions Against Commercial Marijuana Stores in Orange County Cities of Anaheim and La Habra,* August 21, 2012, *available at* http://www.justice.gov/usao/cac/Pressroom/2012/111.html.

[191] *See* David Downs, *City of Oakland Loses Lawsuit Against Department of Justice; Harborside Forfeiture Case Proceeds,* February 15, 2013, EAST BAY EXPRESS, *available at* http://www.eastbayexpress.com/LegalizationNation/archives/2013/02/15/city-of-oakland-loses-lawsuit-against-department-of-justice-harborside-forfeiture-case-proceeds (describing how a federal magistrate judge dismissed the City of Oakland's lawsuit against Attorney General Eric Holder and U.S. Attorney Melinda Haag, which sought to prevent Haag from seizing the building leased by Harborside Health Center, one of the world's largest medical marijuana dispensaries. The judge held that only the dispensary and its landlords have legal standing to challenge the U.S. government's attempted seizure of the property.).

[192] A group of former DEA administrators have reportedly advocated for this action. *See* Michael Tarm, *Ex-DEA Heads, UN Panel Urge U.S. to Nullify Pot Laws,* ASSOCIATED PRESS, March 5, 2013.

[193] Arizona v. United States, 132 S. Ct. 2492 (2012).

investigate and prosecute individuals who merely possess and use less than one ounce of marijuana, in private, pursuant to Washington or Colorado law. However, even if the probability of becoming the subject of a federal criminal prosecution for a violation of the CSA appears remote, there does exist a number of other consequences under federal law that are triggered by the mere use of marijuana, even absent an arrest or conviction. Perhaps most prominent among these concerns is the possibility that marijuana users may lose their ability to purchase and possess a firearm, be barred from living in public housing, or find themselves subject to employment consequences in the workplace.

Under the Gun Control Act, it is unlawful to possess, ship, transport, receive, or dispose of any firearm or ammunition to any person "who is an unlawful user of or addicted to any controlled substance" as defined by the CSA.[194] Federal regulation defines an "unlawful user" or addict of a controlled substance as one who "has lost the power of self-control with reference to the controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician."[195] Furthermore, a person may be considered an unlawful user even if he is not using the substance at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. However, after state laws regarding medical marijuana were enacted, the Bureau of Alcohol, Tobacco Firearms, and Explosives (ATF) issued an open notice stating 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."[196] These individuals are to answer "yes" when asked on the firearms transfer form if they are unlawful users of a controlled substance. With the legalization of marijuana for recreational purposes in Colorado and Washington, it seems likely the ATF will take the same approach and consider a recreational user of marijuana to be a prohibited possessor of firearms regardless of whether the use is lawful under state provisions.

In addition to potentially losing the ability to purchase and possess a firearm, federal law also establishes that "illegal drug users" are ineligible for federally assisted housing.[197] 42 U.S.C. §§13661 and 13662 require public housing agencies and owners of federally assisted housing to establish standards that would allow the agency or owner to prohibit admission to, or terminate the tenancy or assistance of, any applicant or tenant who is an illegal drug user. An agency or an owner can take these actions if a determination is made, pursuant to the standards established, that an individual is "illegally using a controlled substance," or if there is reasonable cause to believe that an individual has a "pattern of illegal use" of a controlled substance that could "interfere with the health, safety, or right to a peaceful enjoyment of the premises by other residents."[198] Under federal law, marijuana remains a controlled substance, thus, it would appear that any individual who the housing authority reasonably believes is using marijuana could be denied access to, or evicted from, federally assisted housing. With respect to medical marijuana, the Department of Housing and Urban Development previously concluded that public housing agencies or owners "must deny *admission*" to applicants who are using medical marijuana, but

[194] 18 U.S.C. §922(g)(3).

[195] 27 C.F.R. §478.11.

[196] *See* Open Letter to All Federal Firearm Licensers, September 21, 2011, *available at* http://www.atf.gov/files/press/releases/2011/09/092611-atf-open-letter-to-all-ffls-marijuana-for-medicinal-purposes.pdf.

[197] 42 U.S.C. §§13661-13662.

[198] *Id.*

"have statutorily-authorized discretion with respect to evicting or refraining from evicting *current residents* on account of their use of medical marijuana."[199]

Some employers may face the loss of federal funding or could be subject to administrative fines if they do not maintain and enforce policies aimed at achieving a drug-free, safe workplace. The federal Drug-Free Workplace Act of 1988 (DFWA)[200] imposes a drug-free workplace requirement on any entity that receives federal contracts with a value of more than $100,000 or that receives any federal grant.[201] DFWA requires these entities to make ongoing, good faith efforts to comply with the drug-free workplace requirement in order to qualify, and remain eligible, for federal funds.[202] Employees who work for federal contractors and grantees could potentially be subject to employer discipline or even termination if they use marijuana while on the job or show up for work under the influence of marijuana, even if the marijuana use is permitted by state law, as such usage may create risks to others' safety.[203] (Similarly, the Drug-Free Schools and Communities Act Amendment of 1989[204] renders any institution of higher education ineligible for federal funding if it fails to establish and implement a program to prevent the abuse of illicit drugs by students and employees on campus grounds.) In addition, employers under the jurisdiction of the Occupational Safety and Health Administration have a general duty to provide to their employees a safe workplace under the Occupational Safety and Health Act.[205] An employee who uses marijuana at work may be considered a workplace hazard if he or she poses a danger to other workers; employers thus risk administrative fines if they do not enforce policies that seek to avoid such a hazard.

