STATE OF NEW HAMPSHIRE

SUPREME COURT

CASE NO. 2019-0685

APPEAL OF ANDREW PANAGGIO

RULE 10 APPEAL FROM THE NEW HAMPSHIRE COMPENSATION APPEALS BOARD PURSUANT TO RSA 541

CAB No. 2017-L-0248

INSURER-APPELLEE'S BRIEF

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QUESTIONS PRESENTED FOR REVIEW[1]

1. Whether the Compensation Appeals Board erred in finding that the employee's claim for reimbursement of his purchase of medical marijuana is federally preempted by the Controlled Substances Act?

2. Whether the Compensation Appeals Board decision was erroneous because the insurer did not demonstrate any active prosecutions against insurers involving similar reimbursement schemes?

PERTINENT STATUTES AND REGULATIONS[2]

18 U.S.C. § 2, Principals

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

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[1] The insurer-appellee is not satisfied with the questions presented for review as stated in the employee-appellant's brief. The questions contained in the employee-appellant's briefs delve into argument and legal conclusions rather than simply expressing the questions of law presented to this Court. The insurer-appellee therefore restates the questions "expressed in terms and circumstances of the case but without unnecessary detail." Sup. Ct. R. 16(3)(b).

[2] Some of the statutes pertinent to this appeal are very lengthy are therefore set forth in the appendix. Sup. Ct. R. 16(3)(c) ("If the provisions involved are lengthy, their citation alone will suffice at that point, and their pertinent text shall be set forth in an appendix.").

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

21 U.S.C. § 812, Schedules of Controlled Substances

See Apx. 50.

21. U.S.C. § 841, Prohibited Acts A.

See Apx. 52.

21 U.S.C. § 844, Penalties for Simple Possession

See Apx. 54.

21 U.S.C. § 846, Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

RSA 281-A:23 Medical, Hospital, and Remedial Care.

I. An employer subject to this chapter, or the employer's insurance carrier, shall furnish or cause to be furnished to an injured employee reasonable medical, surgical, and hospital services, remedial care, nursing, medicines, and mechanical and surgical aids for such period as the nature of the injury may require. The injured employee shall have the right to select his or her own physician.

[Paragraphs II-VIII omitted as irrelevant to the appeal].

STATEMENT OF THE FACTS AND THE CASE

The employee, Andrew Panaggio, injured his lower back on July 9, 1991. *PANAGGIO I C.R. 14.*[3] The insurer accepted the claim and the parties eventually reached a lump sum settlement following the employee's L4-L5 fusion surgery. *PANAGGIO I Apx. 9.* The employee has been prescribed opiates for his back pain throughout the years. *PANAGGIO I C.R. 14.* The employee has used marijuana for years, but in May of 2016 he asked his provider for a prescription under the New Hampshire state medical marijuana law. *PANAGGIO I C.R. 14-15.* The employee's provider completed the necessary paperwork and the employee was issued a medical marijuana "card" pursuant to RSA 126-X:4. *PANAGGIO I C.R. 15.* The employee purchased marijuana from an alternative treatment center and subsequently submitted the bill to the insurer for reimbursement. *PANAGGIO I C.R. 32.*

[3] As noted in Employee's Brief, the CAB's remand decision did not repeat the facts of its first decision. Thus, the facts included here are taken from the Certified Record and Appendix from the first appeal, Case No. 2017-0469. References in this brief to the certified record and appendix from the first appeal will be cited as *"PANAGGIO I C.R."* and *"PANAGGIO I Apx."* respectively.

The insurer denied the employee's request for reimbursement. *PANAGGIO I C.R. 15.* The employee thereafter filed a claim at the Department of Labor. *PANAGGIO I C.R. 31.* The employee's claim was denied at the Department of Labor, and he timely appealed to the Compensation Appeals Board ("CAB"). *PANAGGIO I C.R. 30.* The CAB, in a decision dated June 6, 2017, affirmed the Hearing Officer's decision denying the employee's claim for reimbursement of the costs for medical marijuana. *PANAGGIO I C.R. 14.* The employee thereafter appealed to the New Hampshire Supreme Court pursuant to Rule 10.

In a decision dated March 7, 2019, this Court remanded the case to the CAB for a determination of the issue of federal preemption and whether a reimbursement scheme would require the insurer to commit a federal crime. Appeal of Panaggio, 172 N.H. 13 (2019).

On remand, the CAB again denied the employee's claim. *C.R. 12.*[4] The CAB found that the requested reimbursement scheme would require the insurer to aid and abet the employee's federally illegal purchase, possession, and use of marijuana. *C.R.*

[4] Citations to the Certified Record of the current appeal will be cited to simply as "*C.R.*"

12. The CAB adopted the reasoning of the Maine Supreme Judicial Court case of Bourgoin v. Twin Falls Paper Co., Inc., 187 A.3d 10 (Me. 2018), in full, to deny the employee's claim. *C.R. 12*

The employee subsequently filed a Rule 10 Petition for Appeal to this Court.

SUMMARY OF THE ARGUMENTS

Under the Constitution's Supremacy Clause, state law cannot require an activity that federal law forbids. The federal Controlled Substances Act ("CSA") forbids the possession and use of marijuana for any purpose and renders criminally liable any person who aids and abets a violation of the CSA. New Hampshire state law requires payment of reasonable medical treatment causally related to a work injury; in this case, payment of medical marijuana. An irreconcilable conflict exists between these two laws.

Requiring an insurer to reimburse an injured employee for the purchase of medical marijuana would invoke conduct that violates federal law; the reimbursement aids and abets the employee's ongoing criminal activity. Compliance with both state and federal law in this case is impossible for the insurer. Where it is impossible to comply with both state and federal law, federal law

prevails and preempts the conflicting state law requirement.

