#2016-008

MEMORANDUM

TO: Justice Robert J. Lynn

FROM: Eileen Fox

DATE: September 16, 2016

RE: Ethics and Medical Marijuana

The court discussed the August 30, 2016 letter from the N.H. Bar Association's Ethics Committee, which concerns the application of the Rules of Professional Conduct to RSA Chapter 126-X (making it lawful to manufacture, sell, possess and use marijuana for certain medical or therapeutic purposes). The court requests that the Advisory Committee on Rules consider the Ethics Committee's letter and make a recommendation as to the action that should be taken by the court.

#2016-008

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August 30, 2016

Honorable Linda S. Dalianis
Chief Justice
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

RE: Ethics and Medical Marijuana

Dear Chief Justice Dalianis:

Enclosed please find correspondence from the New Hampshire Bar Association Ethics Committee requesting guidance from the New Hampshire Supreme Court concerning the application of Rule 1.2(d) of the New Hampshire Rules of Professional Conduct to N.H. Rev. Stat. Ann. § 126-X. Additionally enclosed please find a recent decision of the United States Court of Appeals, 9th Circuit Division, which supplements the legal authority cited in the enclosed correspondence.

Thank you for your consideration of the enclosed.

Sincerely,

Judith L. Bomster, Esquire, Immediate Past Chair
Elizabeth S. LaRochelle, Incoming Chair
New Hampshire Bar Association Ethics Committee

Enclosures

cc: Hon. Robert J. Lynn
Advisory Committee on Rules

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NEW HAMPSHIRE BAR ASSOCIATION
ETHICS COMMITTEE

August 30, 2016

Honorable Linda S. Dalianis
Chief Justice
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

RE: RECOMMENDATION FOR SUPREME COURT GUIDANCE WITH RESPECT TO RSA CHAPTER 126-X ("USE OF CANNABIS FOR THERAPUTIC PURPOSES") AND THE APPLICATION OF RULE 1.2(d) OF THE NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT.

Dear Chief Justice Dalianis:

The New Hampshire Bar Association Ethics Committee respectfully requests that the New Hampshire Supreme Court address the application of Rule 1.2(d) of the New Hampshire Rules of Professional Conduct to RSA Chapter 126-X, which makes lawful the manufacturing, sale, possession, and use of marijuana for certain medical or therapeutic purposes. Chapter 126-X also initiates a regulatory scheme applicable to therapeutic cannabis dispensaries and businesses operating in this field.

A plurality of the Ethics Committee recommends that, consistent with the actions of other states, the Court amend Rule 1.2(d) specifying that a New Hampshire lawyer may ethically provide legal advice and assistance in connection with RSA 126-X. A minority of the Ethics Committee does not support a rule amendment. However, a majority of the Committee believes that the issue is important and should be reviewed by the Court to determine what course of action, if any, should be taken. Alternative courses that have been considered by other states include (1) leaving Rule 1.2(d) in its current form; (2) amending Rule 1.2(d) to address the underlying issue; (3) instructing the Ethics Committee to draft Comments to Rule 1.2(d) in lieu of an amendment to the rule; or (4) issuing a directive to the Attorney Discipline Office to exempt from disciplinary action legal advice and assistance undertaken in furtherance of RSA 126-X.

This letter is written to provide the Court with background information, case law, and ethics opinions from other jurisdictions that have addressed this issue.

INTRODUCTION AND FACTUAL BACKGROUND

As of May 1, 2016, 23 states (including New Hampshire) and the District of Columbia have legalized the use of cannabis for medical or therapeutic purposes. Four of these states — Alaska, Colorado, Oregon, and Washington — and the District of Columbia have legalized the use of marijuana more broadly for personal "recreational" use. In turn, a sizeable industry has developed in many states to meet the demand for legal marijuana.[1]

New Hampshire's statutory scheme became effective July 23, 2013. *See generally*, RSA Chapter 126-X ("Use of Cannabis for Therapeutic Purposes").[2] The legislation authorizes the use of marijuana for "qualifying medical conditions". Certain serious medical conditions are qualified for treatment under this legislation, including cancer, hepatitis C, acquired immune deficiency syndrome, muscular dystrophy, Crohn's disease, Parkinson's disease, and Alzheimer's disease. A qualifying medical condition is also defined as "one or more injuries that significantly interfere with daily activities," RSA 126-X:1, IX(1) or "[a] severely debilitating or terminal medical condition or its treatment that has produced" certain specified conditions, RSA 126-X:1, IX(2).

Treatment centers licensed under Chapter 126-X can cultivate, acquire, and sell marijuana to residents of New Hampshire who have been diagnosed as having one of the qualifying medical conditions. The operation of these treatment centers is in turn governed by a range of regulatory requirements implemented by the New Hampshire Department of Health and Human Services and covers areas such as security, insurance, sanitation, electrical safety, customer identification, personnel requirements, labeling standards, advertising, and laboratory testing of cannabis cultivated by or for the treatment center. *See* RSA 126-X:6. On April 30, 2016, the first alternative treatment center began dispensing therapeutic cannabis to qualifying patients and designated caregivers.[3]

While almost half of the states have now legalized marijuana use and businesses in some form, the federal government continues to classify marijuana as a Schedule I "controlled substance". *See* 21 U.S.C. § 812. Accordingly, the cultivation, sale, distribution, and use of marijuana — although legalized at the state level for some purposes — remain subject to criminal sanctions under the federal Controlled Substance Act ("the CSA"), 21 U.S.C. §§ 801, et seq. Under federal law, it is unlawful for any person to knowingly or intentionally possess, manufacture, distribute, or dispense marijuana, or to attempt or conspire to do so. 21 U.S.C. §§ 841, 844, 846. Federal law does not provide an exemption for the cultivation and sale of

[1] For example, in 2015, legal sales of medical and recreational marijuana in Colorado reached almost one billion dollars. *Fortune Magazine* (February 11, 2016).

[2] Statutory provisions allowing for the dispensing and possession of medical marijuana, including the issuing of registry identification cards, did not become effective until August 11, 2015. *See* RSA 126-X:2 through 126-X:5.

[3] *See* http://www.dhhs.nh.gov/oos/tcp/.

marijuana in connection with recreational use or treatment for serious medical conditions. Therefore, alternative treatment centers operating in compliance with New Hampshire's medical marijuana laws and its enabling regulations will nevertheless violate the criminal provisions of federal drug laws. Stated alternatively, even if a licensed facility is operated in meticulous compliance with New Hampshire law and regulatory requirements, that facility would be violating federal law.

The federal government, through the Justice Department, has minimized the current risk of prosecution for marijuana offenses by publishing enforcement guidelines for United States Attorneys that would restrict federal criminal prosecutions to certain "priority" violations.[4] Under this guidance, commonly known as the "Cole Memorandum," the following are the current priorities for federal criminal prosecutions. We would observe that several could, absent a comprehensive oversight program for a marijuana distribution center, be violated with relative ease.

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

Of note, these priorities do not exempt state-licensed entities from prosecution as a whole; they exempt only activities that do not fall in one of the eight priority categories of cases. Further, the Justice Department has emphasized that it has adopted these limitations on its prosecutorial discretion based on "the expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems" in order to minimize the threat to federal enforcement

[4] On August 29, 2013, Deputy Attorney General James M. Cole issued a memorandum to all United States Attorneys regarding "Guidance Regarding Marijuana Enforcement." The "Cole Memorandum" was updated February 14, 2014 to address related financial transactions and money laundering.

priorities.[5] Finally, the Justice Department has emphasized the limited protection provided by guidance with language in the guidance itself:

> [T]his memorandum is intended solely as a guide to the exercise of prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the [federal Controlled Substances Act], the money laundering and unlicensed money transmitter statutes, or the [Bank Secrecy Act].

(Emphasis added).

Separate from the Cole Memorandum, Congress has sought to prohibit the U.S. Department of Justice from enforcing federal marijuana laws in states that have legalized medical marijuana. In 2014, Congress barred the DOJ from using federal funds to interfere with the implementation of state medical marijuana law.[6] Additionally, in 2015, bills were introduced in both the Senate and House seeking to reclassify marijuana as a Schedule II drug, and end the federal ban on medical marijuana.[7]

However, neither the Cole Memorandum nor Congressional actions to date provide lawyers or their clients with any affirmative defense or exemption from federal law. Accordingly, actions taken by lawyers or their clients to comply with the provisions of RSA 126-X nevertheless risk violation of the federal Controlled Substances Act.

ETHICS OPINIONS AND SUPREME COURT GUIDANCE FROM OTHER JURISDICTIONS

The New Hampshire Bar Association Ethics Committee seeks to advise New Hampshire lawyers who represent clients within New Hampshire in connection with therapeutic cannabis businesses, or the prescription of medical marijuana, or who otherwise serve a role within the scope of RSA 126-X.[8] Although practitioners who represent these clients may trigger a range of

[5] Stated alternatively, if a state does not—in the eyes of the federal government—enforce a "clear, strong and effective regulatory program", the exposure of individual operators could increase regardless of the care they take in their own operation.

[6] Consolidated and Further Appropriations Act, 2015, Pub. L. 113-235; Consolidated Appropriations Act 2016, Pub. L. 114-113.