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[199] *See* Memorandum from Helen R. Kanoovsky, *Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing*, January 20, 2011, *available at* http://www.scribd.com/doc/47657807/HUD-policy-Memo-on-Medical-Marijuana-in-Public-Housing.

[200] 41 U.S.C. §§701 et seq.

[201] U.S. Dept. of Labor, *Drug-Free Workplace Act of 1988 Requirements, available at* http://www.dol.gov/elaws/asp/drugfree/screenr.htm.

[202] There are slightly different requirements for individuals and organizations that receive federal contracts or grants. *See* U.S. Dept. of Labor, *Drug-Free Workplace Act of 1988 Requirements for Individuals, available at* http://www.dol.gov/elaws/asp/drugfree/req_ind.htm ("Any individual who receives a contract or grant from the Federal government, regardless of dollar value, must agree not to engage in the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance in the performance of this contract/grant."), and U.S. Dept. of Labor, *Drug-Free Workplace Act of 1988 Requirements for Organizations, available at* http://www.dol.gov/elaws/asp/drugfree/require.htm ("All organizations covered by the Drug-Free Workplace Act of 1988 are required to provide a drug-free workplace by ... [publishing] and [giving] a policy statement to all covered employees informing them that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the covered workplace and specifying the actions that will be taken against employees who violate the policy).

[203] Several state supreme courts have upheld the right of employers to discharge, or refuse to hire, employees who engage in medical marijuana use, even if such usage is allowed by state law. *See, e.g.*, Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC, 257 P.3d 586 (Wash. 2011) (holding that the Washington State Medical Use of Marijuana Act does not prohibit an employer from firing an employee for physician-approved medical marijuana use). In addition, state supreme courts have ruled that employers are not required to accommodate the use of marijuana in the workplace. *See, e.g.*, Ross v. RagingWire Telecommunications, Inc., 174 P.3d 200 (Cal. 2008) (holding that nothing in the text or legislative history of California's Compassionate Use Act creates a duty on the part of employers to accommodate marijuana use by employees); Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, 230 P.3d 518 (Or. 2010) (holding that employers have no obligations to accommodate employees' medical marijuana use).

[204] P.L. 105-244, codified at 20 U.S.C. §1011i.

[205] 29 U.S.C. §651 et seq.

Congressional Response

Several bills concerning marijuana have been introduced that reflect different approaches in response to the state legalization initiatives.

H.R. 499, Ending Federal Marijuana Prohibition Act of 2013. This bill would direct the Attorney General to issue a final order, within 60 days of the bill's enactment, that entirely removes marijuana from any CSA schedule.[206] In addition, the bill would amend the CSA by adding a new Section 103 that declares that no provision of the CSA shall apply to marijuana, with the following new exception: shipping or transporting marijuana from anywhere outside a jurisdiction of the United States into such a jurisdiction where marijuana use, possession, or sale is prohibited.[207] The bill would make conforming amendments to the CSA as well as other sections of the *U.S. Code* to expressly remove the word "marijuana" or "marihuana" from various penalty, enforcement, and definition provisions.[208] The bill also would amend the Federal Alcohol Administration Act[209] to create a new section entitled "Unlawful Businesses Without Marijuana Permit."[210] This section would make it unlawful to engage in importing, shipping, or selling marijuana in interstate or foreign commerce, or cultivating, producing, manufacturing, packaging, or warehousing marijuana, without a permit issued by the Secretary of the Treasury. The criminal fine for persons engaging in such activity without a permit would be not more than $1,000, although the Secretary would be allowed to collect a payment from the violator of up to $500 in lieu of referring the violation to the Attorney General for prosecution. The Secretary would have to follow specific eligibility criteria set forth in the bill in selecting applicants for a marijuana business permit and the Secretary would also be required to establish a reasonable permit fee to cover the cost of implementing and overseeing all aspects of federal regulation of marijuana. Finally, the bill would grant the Food and Drug Administration the same authorities with respect to marijuana as it has with respect to alcohol,[211] and would transfer all current functions of the DEA Administrator relating to marijuana enforcement to the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives.[212]

H.R. 501, Marijuana Tax Equity Act of 2013. This bill would amend the Internal Revenue Code to impose an excise tax on the sale of marijuana by the producer or importer of the drug, equivalent to 50% of the price for which it was sold.[213] In addition, the bill would require anyone engaged in a "marijuana enterprise"[214] to pay an occupational tax in the amount of $1,000 per year (for producers, importers, or manufacturers of marijuana), or $500 per year (for distributors, retailers, or anyone who transports, stores, or displays marijuana products).[215] The bill would require all individuals, prior to commencing business as a marijuana enterprise, to obtain a permit

[206] H.R. 499, §101(a).