For purposes of aiding and abetting liability, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission. Such is the case here for the insurer. If the insurer is required to reimburse the employee, it would be knowingly engaging in a federal crime. The insurer's payment to the employee would be made knowing that the funds would be used for the purchase, possession, and use of marijuana. The insurer would therefore have the requisite intent for aiding and abetting liability. Issuing the reimbursement check to the employee would constitute an affirmative act facilitating the employee's federal crime, and would further encourage him to engage in future marijuana purchases knowing that his ongoing criminal activity is bankrolled by the insurer.

ARGUMENTS

I. STANDARD OF REVIEW

The standard of review of Compensation Appeals Board decisions by the Supreme Court is well settled.

> "We will not disturb the board's decision absent an error of law, or unless, by a clear preponderance of

> the evidence, we find it to be unjust or unreasonable." Appeal of Fay, 150 N.H. 321, 324, 837 A.2d 329 (2003). The appealing party "has the burden of demonstrating that the board's decision was erroneous." Id.

Appeal of Belair, 158 N.H. 273, 276 (2009).

The issue of federal preemption is reviewed *de novo*.

> The issue before us raises a question of federal preemption; preemption is essentially a matter of statutory interpretation and construction. [EnergyNorth Natural Gas v. City of Concord, 164 N.H. 14, 16 (2012)]. Statutory interpretation is a question of law that we review *de novo*. Id. We interpret federal law in accordance with federal policy and precedent. *See* Dube v. N.H. Dep't of Health & Human Servs., 166 N.H. 358, 364 (2014). When interpreting a statute, we begin with the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. Id. When the language of the statute is clear on its face, its meaning is not subject to modification. Id. We will neither consider what Congress might have said, nor add words that it did not see fit to include. Id. at 364-65. We interpret statutes in the context of the overall statutory scheme and not in isolation. EnergyNorth, 164 N.H. at 16.

Hendrick v. New Hampshire Department of Health & Human Services, 169 N.H. 252, 259 (2016).

II. THE EMPLOYEE'S REQUESTED REIMBURSEMENT PRESENTS A CONFLICT BETWEEN FEDERAL AND STATE LAW.

The Supremacy Clause of the United States Constitution is clear -- federal law is supreme and cannot be superseded by state law.[5] The CAB correctly found that a positive conflict of laws exists in this case and that it would be impossible for the insurer to comply with both state and federal law if it participated in the reimbursement scheme requested by the employee.

1. The Purchase, Possession, And Use Of Marijuana Is Federally Illegal Under the Controlled Substances Act.

The Controlled Substances Act ("CSA") classifies marijuana as a Schedule I controlled substance and prohibits its use under any circumstance. See 21 U.S.C. § 812(c)(10); 21 U.S.C. § 841(a); 21 U.S.C. § 844(a). Congress set

[5] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

forth three criteria that Schedule I controlled substances must meet:

> (a) The drug or other substance has a high potential for abuse;
> (b) The drug or other substance has no currently accepted medical use in treatment in the United States; and
> (c)There is a lack of accepted safety for use of the drug or other substance under medical supervision.

21 U.S.C. § 812(b)(1)(A)-(C) (emphasis added).

Marijuana has been classified as a Schedule I drug since the Act's inception. Attempts over the years to reclassify marijuana under a lesser Schedule have all failed.[6] Due to its Schedule I status, the possession and use of marijuana is federally illegal regardless of state laws allowing the use of medical marijuana.

It is a federal crime under the CSA to knowingly or intentionally "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" marijuana,

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[6] See Gonzales v. Raich, 545 U.S. 1, 15 n.23 (2005) (detailing the history of attempts to reclassify marijuana); Americans for Safe Access v. DEA, 706 F.3d 438 (D.C. Cir. 2013) (upholding denial of petition to reschedule marijuana), *cert. denied*, 571 U.S. 885, 1025 (2013); Washington v. Barr, 925 F.3d 109 (2d Cir. 2019) (requiring exhaustion of administrative remedies on marijuana-related reclassification request).

21 U.S.C. § 841(a)(1). Simple possession of marijuana is also a crime under the CSA. 21 U.S.C. § 844(a). To be clear, the CSA criminalizes marijuana use and possession even for medicinal purposes, with the only exception being for federally approved research. 21 U.S.C. § 823(f). The principal is not the only culpable party. It is also illegal under federal law for any person to attempt or conspire to commit such crimes, 21 U.S.C. § 846,[7] to aid or abet the commission of such crimes, 18 U.S.C. § 2(a),[8] or to willfully cause the commission of such crimes, 18 U.S.C. § 2(b).[9] See also United States v. Dingle, 114 F.3d 307, 309–13 (D.C. Cir. 1997) (affirming defendant's conviction for aiding and abetting illegal drug possession).

[7] "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846.

[8] "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a).

[9] "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." 18 U.S.C. § 2(b).

2. The New Hampshire Workers' Compensation Act Requires Payment Of Reasonable Medical Treatment And The New Hampshire Medical Marijuana Act Allows The Use Of Marijuana For Medical Treatment.

Workers' compensation insurers in New Hampshire are required to "furnish or cause to be furnished an injured employee reasonable medical, surgical, and hospital services, remedial care, nursing, medicines, and mechanical and surgical aids for such period as the nature of the injury may require." RSA 281-A:23. The New Hampshire Medical Marijuana Act, RSA 126-X *et seq.*, allows qualifying patients with certain medical conditions or debilitating symptoms to obtain and use marijuana for medicinal use.

This Court's prior opinion in this case concluded that an injured employee's claim for reimbursement of the cost of medical marijuana is allowed under State law:

> Although the statute does not create a right to reimbursement for the cost of medical marijuana nor require any of the listed entities to participate in the therapeutic cannabis program, neither does it bar any of those entities from providing reimbursement. Importantly, the statute provides that "[a] qualifying

> patient shall not be . . . denied any right or privilege for the therapeutic use of cannabis in accordance with this chapter." RSA 126-X:2, I (2015). To read RSA 126-X:2, III as barring reimbursement of an employee with a workplace injury for his reasonable and necessary medical care is to ignore this plain statutory language. Pursuant to the Workers' Compensation Law, an employer's insurance carrier "shall furnish or cause to be furnished to an injured employee reasonable medical . . . care . . . for such period as the nature of the injury may require." RSA 281-A:23, I. Thus, the effect of denying reimbursement of Panaggio under these circumstances is to deny him his right to medical care deemed reasonable under the Workers' Compensation Law.