[7] The Compassionate Access, Research Expansion, and Respect States (CARES) Act of 2015. S.683, 114th Cong. (2015) and H.R. 1538, 114th Cong. (2015).

[8] Whether or not a lawyer is actively engaged in the practice of law, the lawyer's conduct is governed by the Rules of Professional Conduct. Additionally, lawyers are not the only professionals who face potential legal and ethical problems if they represent marijuana entrepreneurs. The banking industry faces similar exposure and has effectively disassociated itself from the industry. Since legalizing marijuana for recreational use, Colorado has

legal questions, *see n. 10, infra.*, consistent with the jurisdiction of this committee, only the ethical issues will be addressed.

The core ethical issue faced by New Hampshire lawyers arises from Rule 1.2(d) of the New Hampshire Rules of Professional Conduct ("Rule 1.2(d)"), which contains the following prohibition:

> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

N.H. R. Prof. Cond. 1.2(d) (emphasis added). The same prohibition is found in ABA Model Rule 1.2(d).

In the opinion of the Committee, the underscored language severely restricts a New Hampshire lawyer's ability to advise or assist clients that are engaged in the use, distribution, and sale of medical marijuana authorized by state law because those same activities would violate federal criminal law.

Several states have now addressed the ethical issues that arise for lawyers due to the direct conflict between state and federal drug laws. Although the opinions vary, one theme is found throughout: a recognition of the importance of legal representation for individuals and entities starting out in a new field of commercial activity that is governed by complex laws and regulations and that is expressly prohibited by federal criminal laws. Because Rule 1.2(d) does not address situations in which state and federal laws are in conflict, the rule does not provide definitive guidance for New Hampshire lawyers who seek to advise or assist clients in the operation of these state-authorized enterprises. We are asking the Court to review this issue and either adopt the recommendation of the Committee's majority (amendment to Rule 1.2[d]) or determine what other action, if any, is required.

New Hampshire Rule of Professional Conduct 1.2(d):

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become the home for hundreds of state-licensed marijuana outlets. However, banks concerned over federal money laundering and racketeering charges, as well as a myriad of regulations governing the use of the banking system by "illegal" businesses, have routinely refused to do business with these enterprises leaving a new industry to operate in an all-cash economy. In Colorado, employees are paid in cash, state taxes are segregated and paid with packages of currency, and the daily business of marijuana sales are exclusively cash transactions—handled without the security of credit cards or customer checks, and without the support of a bank that can provide the business with a secure, insured repository for the substantial sums received by small marijuana outlets on a daily basis. The absence of reliable support from federally insured banks has created an ongoing risk of robbery and burglary of businesses forced to deal solely in cash. For further information on Colorado's unresolved marijuana/banking issues, *see* July 31, 2015 New York Times, "Fed Denies Credit Union for Cannabis", and "High Profits", a documentary produced by Batbridge Entertainment and available on NETFLIX.

The language of Rule 1.2(d) is mandatory and generally clear in its application. Comments to the Model Rules of Professional Conduct (MRPC) summarize the core purpose of Rule 1.2(d) as follows: "Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime...." *Comment 9 to MRPC.* The Committee anticipates that "knowing" conduct will be present in most cases. Any lawyer who undertakes the representation of individuals or businesses in connection with state-licensed medical marijuana facilities will almost certainly "know" that the client's business will violate criminal provisions of the federal CSA, and that his or her legal services will facilitate the operation of that business in violation of federal law. Rule 1.2(d) does, however, provide two safe harbors for lawyers.

First, lawyers can assist clients in making a "good faith effort to determine the validity, scope, meaning or application" of the law without risk of violating Rule 1.2(d). *See Werme's Case,* 150 N.H. 351, 839 A. 2d 1 (2003). In *Werme's Case*, the Court held that a lawyer who advised her client to disclose confidential court materials to the media in violation of RSA 169:C-25 had violated Rule 1.2(d). Attorney Werme acknowledged that she had advised her client to go to the media with confidential material,[9] but sought to defend her conduct by arguing that the statute was unconstitutional, and that her advice constituted a "good faith effort" to challenge the "validity...of the law" — conduct that is permissible under the Rule. The Court rejected the defense, holding that wholesale disclosure of confidential materials to the press did not constitute "good faith," and that a motion to the trial court or a separate declaratory judgment action would have been the proper avenues for testing the constitutionality of the statute. The Court upheld a sanction of reprimand. Thus, while Rule 1.2(d) permits a lawyer to assist a client in making a "good faith effort to determine the validity, scope, meaning or application" of a law, this safe harbor would not seem to encompass the many other forms of advice and assistance that could be provided by lawyers in the day-to-day operation of medical marijuana businesses, including contract negotiation and drafting, real estate due diligence and acquisition, guidance on employment law issues including hiring and firing decisions, drafting of employment contracts, state and federal taxation issues and representation of individuals and entities in legislative, regulatory, and municipal forums and in the many forms of litigation that are encountered by New Hampshire businesses.

The second safe harbor in the rule allows lawyers to counsel clients regarding "the legal consequences of any proposed course of action [by the client]." In this case, such counsel could (and should) include advising clients regarding the possible consequences of federal criminal sanctions. Conceivably, this safe harbor could extend to all forms of "pure" advice regarding compliance with state law. This is not clear, however. In addition, this safe harbor does not extend to the many forms of "assistance" the client will need in the day-to-day operation of a business (some of which are enumerated in the preceding paragraph).

In sum, the Committee believes that these safe harbor provisions of Rule 1.2(d) provide little refuge for lawyers engaged to provide standard legal services to clients who want to comply with New Hampshire law. If the lawyer undertakes work that extends beyond pure advice and provides services such as drafting documents (employment contracts, sales contracts, and

[9] RSA 169-C:25, II makes it a misdemeanor to disclose confidential information under New Hampshire's Child Protection Act (RSA Chapter 169-C).

partnership agreements with growers), dispute resolution, real estate transactions, zoning and other municipal work, employment matters, litigation support, etc., the lawyer's work will likely constitute "assistance" to a client in conduct that the lawyer knows is criminal, contrary to Rule 1.2(d). Absent circumstances that remove the attorney's conduct from the ambit of Rule 1.2(d), exposure to discipline for professional misconduct will generally exist.[10] *See Comment 10 to MRPC 1.2(d)* ("A lawyer may not continue to assist a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent).

Ethics Opinions from Other Jurisdictions:

Because nearly half of the states have now legalized the use of marijuana in some form, several opinions exist on this issue. Initially, there was a split between jurisdictions finding that a lawyer could advise, but not assist, clients engaged in medical marijuana enterprises, and those jurisdictions finding that lawyers could both advise *and* assist clients, even when contrary to the CSA. There is now, however, a growing consensus that amendments or clarifying comments should be employed to eliminate confusion and to allow lawyers to both advise and assist clients in operating, and ensuring regulatory compliance of, medical marijuana enterprises — despite the resulting conflict of these businesses with federal law. As is discussed below, the states that initially held that a lawyer could only advise clients, have since taken steps to propose amendments to Rule 1.2.

1. *States with ethics opinions holding that a lawyer may advise and assist a client related to state medical marijuana laws without violating Rule 1.2.*

Jurisdictions that have issued opinions concluding that lawyers can ethically represent marijuana entrepreneurs under their current versions of Rule 1.2 — and in the process assist their clients in conduct that violates federal criminal law — have based these opinions on the existence of DOJ's enforcement policies minimizing the risk of federal prosecution, on the absence of case law holding that federal narcotics laws preempt state laws, and on policy considerations relating to the importance of the role of lawyers in guiding their clients in this new industry. As explained below, Washington State supported this conclusion with comments to the Rule.

[10] In addition to ethical infractions, attorneys need to consider that their assistance to clients pursuing medicinal marijuana activities in New Hampshire could expose both the client and the lawyer to federal criminal sanctions. At a minimum, the lawyer could potentially face criminal liability as an accomplice or co-conspirator for aiding or furthering the activities of the client. The pursuit of federal sanctions against both lawyer and client would also create substantial conflict issues, *see generally* NHRPC Rule 1.7, since the attorney-client relationship would end and each would need individual representation in defending their own interests. The lawyer might also face efforts by the prosecution to compel testimony regarding advice to the client in the context of the client's criminal prosecution...and a significant possibility will exist that the attorney-client privilege will fall under the "crime/fraud" exception. *See* N.H. R. Ev. 502(d)(1); *State v. Stone and Merchant*, 65 N.H. 124 (1889). All of these issues exceed the scope of this opinion; however, they need to be researched and included as part of advising any client considering marijuana-related activity in New Hampshire. NHRPC 1.4(b).

Arizona: *Arizona Ethics Commission Opinion 11-01* (February, 2011) was the first to reach this conclusion:

> A lawyer may ethically counsel or assist a client in legal matters expressly permissible under the Arizona Medical Marijuana Act ("Act"), despite the fact that such conduct potentially may violate applicable federal law. Lawyers may do so only if: (1) at the time of the advice or assistance is provided, no court decisions have held that the provisions of the Act relating to the client's proposed course of conduct are preempted, void or otherwise invalid; (2) the lawyer reasonably concludes that the client's activities or proposed activities comply fully with state law requirements; and (3) the lawyer advises the client regarding possible federal law implications of the proposed conduct if the lawyers is qualified to do so, or recommends that the client seek other legal counsel regarding these issues and appropriately limits the scope of the representation.