[207] *Id.* §102.

[208] *Id.* §103.

[209] 27 U.S.C. §201 et seq.

[210] *Id.* §201, adding new 27 U.S.C. §301.

[211] *Id.* §301.

[212] *Id.* §302.

[213] H.R. 501, §2(a), adding new 26 U.S.C. §5901.

[214] The bill defines "marijuana enterprise" as a producer, importer, manufacturer, distributor, retailer, or any person who transports, stores, displays, or otherwise participates in any business activity that handles marijuana or marijuana products. *Id.* §2(a), adding new 26 U.S.C. §5904(8).

[215] *Id.* §2(a), adding new 26 U.S.C. §5911.

from the Secretary of the Treasury.[216] Finally, the bill would impose civil and criminal penalties for violation of the duty to pay the new taxes regarding marijuana as well as engaging in business as a marijuana enterprise without obtaining the requisite permit.[217]

H.R. 689, States' Medical Marijuana Patient Protection Act. This bill would direct the Secretary of Health and Human Services, in cooperation with the National Academy of Sciences' Institute of Medicine, to submit to the DEA Administrator a recommendation on the scheduling of marijuana within the CSA, although the bill precludes the Secretary from selecting either Schedule I or II.[218] The Secretary would be required to issue such recommendation within 180 days of the enactment of the bill, and the DEA administrator would need to issue a proposed rulemaking for the rescheduling of marijuana in accordance with the recommendation within a year of enactment of the bill.[219] The legislation declares that no provision of the CSA, nor any provision of the Federal Food, Drug, and Cosmetic Act,[220] shall prohibit or otherwise restrict in a state where the medical use of marijuana is lawful under state law, the production, prescription, transportation, distribution, possession, or use of marijuana for medical use.[221] Finally, the bill would require the Attorney General, within 180 days of the bill's enactment, to transfer control over access to marijuana for research purposes (currently the responsibility of the National Institute on Drug Abuse, a component of the National Institutes of Health, U.S. Department of Health and Human Services) to an Executive Branch entity "that is not focused on researching the addictive properties of substances."[222] The bill would require such entity to "take appropriate actions to ensure that an adequate supply of marijuana is available for therapeutic and medicinal research."[223]

H.R. 710, Truth in Trials Act. This bill would amend the federal criminal code (Title 18 of the *U.S. Code*) to provide an affirmative defense for conduct regarding the medical use of marijuana in a prosecution or proceeding for any marijuana-related offense under any federal law. Individuals asserting such defense must establish, by a preponderance of the evidence, that their marijuana-related activities were conducted in compliance with state law regarding medical use of marijuana.[224] The bill would require that any property seized by the government in connection with such prosecution or proceeding be returned to the owner within 10 days of the court finding that the owner has established a valid affirmative defense.[225] Finally, the bill would permit a court to hold liable for the marijuana-related offense a defendant who has engaged primarily, but not exclusively, in medical marijuana activities, only with respect to the amount of marijuana that was used for nonmedical purposes.[226]

H.R. 784, States' Medical Marijuana Property Rights Protection Act. This bill would amend the civil forfeiture provisions of the CSA[227] to provide that no real property may be subject to

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[216] *Id.* §2(a), adding new 26 U.S.C. §5912.

[217] *Id.* §2(a), adding new 26 U.S.C. §§5921, 5922.

[218] H.R. 689, §2(a)(1).

[219] *Id.* §2(a)(2).

[220] 21 U.S.C. §301 et seq.

[221] H.R. 689, §§2(b), (3).

[222] *Id.* §4.

[223] *Id.*

[224] H.R. 710, §2(a), adding new 18 U.S.C. §§3436(a), (b)(1).

[225] *Id.* §2(a), adding new 18 U.S.C. §3436(c).

[226] *Id.* §2(a), adding new 18 U.S.C. §3436(b)(2).

[227] 21 U.S.C. §881.

civil forfeiture to the United States due to medical marijuana-related activities that are performed in compliance with state law.[228]

H.R. 964, Respect States' and Citizens' Rights Act of 2013. This bill would amend the CSA's preemption provision, Section 708 (codified at 21 U.S.C. §903), to provide a specific rule of construction pertaining to state marijuana laws: that no provision of the CSA shall be construed as—(1) indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of state law regarding marijuana, or (2) preempting any such state law.[229]

H.R. 1523, Respect State Marijuana Laws Act of 2013. This bill would amend federal law to provide that no provision of the CSA related to marijuana may be applied to any person acting in compliance with state laws relating to marijuana.

H.R. 1635, National Commission on Federal Marijuana Policy Act of 2013. This bill would establish a federal commission to undertake a comprehensive review of current federal policies toward marijuana.

H.R. 2652, Marijuana Businesses Access to Banking Act of 2013. This bill would provide legal immunity from federal criminal prosecution to banks and credit unions that provide financial services to marijuana-related businesses that are operating pursuant to state law.

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[228] H.R. 784, §3, amending Section 511(a) of the CSA (21 U.S.C. §881(a)(7)).

[229] H.R. 964, §2, amending Section 708 of the CSA (21 U.S.C. §903).