Panaggio, 172 N.H. at 16. This finding was specifically limited to state law and this Court did not reach the issue of federal preemption. Rather, this Court remanded to the CAB for specific findings on the federal preemption issue.

3. There Is An Irreconcilable Conflict Between The Federal Controlled Substances Act And State Workers' Compensation Act.

The CAB correctly and unanimously found that a conflict exists between state and federal law in this case. The CAB's conclusion that the reimbursement scheme claimed by the employee would

require the insurer to commit a federal crime by aiding and abetting the employee's purchase, possession, and use of a federally illegal drug is correct. *C.R. 12*. Compliance with both the state workers' compensation law and the federal CSA is impossible for the insurer.

Specifically, this situation triggers conflict preemption. Conflict preemption occurs when it is impossible to comply with both state and federal laws, or when the purposes and objectives of Federal law would be thwarted by state law. Section 903 of the CSA preserves conflict preemption.

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

21 U.S.C. § 903 (emphasis added). This section allows a state to establish its own statutory scheme to prohibit or allow marijuana-related conduct on the state level, but preserves

preemption principles when federal and state law irreconcilably conflict.

> Through this statutory provision, Congress has eliminated field preemption—but it has preserved the supremacy of the CSA where its provisions conflict with state law in a way that makes compliance with the requirements of both impossible. In this way, Congress has specified that the principles of conflict preemption are to be invoked to determine if state laws must yield to the CSA.

Bourgoin v. Twin Rivers Paper Co., LLC, 187 A.3d 10, 14-15 (Me. 2018) (internal citations omitted).

As noted by the Maine Supreme Judicial Court in Bourgoin, there are two circumstances which trigger the conflict preemption analysis. "The first is where 'compliance with both federal and state [law] is a physical impossibility,' . . . because federal and state law 'irreconcilabl[y] conflict' with one another . . . Second, conflict preemption occurs where 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Id. at 14. Thus, conflict preemption is more properly broken down into two subcategories: "impossibility" preemption and "obstacle" preemption.

Under impossibility preemption, "When federal law forbids an action that state law requires, the state law is 'without effect.'" Mut. Pharm. Co. v. Bartlett, 570 U.S. 472, 486 (2013), *citing* Maryland v. Louisiana, 451 U. S. 725, 746 (1981). If it is impossible for the actor to comply with both federal and state law, the state law is preempted. *See* Bartlett, 570 U.S. at 486. Under obstacle preemption, federal law preempts state law where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Arizona v. United States, 567 U.S. 387, 399 (2012).

Here, compliance with both New Hampshire state law and the federal CSA is impossible for the insurer. The Court in Bourgoin is enlightening on this issue of impossibility preclusion:

> Compliance with both is an impossibility. Were [the insurer] to comply with the hearing officer's order and knowingly reimburse [the employee] for the cost of the medical marijuana as permitted by the [Maine medical marijuana act], [the insurer] would necessarily engage in conduct made criminal by the CSA because [the insurer] would be aiding and abetting [the employee]—in his purchase, possession, and use of marijuana—by acting with knowledge that it was

> subsidizing Bourgoin's purchase of marijuana. . . . Conversely, if [the insurer] complied with the CSA by not reimbursing [the employee] for the costs of medical marijuana, [the insurer] would necessarily violate the [Maine medical marijuana act]-based order of the hearing officer.

Bourgoin, 187 A.3d at 19. The Maine Supreme Judicial Court's reasoning is sound--an order requiring the insurer to pay for an employee's medical marijuana would require that insurer to commit a federal crime in violation of the CSA.

The reasoning in Bourgoin was also adopted by a Massachusetts workers' compensation case currently pending on appeal to the Massachusetts Supreme Judicial Court. *See* Wright v. Pioneer Valley, 33 Mass. Workers' Comp. Rep. 11 (2019).

> The provision of money by the insurer in return for medical marijuana provided to this or any other employee is a critical component in the distribution channel of a Schedule I controlled substance . . . As such, any insurer payments would be made knowing that the insurer was participating in activity in contravention to federal laws and policies, even if under an order from an administrative judge.

Id. at 23-24.

Further, preemption has been found where analogous state laws require police officers to return seized marijuana to individuals who possessed the marijuana validly under state law. In Colorado, a state law required police officers to return medical marijuana seized unlawfully under state law, but, of course, returning the marijuana would constitute distribution of a controlled substance. People v. Crouse, 388 P.3d 39, 40-42 (Colo. 2017). "Because compliance with one law necessarily requires noncompliance with the other, there is a 'positive conflict' between [the state law] and the CSA such that the two cannot consistently stand together." Id. at 42. Two state attorneys general have reached the same conclusion in advisory opinions assessing similar state laws. *See* Op. Mich. Att'y Gen., No. 7262 (Nov. 10, 2011)[10] (Michigan law that requires police to return seized marijuana preempted by the CSA); Op. Or. Att'y Gen., No. OP-2012-1 (Jan. 19, 2012)[11] (Oregon law that requires police to return seized marijuana preempted by the CSA).

The CAB was correct in adopting the reasoning of the Bourgoin Court. A clear conflict exists

[10] *See Apx. 66.*
[11] *See Apx. 71.*

between the CSA and the New Hampshire state law, and compliance with both is impossible. Thus, the CSA preempts the New Hampshire law.

4. The New Hampshire Medical Marijuana Act Stands As An Obstacle To The Accomplishment And Execution Of The Controlled Substances Act.