State Bar of Arizona Ethics Opinion 11-01: Scope of Representation (emphasis added).

In reaching its conclusion, the Arizona Bar Ethics Committee emphasized the critical role served by lawyers when there is a conflict between state and federal law: "In any potential conflict between state and federal authority, such as may be presented by the interplay between the Act and federal law, lawyers have a critical role to perform in the activities that will lead to the proper resolution of the controversy. Although the Act may be found to be preempted by federal law or otherwise invalid, as of this time there has been no such judicial determination." *Section IV to Arizona Ethics Commission Opinion 11-01.*

New York State: Three years later, the New York State Bar Association joined Arizona in concluding that New York lawyers could provide legal advice and assistance to "doctors, patients, public officials, hospital administrators and others engaged in the cultivation, distribution, prescribing, dispensing, regulation, possession or use of marijuana for medical purposes" under the state's newly-enacted Compassionate Care Act. *N.Y. Comm. on Professional Ethics Opinion 1024 (9/29/14).* While recognizing that "participating in the production, delivery or use of medical marijuana violates federal criminal law as written," the New York opinion declared that the issue presented by enacting directly contradictory state law was "highly unusual if not unique," and emphasized that the federal government had "publicly announced that it is limiting its enforcement of [federal criminal provisions] insofar as individuals act consistently with state laws that legalize and extensively regulate medical marijuana." In short, the New York opinion relies heavily on the existence of DOJ's discretionary enforcement policy. However, it is understood that this is a policy that can change with administrations, and that specifically reserves the Justice Department's authority to pursue criminal charges against individuals and companies at any time, despite the existence of state law authorizing marijuana enterprises. New York's opinion concludes:

> In light of the current federal enforcement policy, the New York Rules of Professional Conduct permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana.

Washington State: In Washington State, where recreational as well as medical use have been legalized, the King County Bar Association endorsed the Arizona conclusion:

> [T]he emphasis [that the Arizona opinion places] on the client's need for legal assistance to comply with state law accurately reflects the reality that Washington clients face in navigating the new Washington law.... As the State Bar of Arizona recognized, disciplining attorneys for working within such a system would deprive the state's citizens of legal services necessary and desirable to implement and bring to fruition that conduct expressly permitted under state law.

KCBA Ethics Advisory Opinion 1-502 (October 2013). See also Washington State Bar Association Proposed Advisory Opinion 2232 (2014) (reaching same conclusion).

On December 9, 2014, following the issuance of these opinions, the Washington Supreme Court adopted Comment 18 to Rule 1.2 of the Washington State Rules of Professional Conduct:

> At least until there is a change in federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and meaning of Washington Initiative 502... and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders, and other state and local provisions implementing them.

Washington Rules of Professional Conduct R. 1.2 (Comment 18) (emphasis added.)

Nevada, San Francisco, and Minnesota: On May 7, 2014, Nevada added a comment to Rule 1.2 of the Nevada Rules of Professional Conduct. It states that a lawyer "may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, including regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy." *NV ST RPC Rule 1.2 (Comment).*

Advisory opinions issued by the Bar Association of San Francisco (Opinion 2015-1) and Minnesota Lawyers Professional Responsibility Board (Opinion No. 23) (issued April 6, 2015) have similarly held that lawyers may assist clients in matters related to medical marijuana laws without violating Rule 1.2, provided lawyers also advise clients of the potential federal liability.

The BASF opinion specifically states that a lawyer may represent a client in forming and operating a marijuana dispensary even if aiding and abetting a violation of federal law. The MLPRB opinion states that a lawyer may "represent, advise and assist clients in all activities relating to and in compliance with [state law], including the manufacture, sale, distribution and use of medical marijuana."

2. States amending Rule 1.2 to permit lawyers to advise and assist a client related to state medical marijuana laws is not a violation of Rule 1.2.

Illinois: *Illinois State Bar Association Ethics Opinion No. 14-07*, like opinions issued in Arizona, New York, and Washington, relied on the existence of the Justice Department's enforcement policy, and particularly the "safe harbor" established for activities that are "demonstrably in compliance with a strong and effective state regulatory system." The Illinois opinion acknowledged that the "guidance on prosecutorial discretion provided by the DOJ memorandum is subject to change...." However, "[u]nder the present state of affairs, the provision of legal services to clients involved in the medical marijuana business is consistent with the Rules of Professional Conduct". *ISBA Professional Conduct Advisory Opinion No. 14-07* (emphasis added).[11]

Illinois subsequently amended Rule 1.2 and added language specifically permitting a lawyer to "counsel or assist a client regarding conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advised the client about that federal or other law and its potential consequences." *IL R S CT RPC Rule* 1.2(d)(3). This is echoed in a new comment to the Illinois rule:

> Paragraph (d)(3) was adopted to address the dilemma facing a lawyer in Illinois after the passage of the Illinois Compassionate Use of Medical Cannabis Pilot Program Act effective January 1, 2014....The conflict between state and federal law makes it particularly important to allow a lawyer to provide legal advice and assistance to a client seeking to engage in conduct permitted by Illinois law. In providing such advice and assistance, a lawyer shall also advise the client about related federal law and policy. Paragraph (d)(3) is not restricted in its application to the marijuana law conflict. A lawyer should be especially careful about counseling or assisting a client in other contexts in conduct that may violate or conflict with federal, state, or local law.

IL R S CT RPC Rule 1.2 (Comment 10).

[11] The San Francisco Bar Association has also concluded that "a California attorney may ethically represent a client in respect to [state-authorized medical marijuana activities]...even though the attorney may thereby aid and abet violations of federal law." However, because California has not adopted Model Rule 1.2(d), the opinion is less useful in interpreting the ethical obligations of a New Hampshire lawyer than opinions issued by states with similar or identical rules.

Colorado: Colorado, which has legalized recreational as well as medical uses of marijuana, tackled the present issues in *Colorado Bar Association Ethics Committee Formal Opinion 125.* The CBA Ethics Committee initially found it difficult to draw a precise dividing line between ethical and unethical legal services. The opinion does, however, provide examples of "unquestionably permissible conduct" on the one hand, and "undoubtedly unethical" conduct on the other.

"Unquestionably permissible" forms of legal representation, in the opinion of the Colorado Ethics Committee, would include representation of clients in connection with the "consequences of their past conduct;" counseling by government lawyers of their clients in connection with "zoning or other ordinances and legislation relating to marijuana;" legal assistance provided to government officials in the "enforcement [and] interpretation" of marijuana laws; representation of clients advocating for changes in the law; and, in the family law context, advice regarding the consequences of using marijuana "before, during or after exercising parental rights."

"Undoubtedly unethical" conduct, by contrast, would include "structuring or implementing transactions which by themselves violated federal law":

> A lawyer cannot comply with Colo. RPC 1.2(d) and, for example, draft or negotiate (1) contracts to facilitate the purchase and sale of marijuana or (2) leases for properties or facilities, or contracts for resources or supplies, that clients intend to use to cultivate, manufacture, distribute, or sell marijuana even though such transactions comply with Colorado law, and even though the law or the transaction may be so complex that the lawyer's assistance would be useful, because the lawyer would be assisting the client in conduct that the lawyer knows is criminal under federal law. Similarly, a lawyer cannot under Colo. RPC 1.2(d) represent the lessor or supplier in such a transaction if the lawyer knows the client's intended use of the property, facilities, or supplies, as such actions are likely to constitute aiding and abetting the violation of or conspiracy to violate federal law.

Colorado Bar Association Ethics Committee Formal Opinion 125 (adopted October 21, 2013).

The Colorado opinion also concludes that tax planning for marijuana enterprises would be unethical, since the intent would be to assist the client in planning the violation of federal law. *Id.*

On the same day that Colorado's opinion was released, the Colorado Supreme Court's Standing Committee on the Colorado Rules of Professional Conduct recommended the adoption of amendments that "would insulate a lawyer from discipline by the Colorado Supreme Court for…the provision of legal services and advice on marijuana-related conduct." In lieu of an amendment, the Colorado Supreme Court adopted a new Comment to Rule 1.2:

> (14) A lawyer may counsel a client regarding the validity, scope and meaning of Colorado constitution article XVIII secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders and other state and local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

CO ST RPC 1.2(d) (Comment 14) (effective March 24, 2014).[12]

Oregon: In Oregon, medical marijuana has been legal since 1998, but a medical marijuana dispensary program was not adopted or implemented until 2014. In 2015, Oregon voters passed Measure 91, which legalized the recreational use of marijuana and placed regulatory responsibilities with the Oregon Liquor Control Commission. In response to concerns over the conflict in state and federal law, the Oregon State Bar Board of Governors proposed, and, on February 19, 2015, the Oregon Supreme Court adopted Oregon RPC 1.2(d). The Oregon amendment to Rule 1.2 provides that:

> (d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon's marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.

OR R PROF COND Rule 1.2.

Alaska: In 1975, the Alaska Supreme Court ruled that an adult's right to use and possess a small amount of marijuana at home for personal use was protected under the Alaska Constitution's right to privacy. *Ravin v. State*, 537 P.2d 494 (Alaska 1975). Alaska voters legalized medical marijuana in 1998, and recreational use for adults in 2014 (effective February, 2015). The commercial sale and distribution of marijuana is regulated by the Alaska Alcohol Beverage Control Board.

