State Medical Cannabis Laws Are Not Preempted By Federal Law

While marijuana possession and distribution — even for medical purposes — is a federal crime under the Controlled Substances Act (CSA) and the Supremacy Clause of the United States Constitution provides that federal law is the "supreme Law of the Land," [1] that is not the entire story: The U.S. system of government is one of dual sovereignty where the states can and do serve as "laboratories of democracy."

The question of federal preemption is a question of Congressional intent. The CSA makes it clear it only preempts state laws under very limited circumstances. 21 U.S.C. 903 says it is not intended to preempt the field of drug laws if "there is a positive conflict" between state and federal law "so that the two cannot consistently stand together." Courts have generally held that a state law is only preempted by the CSA if it is "physically impossible" to comply with both state and federal law or if the state law stands as an obstacle to the CSA. Neither is the case with carefully crafted state medical marijuana programs.

A state law — or a portion of it — would be preempted under impossibility preemption if it *required* someone to violate federal law. For this reason, effective medical marijuana laws do not require state workers to grow or dispense marijuana in violation of federal law; they just regulate private individuals who choose to do so. *Requiring* someone to break federal law is quite different from *allowing* and *regulating* conduct under state law.

When discussing preemption, it's important not to forget about the Tenth Amendment. The federal government is free to enforce its own marijuana laws, but requiring state agents to enforce federal laws would be unconstitutional commandeering of a state's resources.[2] As one court noted:

> It is of considerable consequence that it is Arizona's attempt at partial decriminalization with strict regulation that makes the AMMA vulnerable … This view, if successful, highjacks Arizona drug laws and obligates Arizonans to enforce federal prescriptions that categorically prohibit the use of all marijuana. The Tenth Amendment's "anti-commandeering rule" prohibits Congress from charting that course.[3]

The federal government has never alleged in court that federal laws preempt state medical marijuana or legalization and regulation laws. In fact, the Department of Justice (DOJ) argued in favor of dismissing a lawsuit claiming Arizona's medical marijuana law was preempted. That suit was dismissed.[4]

Federal Policy Should Not Deter States From Reforming Their Own Laws

Since late 2014, Congress has approved a rider to the annual Justice Department appropriations bill that provides that the funds may not be used to interfere with the implementation of state medical marijuana laws.[5] The Ninth Circuit Court of Appeals has interpreted this rider as preventing the

federal government from prosecuting individuals complying with state medical marijuana laws.[6]

Meanwhile, for a more comprehensive solution, several federal bills have been put forth to make state-legal marijuana activities legal under federal law.

It is up to individuals to decide whether they want to take the risk of breaking federal law, and many individuals and businesses are already doing so. What state lawmakers can and should do is remove the barriers to relief that their *state* law poses to patients who could benefit from medical cannabis. The vast majority of states have opted to chart a different course than the federal government, and they will continue to do so. With growing state pressure, federal policy will likely change soon.

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[1] U.S. Constitution Article VI, cl. 2.

[2] See: *Murphy v. NCAA*, No. 16–476, U.S. (2018) ("The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule. … [S]tate legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine."); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). 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.").

[3] *White Mountain Health Center, Inc. v. Maricopa County*, CV 2012-053585 (Arizona Superior Court, Maricopa County, 2012).

[4] *Arizona v. United States*, No. CV 11-1072-PHX-SRB, slip op. at 2 (D. Ariz. Jan. 1, 2012).

[5] See: Consolidated and Further Continuing Appropriations Act of 2015, Section 538, Pub. L. 113-235, 128 Stat. 2130 (2014).

[6] *U.S. v. Marin Alliance for Medical Marijuana*, No. C 98-00086 CRB, decided October 19, 2015.