Obstacle preemption also operates to preempt the New Hampshire law in the context of this case. To reiterate, preemption is also found where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Arizona, 567 U.S. at 399.

The purpose and objective of the Controlled Substances Act is, in part, included in the complete title of the Act: "An Act to amend the Public Health Service Act and other laws to provide increased research into, and prevention of, drug abuse and drug dependence; to provide for treatment and rehabilitation of drug abusers and drug dependent persons; and to strengthen existing law enforcement authority in the field of drug abuse." *See* Pub. L. No. 91-513, 84 Stat. 1236 (1970). Congressional purpose is further derived from § 801 of the Act: "The illegal importation, manufacture, distribution, and possession and

improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people. . . . Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. § 801.

The requested action under state law in this case (i.e., for the insurer to reimburse the employee for his purchase of marijuana) frustrates and undermines the Congressional purposes and objectives of the CSA. Congress is clear in the opening section of the CSA that the distribution, possession, and improper use of controlled substances has a substantial and detrimental effect on the health and welfare of the American people. 21 U.S.C. § 801. Congress considers marijuana to be a Schedule I drug; meaning that it finds marijuana to have (1) a high potential for abuse; (2) no currently accepted medical use in treatment in the United States; and (3) a lack of accepted safety for use of the drug. 21 U.S.C. § 812(b)(1)(A)-(C).

Requiring the insurer to reimburse the employee here would frustrate Congress's intent to control and regulate the traffic and use of

controlled substances. "If the purpose of the act cannot otherwise be accomplished -- if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect -- the state law must yield to the regulation of Congress within the sphere of its delegated power." Savage v. Jones, 225 U.S. 501, 533 (1912). Thus, the CSA preempts the New Hampshire law.

III. AN ORDER OF REIMBURSEMENT WOULD REQUIRE THE INSURER TO COMMIT A FEDERAL CRIME.

The employee's assertion that he is the only individual or entity open to federal prosecution is categorically incorrect. An order against the insurer would force it to be complicit in the employee's purchase, possession, and use of marijuana; to conspire to purchase, distribute, use, and possess marijuana; and to aid and abet the employee in his purchase, use, and possession of marijuana, as well as to aid and abet a marijuana dispensary in the sale and distribution of marijuana.

1. The Insurer Would Knowingly Aid The Employee's Purchase, Possession, And Use Of Marijuana.

The employee argues that the insurer would not commit a federal crime by reimbursing the

employee's marijuana purchases because the insurer does not have the requisite criminal intent to commit such a crime. This argument is erroneous. If the insurer is required to reimburse the employee, it would be knowingly engaging in a federal crime and would therefore have the requisite intent to aid and abet the employee's crime.

The employee's purchase, possession, and use of marijuana, even for state-authorized medicinal purposes, clearly violates the CSA. If the insurer is ordered to reimburse the employee for his purchase of marijuana, even under a court order, it would have the requisite intent to be charged with a federal crime.

Under federal law, a person who "aids, abets, counsels, commands, induces or procures" the commission of a federal offense "is punishable as a principal." 18 U.S.C. § 2(a). "[T]hose who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime." Rosemond v. United States, 572 U.S. 65, 71 (2014).

One of the primary means to facilitate a crime is to furnish the money to be used in committing the crime. Paying for contraband is an act which

contributes to another's possession of the contraband. *See* United States v. Lawson, 872 F.2d 179, 181 (6th Cir. 1989) (defendant provided money for purchase of illegal weapons); see also United States v. Hudson, 1997 U.S. App. LEXIS 34159, at *2 (4th Cir. 1997) (liability where defendant, among other things, gave co-defendant money for the purchase of a gun); United States v. Garcia-Benites, 702 Fed. App'x 818, 821 (11th Cir. 2017) (defendant guilty of aiding and abetting where he "provided the purchase money . . . used to buy the [drugs] and conducted surveillance during the transaction"); United States v. Ibarra-De La Cruz, 492 F. Supp. 2d 646, 647 (W.D. Tex. 2006) (defendant who provided "funding for the manufacture or delivery of marijuana" "participat[ed] in that venture" as an aider or abettor, even though he did not personally distribute the drug).

In the typical claim for medical benefits, an insurer makes payments directly to the provider for covered medical expenses. If that were the case here, the insurer would pay money directly to a marijuana dispensary for an injured employee's marijuana. Payment to the dispensary would unquestionably "contribute to [the employee's]

possession" of contraband, despite the insurer never physically possessing the marijuana. See Lawson, 872 F.2d at 181. *See also* United States v. Valencia, 907 F.2d 671, 678 (7th Cir. 1990) (actual or constructive possession of drugs not needed to be convicted of aiding and abetting). There is no difference if instead the insurer writes a reimbursement check directly to the employee, allocated for the purchase of marijuana. The insurer would still be knowingly providing money for the purchase of contraband, which the employee, in turn, will use to obtain possession. *Cf.* United States v. Pinillos-Prieto, 419 F.3d 61, 63–66 (1st Cir. 2005) (describing a third-party intermediary drug transaction that resulted in guilty verdicts for aiding and abetting).

2. The Insurer Would Intend To Facilitate The Employee's Purchase, Possession, And Use Of Marijuana.

The employee posits that an order from the CAB would eliminate the *mens rea* required for aiding and abetting liability. The fatal flaw in employee's argument is that it substitutes motivation for intention. If the insurer is required to reimburse the employee, it would be ***knowingly*** engaging in a federal crime and would therefore have the requisite intent to commit the

crime. The insurer's reluctance to provide the money and the CAB's insistence to do so through an order are immaterial. Once the insurer takes the affirmative action of providing the reimbursement check, it has knowingly engaged in a federal crime.