In June, 2015, Alaska amended Rule 1.2 and added a comment to Rule 8.4 of the Alaska Rules of Professional Conduct. A new section was added to Rule 1.2, which permits a lawyer to both advise and assist clients regarding state marijuana laws, even when in conflict with federal law:

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[12] However, the United States District Court for the District of Colorado, in a November 17, 2015 amendment to its local rules, opted out of Comment 14. *See D.C. Colo. L. Atty. R. 2.* Under the District Court rule, a lawyer may advise clients regarding the "validity, scope, and meaning" of Colorado's marijuana law, but may not "assist" clients "in conduct that the lawyer reasonably believes is permitted" by such laws. Thus, while the Colorado Supreme Court's Standing Committee on Rules took steps to allow lawyers to assist clients engaged in lawful state conduct, the federal court's action contradicts that initiative, which suggests a member of both the state and federal bar jeopardizes his or her practice when assisting client's in conduct consistent with Colorado's marijuana laws.

> (f) A lawyer may counsel a client regarding Alaska's marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

AK R RPC Rule 1.2(f). The comment to Rule 8.4 further clarifies that providing legal assistance regarding marijuana laws is not a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer: "Although assisting a client under Rule 1.2(f) may violate federal drug laws, it is not a violation of Rule 8.4(b)." *AK R RPC Rule 8.4 (Comment 5).*

Hawaii: In 2015, the Hawaii legislature established a regulated statewide dispensary system for medical marijuana. Following the passage of this law, the Disciplinary Board of the Hawaii Supreme Court was asked to answer two questions:

> (1) whether a lawyer may provide legal advice about Act 241; and
>
> (2) whether a lawyer may provide legal services to facilitate the establishment and operation of a medical marijuana business "when such acts are expressly authorized under [Act 241], but remain a crime under federal law, albeit with a low enforcement priority."

DBHSC Advisory Opinion 49. The DBHSC answered the first question in the affirmative, but the second in the negative:

> [U]ntil such time as the Hawai'i Supreme Court amends HRPC Rule 1.2(d) or adds an appropriate comment, or the Congress acts to excepts from federal criminal law state authorized production and distribution of marijuana, a lawyer may advise a client with regard to legality under state and federal law on the subject of marijuana production and distribution and may advocate for changes in court rules or state or federal laws on the subject, but a lawyer may not "provide legal services to facilitate the establishment and operation of a medical marijuana business" in accordance with [the state medical marijuana law] or otherwise.

Id.

As a result, on October 20, 2015, the Hawaii Supreme Court promptly amended Rule 1.2(d) to include language permitting a Hawaiian lawyer to provide legal services to facilitate the establishment and operation of a medical marijuana business:

> **(d)** A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law, and may

> counsel or assist a client regarding conduct expressly permitted by Hawai'i law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

Haw. R. Sup. Ct. EX A RPC 1.2 (emphasis added).

3. States that have proposed, but not yet approved, amending Rule 1.2 to permit lawyers to advise and assist a client in connection with state-authorized medical marijuana businesses without violating Rule 1.2.

Maine: Maine Rule of Professional Conduct 1.2(e) is identical to New Hampshire Rule of Professional Conduct 1.2(d). In 2010, the Maine Professional Conduct Commission issued *Ethics Opinion 199*. The Commission found that the role of a lawyer representing a client in connection with a medical marijuana business was "limited" to advice regarding the legal consequences of pursuing the activities, and "counsel or [assistance]…in making good faith efforts to determine the validity, scope, meaning or application" of Maine's legislation.

Before undertaking broader representation, however, the Commission cautioned Maine lawyers to determine whether other legal services rise to the level of assistance in violating federal law." *Id.* The opinion stopped short of identifying the particular legal services that would violate the rule, stating only that "where the line is drawn between permitted and forbidden activities needs to be evaluated on a case by case basis." The opinion ended with the following warning: "We can, however, state that participation in this endeavor by an attorney involves a significant degree of risk that needs to be carefully evaluated."

On May 4, 2016, the Mane Professional Ethics Commission re-evaluated Opinion 199 and recommended an amendment to Rule 1.2 that would specifically allow Maine lawyers to assist clients engaged in conduct permitted by Maine's medical marijuana laws. The proposed amendment to Maine Rule of Professional Conduct 1.2(e) provides that:

> (e) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may (1) discuss the legal consequences of any proposed course of conduct with a client; (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law; or (3) counsel or assist a client regarding conduct expressly permitted by Maine law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

M. R. Prof. Conduct 1.2(e) (proposed amendment) (emphasis added).

Pennsylvania: In October 2015, the Pennsylvania Bar Association and the Philadelphia Bar Association issued *Joint Formal Opinion 2015-100.* Pennsylvania's Rule 1.2(d) is identical to New Hampshire's.

As with Maine and Colorado, Pennsylvania saw the issue as one of distinguishing between "counseling and assisting the client in criminal or fraudulent conduct, which is prohibited [by Rule 1.2(d)], and discussing the legal consequences of any proposed course of conduct or assisting a client to make a good faith effort to determine the validity, scope, meaning or application of the law, which is permitted." The joint opinion of the Pennsylvania bars recognized that prohibition of lawyers from assisting clients in marijuana-related activities that are "expressly permitted by state law would deprive these clients of the legal services necessary to implement that conduct." However, the opinion continued with language with which this Committee agrees:

> The fact that the proposed client conduct is permitted by state law, and federal law enforcement may not target those operating in compliance with state law, does not change the analysis, as [Rule 1.2(d)] makes no distinction between laws that are enforced and laws that are not.

PA Eth. Op. 2015-100 (emphasis added).

Pennsylvania further concluded that:

1. Under Rule 1.2(d), a lawyer may provide services to a client that are strictly advisory; that is, a lawyer may discuss and explain to the client the consequences of a proposed course of conduct and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

2. In providing such services to clients engaged in the marijuana business, we believe that the lawyer must also advise the client regarding related federal law and policy, because such guidance is clearly a material consideration for the client to take into account for purposes of making an informed judgment how to proceed. [Citing Rule 1.4 relating to client communication.]

3. A lawyer may not advise a client to engage in conduct that violates federal criminal statutes, or assist a client in such conduct, even if such conduct is authorized under applicable state law.

Id.

As in Colorado, Pennsylvania's bar associations have sought to cure the dilemma caused by conflicting state and federal law by recommending the following amendment to the language of Rule 1.2:

> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, except as stated in paragraph (e), but a lawyer may discuss the legal consequences of any proposed course of conduct with a client

and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) A lawyer may counsel or assist a client regarding conduct expressly permitted by the law of the state where it takes place or has its predominant effect, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

As of this date, the recommended amendment had not been adopted.

4. Exemption from Disciplinary Action under Rule of Professional Conduct 1.2:

Finally, one state has created an exemption to disciplinary action as a means of resolving the ethical dilemma created by conflicting state and federal laws.

Massachusetts: In 2012, Massachusetts residents approved a ballot measure authorizing the Humanitarian Medical Use of Marijuana. M.G.L.A. Chapter 94C. The Massachusetts Board of Bar Overseers and Office of Bar Counsel subsequently issued a policy on medical marijuana indicating that no disciplinary action would be brought against lawyers advising and assisting clients under this statute:

> The Massachusetts Board of Bar Overseers and Office of the Bar Counsel will not prosecute a member of the Massachusetts bar solely for advising a client regarding the validity, scope, and meaning of Massachusetts statutes regarding medical marijuana or for assisting a client in conduct that the lawyer reasonably believes is permitted by Massachusetts statutes, regulations, orders, and other state or local provisions implementing them, as long as the lawyer also advises the client regarding related federal law and policy.

BBO/BBC Policy on Legal Advice on Medical Marijuana (emphasis added). Although Massachusetts has not amended its Professional Conduct rules, it has, through this policy statement, allowed lawyers advising clients about Massachusetts marijuana laws to operate openly, without the specter of disciplinary action.

CONCLUSIONS OF THE ETHICS COMMITTEE; RECOMMENDATION FOR COURT ACTION

Among the states that have legalized medical and recreational marijuana, there is a clear consensus that lawyers should be able to advise clients involved in the business of medical marijuana. Most of those states have either interpreted Rule 1.2 as allowing such representation,

or have taken action to amend Rule 1.2 to permit lawyers to counsel and assist clients with state regulatory compliance and with the varied legal services required by the medical marijuana businesses, even though such state-authorized businesses may violate federal criminal law.

After careful review of the varied ethics opinions and extensive discussion, New Hampshire's Ethics Committee has reached consensus regarding the proper interpretation of Rule 1.2(d) in this context. The current language of New Hampshire Rule of Professional Conduct 1.2(d) prohibits the assistance of a client's criminal conduct. No distinction is drawn in the rule between state and federal criminal law. Accordingly, a strict construction of this Rule is that the role of lawyers representing clients in connection with state-authorized medical marijuana enterprises or activities must be limited to (1) discussion of the legal consequences of any proposed course of conduct relating to marijuana under RSA 126-X, and (2) counsel[ing] or assist[ing] a client to make a "good faith effort to determine the validity, scope, meaning or application of the law."

Reading Rule 1.2(d) in this way, the Committee has concluded that New Hampshire lawyers cannot — consistent with Rule 1.2(d) in its present form — provide legal services that would assist a client in the operation of a planned or ongoing medical marijuana enterprise through activities including, but not limited to, drafting documents, negotiating transactions, assisting in land or real property leasing or acquisition, providing tax advice and services, pursuing zoning ordinance changes, litigating contract or other disputes with third parties, advising on employment matters, buying or selling the enterprise, cultivating and distributing of marijuana, and advising care providers on the full range of matters associated with the prescription of marijuana in their practices, including the identification of medical conditions that qualify for treatment under the Act.

The Committee further concludes that the dividing line between impermissible "assistance" of a client, and permissible counseling of a client, is difficult to draw as the Rule is currently phrased. While certain legal services might be characterized as pure "advice" or "counseling," this does not mean that these services cannot, under certain circumstances, rise to the level of prohibited "assistance" in the violation of the federal law and Rule 1.2(d). For example, a lawyer who limits his or her role to advising a client on how to manage the client's planned marijuana cultivation or distribution business in compliance with state regulations may, at the same time, be assisting that client to establish and operate a business that will violate the criminal provisions of the CSA. Stated alternatively, the Committee has found it more difficult to determine whether advice on how to operate in compliance with state law constitutes "discuss(ion of) the legal consequences of any proposed course of conduct" (a safe harbor under Rule 1.2(d)" or rises to the level of "assist(ance of) a client in conduct that the lawyer knows is criminal....."(which is clearly prohibited under Rule 1.2(d)). Clarification through an amendment or comments should be provided to New Hampshire practitioners.

The Committee has also considered whether lawyers who advise state or municipal officers and employees in the enforcement of the RSA 126-X and its implementing regulations are acting in violation of Rule 1.2(d). We do not believe the representation of governmental clients in matters relating to, or arising under, RSA 126-X would violate Rule 1.2(d). Lawyers are at risk of a disciplinary rule violation only if the "client" they represent is or will be engaged

in activity that violates federal criminal provisions of the Controlled Substances Act. *See Rule 1.2(d)* ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal....") (emphasis added). While this Committee's area of concentration is limited to professional ethics matters, rather than criminal law, we do not believe that executive branch agency officials, law enforcement authorities, municipal employees, and other officials who deal with, implement, or enforce RSA 126-X are violating federal criminal laws in the process. Nevertheless, in our opinion, it is important that any amendment, comment or policy make clear that lawyers may provide advice to these officials without violating Rule 1.2(d).

It is the majority opinion of the Committee that the Court should consider and take whatever action it considers warranted to clarify the application of Rule 1.2(d) to lawyers who are representing clients in the operation of state-authorized medical marijuana businesses, or in the prescription of marijuana for qualifying medical conditions.

A plurality of the Committee recommends that the Court's clarification take the form of an amendment to Rule 1.2.[13] A proposed amendment to Rule 1.2 is attached to this letter.

A minority of the Ethics Committee does not support any amendment. Rather, these Committee members believe that this issue should be forwarded to the Court to determine what action, if any, should be taken to address this situation and to take whatever action the Court may determine is necessary.

Respectfully,

Judith A. Borsten, Immediate Past Chair

Elizabeth S. LaRochelle, JD, Incoming Chair

The New Hampshire Bar Association
Ethics Committee

Enclosures

cc: Hon. Robert J. Lynn, Chair
Advisory Committee on Rules

[13] Some jurisdictions, including Colorado and Washington State, have sought to clarify their rules by Comments rather than by the drafting and approval of an amendment of the language of the rules themselves. However, in New Hampshire, a comment to Rule 1.2 may offer no assurances to New Hampshire lawyers practicing in this area. The New Hampshire Ethics Committee Comments are "intended to be interpretive, not mandatory" and are provided by the Ethics Committee, not the Supreme Court. (See Statement of Purpose to NH Rules of Professional Conduct.) Additionally, Ethics Committee Comments do not go through a Supreme Court approval process before they are published along with the actual rules themselves.

ATTACHMENT A

PROPOSED AMENDMENT TO RULE 1.2
OF THE NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent, except as stated in paragraph (e), but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) A lawyer may counsel or assist a client regarding conduct expressly permitted by New Hampshire law that conflicts with federal law, provided that the lawyer counsels the client about the potential legal consequences of the client's proposed course of conduct under applicable federal law.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. STEVE MCINTOSH, *Defendant-Appellant.*	No. 15-10117 D.C. No. 3:14-cr-00016- MMC-3

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, Senior District Judge, Presiding

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. IANE LOVAN, *Defendant-Appellant.*	No. 15-10122 D.C. No. 1:13-cr-00294- LJO-SKO-1

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. SOMPHANE MALATHONG, *Defendant-Appellant.*	No. 15-10127 D.C. No. 1:13-cr-00294- LJO-SKO-3
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. VONG SOUTHY, *Defendant-Appellant.*	No. 15-10132 D.C. No. 1:13-cr-00294- LJO-SKO-2
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. KHAMPHOU KHOUTHONG, *Defendant-Appellant.*	No. 15-10137 D.C. No. 1:13-cr-00294- LJO-SKO-4

Appeals from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JERAD JOHN KYNASTON, AKA Jared J. Kynaston, AKA Jerad J. Kynaston; SAMUEL MICHAEL DOYLE, AKA Samuel M. Doyle; BRICE CHRISTIAN DAVIS, AKA Brice C. Davis; JAYDE DILLON EVANS, AKA Jayde D. Evans; TYLER SCOTT MCKINLEY, AKA Tyler S. McKinley, *Defendants-Appellants*.	No. 15-30098 D.C. No. 2:12-cr-00016-WFN-1

Appeal from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielsen, Senior District Judge, Presiding

IN RE IANE LOVAN, IANE LOVAN, *Petitioner*, v. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FRESNO, *Respondent*, UNITED STATES OF AMERICA, *Real Party in Interest.*	No. 15-71158 D.C. No. 1:13-cr-00294-LJO-SKO-1

IN RE SOMPHANE MALATHONG, SOMPHANE MALATHONG, *Petitioner*, v. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FRESNO, *Respondent*, UNITED STATES OF AMERICA, *Real Party in Interest.*	No. 15-71174 D.C. No. 1:13-cr-00294-LJO-SKO-3

IN RE VONG SOUTHY, VONG SOUTHY, *Petitioner*, v. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FRESNO, *Respondent*, UNITED STATES OF AMERICA, *Real Party in Interest.*	No. 15-71179 D.C. No. 1:13-cr-00294-LJO-SKO-2
IN RE KHAMPHOU KHOUTHONG, KHAMPHOU KHOUTHONG, *Petitioner*, v. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FRESNO, *Respondent*, UNITED STATES OF AMERICA, *Real Party in Interest.*	No. 15-71225 D.C. No. 1:13-cr-00294-LJO-SKO-4 OPINION

Petitions for Writ of Mandamus

Argued and Submitted December 7, 2015
San Francisco, California

Filed August 16, 2016

Before: Diarmuid F. O'Scannlain, Barry G. Silverman, and Carlos T. Bea, Circuit Judges.

Opinion by Judge O'Scannlain

SUMMARY*

Criminal Law

In ten consolidated interlocutory appeals and petitions for writs of mandamus arising from three district courts in two states, the panel vacated the district court's orders denying relief to the appellants, who have been indicted for violating the Controlled Substances Act, and who sought dismissal of their indictments or to enjoin their prosecutions on the basis of a congressional appropriations rider, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015), that prohibits the Department of Justice from spending funds to prevent states' implementation of their medical marijuana laws.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that it has jurisdiction under 28 U.S.C. § 1292(a)(1) to consider the interlocutory appeals from these direct denials of requests for injunctions, and that the appellants have standing to invoke separation-of-powers provisions of the Constitution to challenge their criminal prosecutions.

The panel held that § 542 prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by state medical marijuana laws and who fully complied with such laws. The panel wrote that individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and that prosecuting such individuals does not violate § 542.

Remanding to the district courts, the panel instructed that if DOJ wishes to continue these prosecutions, the appellants are entitled to evidentiary hearings to determine whether their conduct was completely authorized by state law. The panel wrote that in determining the appropriate remedy for any violation of § 542, the district courts should consider the temporal nature of the lack of funds along with the appellants' rights to a speedy trial.

COUNSEL

Marc J. Zilversmit (argued), San Francisco, California, for Defendant-Appellant Steve McIntosh.

Robert R. Fischer (argued), Federal Defenders of Eastern Washington & Idaho, Spokane, Washington, for Defendant-Appellant Jerad John Kynaston.

Richard D. Wall, Spokane, Washington, for Defendant-Appellant Tyler Scott McKinley.

Douglas Hiatt, Seattle, Washington; Douglas Dwight Phelps, Spokane, Washington; for Defendant-Appellant Samuel Michael Doyle.

David Matthew Miller, Spokane, Washington, for Defendant-Appellant Brice Christian Davis.

Nicholas V. Vieth, Spokane, Washington, for Defendant-Appellant Jayde Dillion Evans.

Andras Farkas (argued), Assistant Federal Defender; Heather E. Williams, Federal Defender; Federal Defenders of the Eastern District of California, Fresno, California; for Defendant-Appellant/Petitioner Iane Lovan.