The intent for criminal aiding and abetting liability was discussed at length by the Supreme Court in Rosemond, supra. The Court found, "[F]or purposes of aiding and abetting law, a person who actively participates in a criminal scheme ***knowing*** its extent and character intends that scheme's commission." Id. at 77 (emphasis added). The Maine Supreme Judicial Court discussed this issue of criminal intent in Bourgoin:

> The mens rea required for aiding and abetting is an "intent [that] must go to the specific and entire crime charged," such as "when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." Put another way, "for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission," and, on that basis, is criminally liable. Therefore, were [the insurer] to comply with the administrative

> order by subsidizing [the employee's] use of medical marijuana, it would be engaging in conduct that meets all of the elements of criminal aiding and abetting as defined in section 2(a).

Bourgoin, 187 A.3d at 17 (internal citations omitted). As the Rosemond Court further reasoned,

> What matters for purposes of gauging intent, and so what jury instructions should convey, is that the defendant has chosen, with full knowledge, to participate in the illegal scheme . . . ***The law does not, nor should it, care whether he participates with a happy heart or a sense of foreboding***. Either way, he has the same culpability, because either way he has knowingly elected to aid in the commission of a peculiarly risky form of offense.

Rosemond, 572 U.S. at 79-80 (emphasis added).

The employee urges this Court to instead apply the reasoning of the dissent in Bourgoin. In his dissent, Justice Jabar reasoned that the insurer was "disinterested" and did not "wish or desire" to aid the employee's possession or use of marijuana. Bourgoin, 187 A.3d at 27 (Jabar, J., dissenting). This argument again confuses motivation for intention. Regardless of the insurer's "wish or desire" about marijuana possession and use, the insurer that reimburses an

employee for medical marijuana not only knows that the drug will be possessed and used, but also ***intends*** that its own money be used for the purchase of marijuana. When that level of knowledge and intent is established, "The law does not, nor should it, care whether [the aider and abettor] participates with a happy heart or a sense of foreboding. Either way, he has the same culpability, because either way he has knowingly elected to aid in the commission of a peculiarly risky form of offense." Rosemond, 572 U.S. at 79-80.

Applying the Rosemond analysis, any payments by the insurer here would be made knowing that the insurer was participating in activity that violates federal law. The insurer would act with knowledge that the money it is providing to the employee money is to be used solely for the employee to purchase marijuana (or, in the case of reimbursement, solely because he has purchased marijuana, thus providing encouragement for future acquisitions). This satisfies the requisite *mens rea* for aiding and abetting.

3. The Employee's Reliance Upon The "Completed Crime" Doctrine Is Misplaced.

The employee relies upon a recent New Jersey Appellate Division case, Hager v. M & K Constr., 225 A.3d 137, 148 (N.J. Super. Ct., App. Div. 2020), to argue that the insurer cannot "aid and abet" the employee's crime through a reimbursement scheme because the crime is already completed.

In Hager, the court held that federal law did not preempt a state law that required a workers' compensation insurer to reimburse an employee for the purchase of medical marijuana. The court reasoned that the insurer's reimbursement after the employee completed his purchase would not aid and abet a marijuana possession offense. According to the court, the insurer's "aid" occurred after the crime was completed and therefore could not be used to establish aiding and abetting liability. Id.

However, reliance upon the "completed crime" doctrine misses the mark. The injured employee is not seeking a one-time reimbursement, he is instead hoping to establish an ongoing reimbursement scheme for the payment of his medical marijuana. This promise of future reimbursement itself assists in the commission of

the crime; the promise encourages the future act. *Cf.* United States v. Mitchell, 944 F.3d 116, 119 (3d Cir. 2019) (affirming aiding and abetting possession of a firearm conviction where defendant told co-defendant to buy a gun and then reimbursed the co-defendant for the cost of the gun).

Workers' compensation insurers under New Hampshire state law bear a "'***continuing*** obligation to provide or to pay for medical, hospital, and remedial care for as long as is required by an injured employee's condition' where it bears liability for the initial injury that necessitated the subsequent health care." Appeal of Bergeron, 144 N.H. 681, 684 (2000) (emphasis added), quoting Appeal of Cote, 139 N.H. 575, 581 (1995). Thus, if reimbursement is granted in the first instance here, it would arguably result in a "continuing obligation" to reimburse the employee for his marijuana purchases -- exactly the result the employee is hoping for. The insurer's "continuing obligation" to pay for medical marijuana would facilitate the employee's federal crime by assuring the employee a bankroll for his recurring purchase, possession, and use of marijuana.

4. A Court Order Of Reimbursement Does Not Remove The *Mens Rea* Of Aiding And Abetting.

The employee urges this Court to find that a state agency order to reimburse would eliminate the required intent of aiding and abetting. However, even where reimbursement is provided pursuant to a state agency order, the insurer still knowingly and intentionally chooses to act in a manner that federal law forbids. The idea that a state order to violate federal law avoids preemption contradicts the primary purpose of preemption -- that federal law is supreme over conflicting state law.

Conflict preemption applies because state law requires what federal law forbids, thereby creating a "conflict of duties." *See* Bartlett, 570 U.S. at 486. The employee argues that a state law order to reimburse negates the insurer's criminal liability because the insurer lacks the requisite willfulness. This argument attempts to use the existence of the conflict to defeat the conflict.

If this Court adopts the employee's reasoning, it would in essence allow the state to circumvent federal criminal law. An example illustrates the absurdity of this reasoning:

> Suppose a state law *requires* doctors to prescribe marijuana as a painkiller to all cancer patients who request the drug. Suppose also that federal law *prohibits* prescribing marijuana to cancer patients under any circumstances. A doctor confronted with a valid request under state law will find it *physically impossible* to comply with both state and federal law, since compliance with one violates the other.

Christopher N. May et al., Constitutional Law, National Power and Federalism: Examples and Explanations 305 (8th ed. 2019). Using the state-law-requirement runaround the employee urges, the hypothetical would result in no preemption. So long as an order directing compliance with the state law required the doctor to prescribe marijuana, the doctor, same as the insurer, would lack the requisite intent. The adoption of this reasoning will create a backdoor for states to evade preemption. This absurd result should not be endorsed by this Honorable Court. Rather, where state law requires what federal law would otherwise forbid, conflict preemption applies, regardless of whether the state law is carried out through a state court order.