Daniel L. Harralson, Daniel L. Harralson Law Corp., Fresno, California, for Defendant-Appellant/Petitioner Somphane Malathong.

Harry M. Drandell, Law Offices of Harry M. Drandell, Fresno, California, for Defendant-Appellant/Petitioner Vong Southy.

Peter M. Jones, Wanger Jones Helsley, P.C., Fresno, California, for Defendant-Appellant/Petitioner Khamphou Khouthong.

Owen P. Martikan (argued), Assistant United States Attorney; Barbara J. Valliere, Chief, Appellate Division; Brian Stretch, United States Attorney; United States Attorney's Office, San Francisco, California, and ; Russell E. Smoot and Timothy J. Ohms, Assistant United States Attorneys; Michael C. Ormsby, United States Attorney; United States Attorney's Office, Spokane, Washington; Camil A. Skipper, Assistant United States Attorney; Benjamin B. Wagner, United States Attorney; United States Attorney's Office, Sacramento, California; for Plaintiff-Appellee/Real Party in Interest United States.

OPINION

O'SCANNLAIN, Circuit Judge:

We are asked to decide whether criminal defendants may avoid prosecution for various federal marijuana offenses on the basis of a congressional appropriations rider that prohibits the United States Department of Justice from spending funds to prevent states' implementation of their own medical marijuana laws.

I

A

These ten cases are consolidated interlocutory appeals and petitions for writs of mandamus arising out of orders entered

by three district courts in two states within our circuit.[1] All Appellants have been indicted for various infractions of the Controlled Substances Act (CSA). They have moved to dismiss their indictments or to enjoin their prosecutions on the grounds that the Department of Justice (DOJ) is prohibited from spending funds to prosecute them.

In *McIntosh*, five codefendants allegedly ran four marijuana stores in the Los Angeles area known as Hollywood Compassionate Care (HCC) and Happy Days, and nine indoor marijuana grow sites in the San Francisco and Los Angeles areas. These codefendants were indicted for conspiracy to manufacture, to possess with intent to distribute, and to distribute more than 1000 marijuana plants in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(l)(A). The government sought forfeiture derived from such violations under 21 U.S.C. § 853.

In *Lovan*, the U.S. Drug Enforcement Agency and Fresno County Sheriff's Office executed a federal search warrant on 60 acres of land located on North Zedicker Road in Sanger, California. Officials allegedly located more than 30,000 marijuana plants on this property. Four codefendants were indicted for manufacturing 1000 or more marijuana plants and for conspiracy to manufacture 1000 or more marijuana plants in violation of 21 U.S.C. §§ 841(a)(1), 846.

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[1] Appellants filed one appeal in *United States v. McIntosh*, No. 15-10117, arising out of the Northern District of California; one appeal in *United States v. Kynaston*, No. 15-30098, arising out of the Eastern District of Washington; and four appeals with four corresponding petitions for mandamus—Nos. 15-10122, 15-10127, 15-10132, 15-10137, 15-71158, 15-71174, 15-71179, 15-71225, which we shall address as *United States v. Lovan*—arising out of the Eastern District of California.

In *Kynaston*, five codefendants face charges that arose out of the execution of a Washington State search warrant related to an investigation into violations of Washington's Controlled Substances Act. Allegedly, a total of 562 "growing marijuana plants," along with another 677 pots, some of which appeared to have the root structures of suspected harvested marijuana plants, were found. The codefendants were indicted for conspiring to manufacture 1000 or more marijuana plants, manufacturing 1000 or more marijuana plants, possessing with intent to distribute 100 or more marijuana plants, possessing a firearm in furtherance of a Title 21 offense, maintaining a drug-involved premise, and being felons in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(c)(1)(A)(i) and 21 U.S.C. §§ 841, 856(a)(1).

B

In December 2014, Congress enacted the following rider in an omnibus appropriations bill funding the government through September 30, 2015:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such

> States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014). Various short-term measures extended the appropriations and the rider through December 22, 2015. On December 18, 2015, Congress enacted a new appropriations act, which appropriates funds through the fiscal year ending September 30, 2016, and includes essentially the same rider in § 542. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332–33 (2015) (adding Guam and Puerto Rico and changing "prevent such States from implementing their own State laws" to "prevent any of them from implementing their own laws").

Appellants in *McIntosh*, *Lovan*, and *Kynaston* filed motions to dismiss or to enjoin on the basis of the rider. The motions were denied from the bench in hearings in *McIntosh* and *Lovan*, while the court in *Kynaston* filed a short written order denying the motion after a hearing. In *McIntosh* and *Kynaston*, the court concluded that defendants had failed to carry their burden to demonstrate their compliance with state medical marijuana laws. In *Lovan*, the court concluded that the determination of compliance with state law would depend on facts found by the jury in a federal prosecution, and thus it would revisit the defendants' motion after the trial.

Appellants in all three cases filed interlocutory appeals, and Appellants in *McIntosh* and *Lovan* ask us to consider issuing writs of mandamus if we do not assume jurisdiction over the appeals.

II

Federal courts are courts of limited subject-matter jurisdiction, possessing only that power authorized both by the Constitution and by Congress. *See Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013). Before proceeding to the merits of this dispute, we must assure ourselves that we have jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998).

A

The parties dispute whether Congress has authorized us to exercise jurisdiction over these interlocutory appeals. "Our jurisdiction is typically limited to final decisions of the district court." *United States v. Romero-Ochoa*, 554 F.3d 833, 835 (9th Cir. 2009). "In criminal cases, this prohibits appellate review until after conviction and imposition of sentence." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989). In the cases before us, no Appellants have been convicted or sentenced. Therefore, unless some exception to the general rule applies, we should not reach the merits of this dispute. Appellants invoke three possible avenues for reaching the merits: jurisdiction over an order refusing an injunction, jurisdiction under the collateral order doctrine, and the writ of mandamus. We address the first of these three avenues.

1

Under 28 U.S.C. § 1292(a), "the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, *refusing* or dissolving *injunctions*, . . .

except where a direct review may be had in the Supreme Court." (emphasis added). By its terms, § 1292(a)(1) requires only an interlocutory order refusing an injunction. Nonetheless, relying on *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981), the government argues that § 1292(a)(1) requires Appellants to show that the interlocutory order (1) has the effect of refusing an injunction; (2) has a serious, perhaps irreparable, consequence; and (3) can be effectually challenged only by immediate appeal.

The government's reliance on *Carson* is misplaced in light of our precedent interpreting that case. In *Shee Atika v. Sealaska Corp.*, we explained:

> In *Carson*, the Supreme Court considered whether section 1292(a)(1) permitted appeal from an order denying the parties' joint motion for approval of a consent decree that contained an injunction as one of its provisions. Because the order did not, on its face, deny an injunction, an appeal from the order did not fall precisely within the language of section 1292(a)(1). The Court nevertheless permitted the appeal. The Court stated that, while section 1292(a)(1) must be narrowly construed in order to avoid piecemeal litigation, it does permit appeals from orders that have the "practical effect" of denying an injunction, provided that the would-be appellant shows that the order "might have a serious, perhaps irreparable, consequence."

> We find nothing in *Carson* to suggest that the requirement of irreparable injury applies to appeals from orders specifically denying injunctions. *Carson* merely expanded the scope of appeals that do not fall within the meaning of the statute. Sealaska appeals from the direct denial of a request for an injunction. *Carson*, therefore, is simply irrelevant.

39 F.3d 247, 249 (9th Cir. 1994) (citations omitted); *accord Paige v. California*, 102 F.3d 1035, 1038 (9th Cir. 1996); *see also Shee Atika*, 39 F.3d at 249 n.2 (noting that its conclusion was consistent with "the overwhelming majority of courts of appeals that have considered the issue" and collecting cases). Thus, *Carson*'s requirements do not apply to appeals from the "direct denial of a request for an injunction." *Shee Atika*, 39 F.3d at 249.

2

In the cases before us, the district courts issued direct denials of requests for injunctions. Lovan, for instance, requested injunctive relief in the conclusion of his opening brief: "Therefore, the Court should dismiss all counts against Mr. Lovan based upon alleged violations of 21 U.S.C. § 841 and/or enjoin the Department of Justice from taking any further action against the defendants in this case unless and until the Department can show such action does not involve the expenditure of any funds in violation of the Appropriations Act." At the hearing, Lovan's counsel made exceptionally clear that his motion sought injunctive relief in the alternative:

> THE COURT: But remember, your remedy is not because you are upset that the Department of Justice is spending taxpayer money. Your remedy is a dismissal, which is what you are seeking now, is it not?
>
> MR. FARKAS: And your Honor, as an alternative in our motion, we ask for a stay of these proceedings, asked this Court to enjoin the Department of Justice from spending any funds to prosecute Mr. Lovan if this Court finds he is in conformity with the California Compassionate Use Act. So it is a motion to dismiss or, alternatively, a motion to enjoin until Congress designates funds for that purpose.

Shortly thereafter, Lovan's counsel reiterated: "[W]e would ask either for a dismissal or to enjoin the government from spending any funds that were not appropriated under the Appropriations Act." At the close of the hearing, Lovan's counsel even explicitly argued that the district court's denial of injunctive relief would be appealable immediately: "I believe this might be the type of collateral order that is appealable to the Ninth Circuit immediately. As I said, we are asking for an injunction." The district court denied Lovan's motion, which clearly requested injunctive relief.

Similarly, in *Kynaston*, the opening brief in support of the motion began and ended with explicit requests for injunctive relief. Subsequent filings by other defendants in that case referenced the injunctive relief sought, and one discussed at length how courts of equity should exercise their jurisdiction.

The district court denied the motion, which clearly sought injunctive relief.

In *McIntosh*, the defendant requested injunctive relief in his moving papers, and he mentioned his request for injunctive relief three times in his reply brief. At the hearing, the question of injunctive relief did not arise, and the district court said simply that it was denying the motion. Although McIntosh could have emphasized the equitable component of his request more, we conclude that he raised the issue sufficiently for the denial of his motion to constitute a direct denial of a request for an injunction.

Therefore, we have jurisdiction under 28 U.S.C. § 1292(a)(1) to consider the interlocutory appeals from these direct denials of requests for injunctions.

3

We note the unusual circumstances presented by these cases. In almost all federal criminal prosecutions, injunctive relief and interlocutory appeals will not be appropriate. Federal courts traditionally have refused, except in rare instances, to enjoin federal criminal prosecutions. *See Ackerman v. Int'l Longshoremen's Union*, 187 F.2d 860, 868 (9th Cir. 1951); *Argonaut Mining Co. v. McPike*, 78 F.2d 584, 586 (9th Cir. 1935); *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177, 185 (3d Cir. 2006); *Deaver v. Seymour*, 822 F.2d 66, 69 (D.C. Cir. 1987). "An order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988). Thus, in almost all circumstances, federal

criminal defendants cannot obtain injunctions of their ongoing prosecutions, and orders by district courts relating solely to requests to stay ongoing federal prosecutions will not constitute appealable orders under § 1292(a)(1).

Here, however, Congress has enacted an appropriations rider that specifically restricts DOJ from spending money to pursue certain activities. It is "emphatically . . . the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for . . . the courts to enforce them when enforcement is sought." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978); *accord United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001). A "court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" *Oakland Cannabis*, 532 U.S. at 497 (quoting *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 551 (1937)). Even if Appellants cannot obtain injunctions of their prosecutions themselves, they can seek—and have sought—to enjoin DOJ from *spending funds* from the relevant appropriations acts on such prosecutions.[2] When Congress has enacted a legislative

[2] We need not decide in the first instance exactly how the district courts should resolve claims that DOJ is spending money to prosecute a defendant in violation of an appropriations rider. We therefore take no view on the precise relief required and leave that issue to the district courts in the first instance. We note that district courts in criminal cases have ancillary jurisdiction, which "is the power of a court to adjudicate and determine matters incidental to the exercise of its primary jurisdiction over a cause under review." *United States v. Sumner*, 226 F.3d 1005, 1013–15 (9th Cir. 2000); *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.

restriction like § 542 that expressly prohibits DOJ from spending funds on certain actions, federal criminal defendants may seek to enjoin the expenditure of those funds, and we may exercise jurisdiction over a district court's direct denial of a request for such injunctive relief.

B

1

As part of our jurisdictional inquiry, we must consider whether Appellants have standing to complain that DOJ is spending money that has not been appropriated by Congress. "The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance." *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004). Although the government concedes that Appellants have standing, we have an "independent obligation to examine [our] own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." *United States v. Hays*, 515 U.S. 737, 742 (1995) (internal quotation marks and alterations omitted).

Constitutional limits on our jurisdiction are established by Article III, which limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. It "demands that an 'actual controversy' persist throughout all stages of litigation. That means that standing 'must be met by persons seeking appellate review . . . .'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (citations omitted). To have Article III standing, a litigant "must have suffered or be

375, 378–80 (1994); *Garcia v. Teitler*, 443 F.3d 202, 206–10 (2d Cir. 2006).

imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action . . . and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014).

In *Bond v. United States*, the Supreme Court addressed a situation similar to the cases before us. 564 U.S. 211 (2011). There, the Third Circuit had concluded that the criminal defendant lacked "standing to challenge a federal statute on grounds that the measure interferes with the powers reserved to States," and the Supreme Court reversed. *Id.* at 216, 226.

The Court explained that "[o]ne who seeks to initiate or continue proceedings in federal court must demonstrate, among other requirements, both standing to obtain the relief requested, and, in addition, an 'ongoing interest in the dispute' on the part of the opposing party that is sufficient to establish 'concrete adverseness.'" *Id.* at 217 (citations omitted). "When those conditions are met, Article III does not restrict the opposing party's ability to object to relief being sought at its expense." *Id.* "The requirement of Article III standing thus had no bearing upon [the defendant's] capacity to assert defenses in the District Court." *Id.*

Applying those principles to the defendant's standing to appeal, the Court concluded that it was "clear Article III's prerequisites are met. Bond's challenge to her conviction and sentence 'satisfies the case-or-controversy requirement, because the incarceration . . . constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction.'" *Id.* Here, Appellants have not yet been deprived of liberty via a conviction, but their indictments imminently threaten such a deprivation. *Cf. Susan B.*

Anthony List v. Driehaus, 134 S. Ct. 2334, 2342–47 (2014) (threatened prosecution may give rise to standing). They clearly had Article III standing to pursue their challenges below because they were merely objecting to relief sought at their expense. And they have standing on appeal because their potential convictions constitute concrete, particularized, and imminent injuries, which are caused by their prosecutions and redressable by injunction or dismissal of such prosecutions. *See Bond*, 564 U.S. at 217.

After addressing Article III standing, the *Bond* Court concluded that, "[i]f the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." *Id.* at 223. The Court explained that both federalism and separation-of-powers constraints in the Constitution serve to protect individual liberty, and a litigant in a proper case can invoke such constraints "[w]hen government acts in excess of its lawful powers." *Id.* at 220–24. The Court gave numerous examples of cases in which private parties, rather than government departments, were able to rely on separation-of-powers principles in otherwise jusiticiable cases or controversies. *See id.* at 223 (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Clinton v. City of New York*, 524 U.S. 417, 433–36 (1998); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

The Court reiterated this principle in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). There, the Court granted

relief to a private party challenging an order against it on the basis that certain members of the National Labor Relations Board had been appointed in excess of presidential authority under the Recess Appointments Clause, another separation-of-powers constraint. *Id.* at 2557. The Court "recognize[d], of course, that the separation of powers can serve to safeguard individual liberty and that it is the 'duty of the judicial department'—in a separation-of-powers case as in any other—'to say what the law is.'" *Id.* at 2559–60 (citing *Clinton*, 524 U.S. at 449–50 (Kennedy, J., concurring), and quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also id.* at 2592–94 (Scalia, J., concurring in the judgment) (discussing at great length how the separation of powers protects individual liberty).

Thus, Appellants have standing to invoke separation-of-powers provisions of the Constitution to challenge their criminal prosecutions.

2

Here, Appellants complain that DOJ is spending funds that have not been appropriated by Congress in violation of the Appropriations Clause of the Constitution. *See* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). This "straightforward and explicit command . . . means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (citation omitted). "Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute." *Id.*

The Appropriations Clause plays a critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them. "Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Id.* at 425. The Clause has a "fundamental and comprehensive purpose . . . to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *Id.* at 427–28. Without it, Justice Story explained, "the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure." *Id.* at 427 (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1348 (3d ed. 1858)).

Thus, if DOJ were spending money in violation of § 542, it would be drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause. That Clause constitutes a separation-of-powers limitation that Appellants can invoke to challenge their prosecutions.

III

The parties dispute whether the government's spending money on their prosecutions violates § 542.

A

We focus, as we must, on the statutory text. Section 542 provides that "[n]one of the funds made available in this Act

to the Department of Justice may be used, with respect to [Medical Marijuana States[3]] to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332–33 (2015). Unfortunately, the rider is not a model of clarity.

1

"It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Thus, in order to decide whether the prosecutions of Appellants violate § 542, we must determine the plain meaning of "prevent any of [the Medical Marijuana States] from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." The pronoun "them" refers back to the Medical Marijuana States, and "their own

[3] To avoid repeating the names of all 43 jurisdictions listed, we refer to Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming, the District of Columbia, Guam, and Puerto Rico as the "Medical Marijuana States" and their laws authorizing "the use, distribution, possession, or cultivation of medical marijuana" as the "State Medical Marijuana Laws." While recognizing that the list includes three non-states, we will refer to the listed jurisdictions as states and their laws as state laws without further qualification.

laws" refers to the state laws of the Medical Marijuana States. And "implement" means:

> To "carry out, accomplish; *esp.*: to give practical effect to and ensure of actual fulfillment by concrete measure." *Implement, Merriam-Webster's Collegiate Dictionary* (11th ed. 2003);
>
> "To put into practical effect; carry out." *Implement, American Heritage Dictionary of the English Language* (5th ed. 2011); and
>
> "To complete, perform, carry into effect (a contract, agreement, etc.); to fulfil (an engagement or promise)." *Implement, Oxford English Dictionary*, www.oed.com.

See Sanford v. MemberWorks, Inc., 625 F.3d 550, 559 (9th Cir. 2010) (We "may follow the common practice of consulting dictionaries to determine" ordinary meaning.); *Sandifer*, 134 S. Ct. at 876. In sum, § 542 prohibits DOJ from spending money on actions that prevent the Medical Marijuana States' giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

2

DOJ argues that it does not prevent the Medical Marijuana States from giving practical effect to their medical marijuana laws by prosecuting private individuals, rather than taking legal action against the state. We are not persuaded.