5. State Officials May Not Order An Insurer To Violate Federal Law.

The reimbursement scheme sought by the employee would not only entangle the insurer in a federal crime, it would also entangle the State of New Hampshire, as such action by an administrative agency of the State would constitute a state-sponsored facilitation of a federal crime. An order by the CAB would expose the CAB members rendering the order to criminal liability under 18 U.S.C. § 2(b).

The federal aiding-and-abetting statute establishes two types of liability:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2.

Section 2(b) recognizes the "general principle of causation in criminal law that an individual (with the necessary intent) may be held liable if he is a cause in fact of the criminal violation, even though the result which the law condemns is

achieved through the actions of innocent intermediaries." United States v. Kelner, 534 F.2d 1020, 1022 (2d Cir. 1976); *see also* United States v. Roach, 792 F.3d 1142, 1146 (9th Cir. 2015). It is well recognized that "the guilt or innocence of the intermediary [under a § 2(b) charge] is irrelevant." United States v. Rapoport, 545 F.2d 802, 806 (2d Cir. 1976).

The CAB members who order reimbursement would therefore be liable pursuant to § 2(b). Applying the § 2(b) analysis, it is irrelevant whether the insurer had the requisite intent to assist in the employee's federal offense. The CAB members would be willfully causing the insurer to assist the employee's crime, and that is all that § 2(b) requires. *See* United States v. Ordner, 554 F.2d 24, 29 (2d Cir. 1977) ("[Defendant] is responsible as a principal for causing the possession of unserialed firearms by Government agents, regardless of the fact that the Government agents were themselves immune from criminal responsibility."). It should be noted that CAB members are not immune from prosecution under federal criminal laws, even when acting in their official capacity. *See* Imbler v. Pachtman, 424 U.S. 409, 428–29 (1976) ("This Court has never

suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law.").

IV. THE LIKELIHOOD OF PROSECUTION IS IRRELEVANT TO THE PREEMPTION ANALYSIS.

The second issue raised by the employee is irrelevant and immaterial to the disposition of this case. The employee fails to identify any statutory or regulatory authority requiring an insurer to produce evidence of active prosecutions. Further, this argument is being pressed to obfuscate the real issue. The issue in this case is whether federal **law** forbids the action that state law requires. The question is ***not*** whether a prosecutor will exercise his/her discretion to file charges. That question has no bearing on the preemption analysis.

The employee continuously harks on the insurer's supposed failure to provide evidence of any prosecutions against other insurers for a similar aiding and abetting charge. He further posits that the Sessions' Memorandum[12] has not

[12] Former Attorney General Sessions issued a Memorandum on January 4, 2018 to federal prosecutors rescinding former guidance issued under Attorneys General Ogden and Cole. *See Apx. 62.* The prior guidance stated that

"yielded any prosecutions brought against third party insurers such as those described here." *See* Appellant's Brief at 39. First, the employee's obsession with this point ignores the fact that the insurer is under no burden to prove such prosecutions exist. The employee provides ***no*** authority for the existence of such a burden. Second, there is no available means to prove or to disprove the existence of such ongoing charges or prosecutions. The employee cannot state with certainty that such prosecutions do not exist. Until such a case is tried in a federal district court with press coverage (of course, press coverage of any case is speculative) or it reaches a federal appellate court and an opinion is issued, we will not know about any ongoing prosecutions. Further, it goes without saying that the parties in this case do not have access to active prosecutions in each federal district in this country.

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the Justice Department would not enforce federal marijuana prohibition in states that had legalized marijuana. The rescission of these prior memoranda by the Sessions Memoranda allowed federal prosecutors to prosecute federal marijuana charges at their discretion, regardless of the legality of marijuana on the state level.

The employee relies on both the Cole Memorandum and a Congressional appropriations rider[13] to support his argument regarding the threat of prosecution. Reliance on either is unwarranted.

Conflict preemption applies where "federal ***law*** forbids an action that state law requires." Bartlett, 570 U.S. at 486 (emphasis added). Prosecutors have discretion to choose which cases to bring, but they have no power to change what federal ***law*** forbids. And, of course, the CSA unquestionably prohibits possession and use of marijuana.

Prosecutorial discretion is especially irrelevant after the issuance of the Sessions Memorandum, which explicitly rescinded the prior enforcement memoranda issued under Attorneys

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[13] Congress has attached an appropriations rider to its omnibus spending bills each year since 2014. The name of the appropriations rider has varied with its sponsors each fiscal year (i.e., Rohrabacher-Farr Amendment, Hinchey–Rohrabacher Amendment, Rohrabacher-Blumenauer Amendment). The rider purports to prohibit the Justice Department from spending funds to interfere with the implementation of state medical marijuana laws. The rider is temporary in nature and must be renewed with every new spending bill. Currently, the rider will expire on September 30, 2020. *See* Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, § 531.

General Ogden and Cole.[14] Pursuant to the Sessions Memorandum, individuals who possess and use marijuana in states where doing so is legal are no longer afforded any specific protection from prosecution under federal law.

The employee's reliance on Lewis v. American General Media, 355 P.3d 850 (N.M. Ct. App. 2015), is misplaced because the Lewis decision relied entirely on the now-rescinded Cole Memorandum. The primary focus and reliance in Lewis and other similar cases[15] has been on the Cole Memorandum's directive to use a "hands-off" approach to prosecution of marijuana crimes. This rationale is completely undermined by the rescission of the Cole Memorandum and other actions of the current Presidential Administration.[16]

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[14] "[P]revious nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately." *Apx. 62*. In a footnote, the memorandum specifies that the previous guidance being rescinded include the 2009 Ogden Memorandum and the 2011, 2013, and 2014 Cole memoranda. *Apx. 62.*

[15] *See* Noll v. LePage Bakeries, Inc., Me. W.C.B. No. 16-25 (App. Div. *en banc* Aug. 23, 2016); Vialpando v. Ben's Automotive Services, 331 P.3d 975 (N.M. Ct. App. 2014).