Importantly, the "[s]tatutory language cannot be construed in a vacuum. It is [another] fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (internal quotation marks omitted). Here, we must read § 542 with a view to its place in the overall statutory scheme for marijuana regulation, namely the CSA and the State Medical Marijuana Laws. The CSA prohibits the use, distribution, possession, or cultivation of any marijuana. *See* 21 U.S.C. §§ 841(a), 844(a).[4] The State Medical Marijuana Laws are those state laws that authorize the use, distribution, possession, or cultivation of medical marijuana. Thus, the CSA prohibits what the State Medical Marijuana Laws permit.

In light of the ordinary meaning of the terms of § 542 and the relationship between the relevant federal and state laws, we consider whether a superior authority, which prohibits certain conduct, can prevent a subordinate authority from implementing a rule that officially permits such conduct by punishing individuals who are engaged in the conduct officially permitted by the lower authority. We conclude that it can.

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[4] This requires a slight caveat. Under the CSA, "the manufacture, distribution, or possession of marijuana [is] a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study." *Gonzales v. Raich*, 545 U.S. 1, 14 (2005); *see* 21 U.S.C. §§ 812(c), 823(f), 841(a)(1), 844(a). Thus, except as part of "a strictly controlled research project," federal law "designates marijuana as contraband for *any* purpose." *Raich*, 545 U.S. at 24, 27.

DOJ, without taking any legal action against the Medical Marijuana States, prevents them from implementing their laws that authorize the use, distribution, possession, or cultivation of medical marijuana by prosecuting individuals for use, distribution, possession, or cultivation of medical marijuana that is authorized by such laws. By officially permitting certain conduct, state law provides for non-prosecution of individuals who engage in such conduct. If the federal government prosecutes such individuals, it has prevented the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct.

We therefore conclude that, at a minimum, § 542 prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws.

3

Appellants in *McIntosh* and *Kynaston* argue for a more expansive interpretation of § 542. They contend that the rider prohibits DOJ from bringing federal marijuana charges against anyone licensed or authorized under a state medical marijuana law for activity occurring within that state, including licensees who had failed to comply fully with state law.

For instance, Appellants in *Kynaston* argue that "implementation of laws necessarily involves all aspects of putting the law into practical effect, including interpretation of the law, means of application and enforcement, and procedures and processes for determining the outcome of

individual cases." Under this view, if the federal government prosecutes individuals who are not strictly compliant with state law, it will prevent the states from implementing the *entirety* of their laws that authorize medical marijuana by preventing them from giving practical effect to the penalties and enforcement mechanisms for engaging in unauthorized conduct. Thus, argue the *Kynaston* Appellants, the Department of Justice must refrain from prosecuting "unless a person's activities are so clearly outside the scope of a state's medical marijuana laws that reasonable debate is not possible."

To determine whether such construction is correct, we must decide whether the phrase "laws that authorize" includes not only the rules authorizing certain conduct but also the rules delineating penalties and enforcement mechanisms for engaging in unauthorized conduct. In answering that question, we consider the ordinary meaning of "laws that authorize the use, distribution, possession, or cultivation of medical marijuana." "Law" has many different meanings, including the following definitions that appear most relevant to § 542:

> "The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them."
>
> "The set of rules or principles dealing with a specific area of a legal system <copyright law>."

Law, *Black's Law Dictionary* (10th ed. 2014); and:

> "1. a. The body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects. (In this sense usually *the law*.)."
>
> "One of the individual rules which constitute the 'law' (sense 1) of a state or polity. . . . The plural has often a collective sense . . . approaching sense 1."

Law, *Oxford English Dictionary*, www.oed.com. The relative pronoun "that" restricts "laws" to those laws authorizing the use, distribution, possession, or cultivation of medical marijuana. *See* Bryan A. Garner, *Garner's Dictionary of Legal Usage* 887–89 (3d ed. 2011). In sum, the ordinary meaning of § 542 prohibits the Department of Justice from preventing the implementation of the Medical Marijuana States' laws or sets of rules and only those rules that authorize medical marijuana use.

We also consider the context of § 542. The rider prohibits DOJ from preventing forty states, the District of Columbia, and two territories from implementing their medical marijuana laws. Not only are such laws varied in composition but they also are changing as new statutes are enacted, new regulations are promulgated, and new administrative and judicial decisions interpret such statutes and regulations. Thus, § 542 applies to a wide variety of laws that are in flux.

Given this context and the restriction of the relevant laws to those that authorize conduct, we conclude that § 542 prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana. DOJ does not prevent the implementation of rules authorizing conduct when it prosecutes individuals who engage in conduct unauthorized under state medical marijuana laws. Individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate § 542. Congress could easily have drafted § 542 to prohibit interference with laws that address medical marijuana or those that regulate medical marijuana, but it did not. Instead, it chose to proscribe preventing states from implementing laws that authorize the use, distribution, possession, and cultivation of medical marijuana.

B

The parties cite various pieces of legislative history to support their arguments regarding the meaning of § 542.

We cannot consider such sources. It is a fundamental principle of appropriations law that we may only consider the text of an appropriations rider, not expressions of intent in legislative history. "An agency's discretion to spend appropriated funds is cabined only by the 'text of the appropriation,' not by Congress' expectations of how the funds will be spent, as might be reflected by legislative history." *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2194–95 (2012) (quoting *Int'l Union, UAW v. Donovan*,

746 F.2d 855, 860–61 (D.C. Cir. 1984) (Scalia, J.)). In *International Union*, then-Judge Scalia explained:

> As the Supreme Court has said (in a case involving precisely the issue of Executive compliance with appropriation laws, although the principle is one of general applicability): "legislative intention, without more, is not legislation." The issue here is not how Congress expected or intended the Secretary to behave, but how it *required* him to behave, through the only means by which it can (as far as the courts are concerned, at least) require anything—the enactment of legislation. Our focus, in other words, must be upon the text of the appropriation.

746 F.2d at 860–61 (quoting *Train v. City of New York*, 420 U.S. 35, 45 (1975)); *see also Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646 (2005) ("The relevant case law makes clear that restrictive language contained in Committee Reports is not legally binding."); *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) ("'[I]ndicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on' the agency." (citation omitted)).

We recognize that some members of Congress may have desired a more expansive construction of the rider, while others may have preferred a more limited interpretation. However, we must consider only the text of the rider. If Congress intends to prohibit a wider or narrower range of DOJ actions, it certainly may express such intention, hopefully with greater clarity, in the text of any future rider.

IV

We therefore must remand to the district courts. If DOJ wishes to continue these prosecutions, Appellants are entitled to evidentiary hearings to determine whether their conduct was completely authorized by state law, by which we mean that they strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana. We leave to the district courts to determine, in the first instance and in each case, the precise remedy that would be appropriate.

We note the temporal nature of the problem with these prosecutions. The government had authority to initiate criminal proceedings, and it merely lost funds to continue them. DOJ is currently prohibited from spending funds from specific appropriations acts for prosecutions of those who complied with state law. But Congress could appropriate funds for such prosecutions tomorrow. Conversely, this temporary lack of funds could become a more permanent lack of funds if Congress continues to include the same rider in future appropriations bills. In determining the appropriate remedy for any violation of § 542, the district courts should consider the temporal nature of the lack of funds along with Appellants' rights to a speedy trial under the Sixth Amendment and the Speedy Trial Act, 18 U.S.C. § 3161.[5]

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[5] The prior observation should also serve as a warning. To be clear, § 542 does not provide immunity from prosecution for federal marijuana offenses. The CSA prohibits the manufacture, distribution, and possession of marijuana. Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) is committing a federal crime. The federal government can prosecute such offenses for up to five years after they occur. *See* 18 U.S.C. § 3282. Congress currently restricts the government

V

For the foregoing reasons, we vacate the orders of the district courts and remand with instructions to conduct an evidentiary hearing to determine whether Appellants have complied with state law.[6]

VACATED AND REMANDED WITH INSTRUCTIONS.

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from spending certain funds to prosecute certain individuals. But Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding. Moreover, a new president will be elected soon, and a new administration could shift enforcement priorities to place greater emphasis on prosecuting marijuana offenses.

Nor does any state law "legalize" possession, distribution, or manufacture of marijuana. Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. U.S. Const. art VI, cl. 2. Thus, while the CSA remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana. Such activity remains prohibited by federal law.

[6] We have jurisdiction under the All Writs Act to "issue all writs necessary or appropriate in aid of [our] jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The writ of mandamus "is a drastic and extraordinary remedy reserved for really extraordinary causes." *United States v. Guerrero*, 693 F.3d 990, 999 (9th Cir. 2012) (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004)). We **DENY** the petitions for the writ of mandamus because the petitioners have other means to obtain their desired relief and because the district courts' orders were not clearly erroneous as a matter of law. *See id.* (citing *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654–55 (9th Cir. 2010)). In addition, we **GRANT** the motion for leave to file an oversize reply brief, ECF No. 47-2; **DENY** the motion to strike, ECF No. 52; and **DENY** the motion for judicial notice, ECF No. 53.