[16] President Trump issued a signing statement to his passage of the 2020 Consolidated Appropriations Act reserving his right to ignore the appropriations rider: "Division B, section 531 of the Act provides that the Department of Justice may not use any funds

The appropriations rider similarly impacts only the ***enforcement*** of the crime. The rider does not alter the ***existence*** of the crime. As long as marijuana remains a Schedule I drug, reimbursement by the insurer will constitute a federal crime. *See* United States v. Evans, 929 F.3d 1073, 1077 (9th Cir. 2019) ("[T]he appropriations rider does not amend the CSA to impose a new element for federal marijuana crimes."); United States v. Nixon, 839 F.3d 885, 887–88 (9th Cir. 2016) (rejecting the defendant's argument that the "appropriations rider suspended the [CSA]"); United States v. McIntosh, 833 F.3d 1163, 1179 & n.5 (9th Cir. 2016) (appropriations rider "does not provide immunity from prosecution for federal marijuana offenses").

As courts in other jurisdictions have made clear, the appropriations rider is temporary in nature and does not insulate an individual or entity from federal prosecution at a later date.

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made available under this Act to prevent implementation of medical marijuana laws by various States and territories. My Administration will treat this provision consistent with the President's constitutional responsibility to faithfully execute the laws of the United States." *See* Statement by President Donald J. Trump on Signing H.R. 1158 into Law (December 20, 2019). *Apx. 63.*

> To be clear, [the appropriations rider] 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 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.

McIntosh, 833 F.3d at 1179 (emphasis added). Of course, the McIntosh court's concern with the temporary nature of the appropriations rider is warranted by the upcoming expiration of the rider on September 30, 2020. Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, § 531.

Thus, the appropriations rider cannot be read to immunize the insurer in this case from violating federal law. Marijuana's clear classification as a Schedule I drug renders it indisputably illegal under federal law. The speculative nature of a ***prosecution*** does not make the ***conflict*** itself speculative. Where state law requires action that federal law forbids, it is impossible to comply with both and the state law is preempted. *See* Bartlett, 570 U.S. at 486; Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) ("[S]tate law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law . . ."). The focus of the analysis is on the current conflict, not the future prosecution.

The CAB found that reimbursement would result in the insurer aiding and abetting the employee's federal crime. The analysis properly ended there. "'Most importantly, however, the magnitude of the *risk* of criminal prosecution is immaterial in this case. Prosecuted or not, the fact remains that [the carrier] would be forced to commit a federal crime' if ordered to pay for the claimant's

medical marijuana." *C.R. 11*, *quoting* Bourgoin, 187 A.3d at 28.

The statistical likelihood of prosecution at this current moment in time is irrelevant. The fact is that such federal prosecution can be brought within the five-year statute of limitations. 18 U.S.C. § 3282. The CAB correctly addressed this argument of the employee by stating, "Risk is not the issue, forcing the carrier to commit a federal crime is. The ephemeral nature of the rider and the Ogden memo is underscored by the provision of the CSA that allows for prosecution of crimes up to five years old." *C.R. 11-12.*

CONCLUSION

"[A] person's right to use medical marijuana cannot be converted into a sword that would require another party, such as [the insurer], to engage in conduct that would violate the CSA." Bourgoin, 187 A.3d at 20. The applicable federal law in this case is unquestionably clear; marijuana is an illegal Schedule I drug. It remains illegal at the federal level, and federal law is supreme.

The relief requested by the employee -- an order under state law for the insurer to reimburse

the employee for his purchase of marijuana -- would require the insurer to aid and abet the employee's purchase, possession, and use of marijuana. Where state law requires that which federal law forbids, the state law is preempted. The CAB's ultimate finding of preemption is not erroneous or unreasonable. Rather, its decision is in line with clear federal statutory preemption principles.

Further, the employee's argument that any violation of federal law is unrealistic due to the Cole Memorandum and the Rohrabacher-Farr Amendment is erroneous and immaterial to the current claim. "'[T]he political winds of prosecutory discretion do not erase duly enacted laws, only legislative action can accomplish what the Employee desires.'" Wright, 33 Mass. Workers' Comp. Rep. at 22.

The CAB's analysis of the federal preemption issue in this case was correct. The insurer-appellee therefore respectfully requests that this Honorable Court affirm the CAB's decision denying the employee's claim.

Respectfully submitted,
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By its attorney,

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Dated: August 5, 2020

STATEMENT REGARDING ORAL ARGUMENT

By order dated February 3, 2020, this appeal was assigned for argument before the full court. The Insurer's oral argument will be presented by Attorney Robert Martin.

APPEALED DECISION APPENDED

The Insurer certifies that the appealed decision from the Compensation Appeals Board is in writing and is appended to this Brief.

CERTIFICATION OF WORD LIMIT

The insurer certifies that the total words in this brief do not exceed the maximum of 9,500 words allowed under Sup. Ct. R. 16(11).

CERTIFICATE OF SERVICE

I, Robert S. Martin, Esq., hereby certify that on August 5, 2020, I served, by first class mail and electronic mail, a true and exact copy of the foregoing paper to the following:

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APPENDIX

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21 U.S.C. § 812, Schedules of Controlled Substances

(a) Establishment. There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section.

(b) Placement on schedules; findings required. Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made

with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

. . . . *[Schedules II through V omitted as irrelevant to this appeal]*

(c) Initial schedules of controlled substances. Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

Schedule I

. . . .

[Paragraphs (a) and (b) omitted as irrelevant to this appeal].

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of

isomers is possible within the specific chemical designation:

. . . .

[Drugs listed as items (1) through (9) omitted as irrelevant to this appeal].

(10)Marihuana.

. . . .

[Remainder of § 812, including identification of drugs classified in Schedules II through V, omitted as irrelevant to this appeal]

21. U.S.C. § 841, Prohibited Acts A.

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

. . . .

[Paragraphs (A) through (C) omitted as irrelevant to this appeal]

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was

such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

. . . .

[Remainder of § 841 omitted as irrelevant to this appeal]

21 U.S.C. § 844, Penalties for Simple Possession

(a) Unlawful acts; penalties. It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 303 of this title [21 USCS § 823] or section 1008 of title III [21 USCS § 958] if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this

subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this title or title III, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this title or title III, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, United States Code, except that this sentence shall not apply and a fine under this section need not be imposed if the court

determines under the provision of title 18 that the defendant lacks the ability to pay.

(b) [Repealed]

(c) “Drug, narcotic, or chemical offense” defined. As used in this section, the term “ drug, narcotic, or chemical offense” means any offense which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this title.

State of New Hampshire

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August 30, 2019

Jared O'Connor, Esq,
Shaheen & Gordon PA
80 Merrimack St
Manchester NH 03101

Re: Andrew Panaggio V W. R Grace & Co.
Docket # 2017-L-0248

Dear Attorney O'Connor:

Enclosed is a copy of the decision rendered by the Compensation Appeals Board in the above-captioned matter.

Any party to the proceeding aggrieved by an order or decision of the Panel may appeal same to the Supreme Court pursuant to RSA 541:6 Appeal. - ***Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal the petition to the Supreme Court.***

Should either party wish to utilize an audio recording of the hearing, it will be held for six months from the date of the decision. After that time, it will be destroyed in accordance with our retention policy. The digital recording is available through the Department of Labor for a fee of $20.00.

Respectfully submitted,

Richard Mitchell, Esq., Panel Chair
Compensation Appeals Board

Cc: James O'Sullivan, Esq.

State of New Hampshire

COMPENSATION APPEALS BOARD

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August 30, 2019

DECISION OF THE WORKERS' COMPENSATION APPEAL BOARD

ANDREW PANAGGIO

V.

W.R. GRACE & COMPANY

DOCKET # 2017-L-0248

APPEARANCES: Jared O'Connor, Esquire, appeared for Andrew Panaggio
James O'Sullivan, Esquire, appeared for CNA Insurance Company

WITNESS: None

ISSUE: RSA 281-A: 23: Medical, Hospital and Remedial Care

DATE OF INJURY: July 9, 1991

HEARING: A hearing on remand from the New Hampshire Supreme Court decision dated March 7, 2019, was held at the New Hampshire Department of Labor, Concord, New Hampshire on July 27, 2019.

PANEL: The panel was composed of Daniel Manning, Susan Jeffrey and Richard Mitchell, Esquire, chairperson.

BACKGROUND AND FINDINGS

The background of this case is simple. The Compensation Appeals Board ruled that Mr. Panaggio's use of medical marijuana was reasonable and medically necessary. However, the majority ruled that the carrier could not be compelled to pay for the medical marijuana as the payment would violate both state and federal law.

In its partial decision, the Supreme Court ruled that payment for the prescription would not violate New Hampshire law. However, the CAB majority decision had ruled that by paying for drug, the carrier would be committing a crime without specifying the

crime it would commit. The Supreme Court remanded the case to the board for a determination on the issue of whether the carrier would be committing a federal crime by reimbursing the claimant for the drug or paying for it directly.

Coincidentally, on the day this case was argued to our Supreme Court, the Maine Supreme Court decided Bourgoin v Twin Rivers Paper Company, LLC, et al, 187 A.3rd 10 (2018) which is directly on point with this one. The Maine Supreme Court analyzed the federal law and found that payment by the worker's compensation carrier for medical marijuana, duly prescribed in accordance with Maine's medical marijuana law, would constitute a federal crime. The claimant here argues that the dissent in that case had the greater wisdom.

The primary issue is the conflict between the Federal Controlled Substances Act, 21 U.S.C.S. Sec. 801-904) and the state medical marijuana laws. The Maine Supreme Court first analyzed the Supremacy Clause of the United States Constitution which "unambiguously provides that if there is a conflict between federal and state law, federal law shall prevail". Citations omitted. It went on to hold that Congress framed the CSA to expressly preserve its supremacy. 21 USCS 903.

Under the CSA, marijuana is classified as a Schedule I drug barring its use even in states with local laws allowing its medical use and application. 21 USCS 812(b)(1)(A)-(C). The Bourgoin Court then found that the CSA not only provides that possession, manufacture, and distribution illegal, but that federal prosecution can be directed at any "principle". The principle includes any individual who "commits an offense against the United States or *aids, abets,* counsels, induces or procures its commission". 18 USCS 2(a) (emphasis in citation). That has been interpreted by federal courts: "a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission." Rosemond v United States, __US___, 134 S.Ct. 1240, 1245 (2014).

From there, the Court addressed the *mens rea*, a sticking point for the dissenters. It found that "for purposes of aiding and abetting law, a person who actively participates in a criminal scheme's commission...is criminally liable".

Finishing its analysis on the Supremacy of CSA, the Bourgoin court concluded: "Therefore, were [the carrier] to comply with the administrative order by subsidizing

Bourgoin's use of medical marijuana, it would be engaging in conduct that meets all of the elements of criminal aiding and abetting as defined in section 2(a)."

It summarized that compliance with both the CSA and the state's medical marijuana law is an impossibility. If Twin Rivers were to comply with the hearing officer's order that it pay for the prescription marijuana, the order would cause Twin Rivers to be criminally aiding and abetting Bourgoin's purchase, possession and use of marijuana – by acting with the knowledge that it was subsidizing the worker's purchase of it. Such an act is punishable by up to a $1000 fine and up to a year in prison, but repeated acts may result in up to 20 years in prison.

In related cases, courts in Oregon and New Mexico have found that the CSA preempts those states' medical marijuana laws and the states' law application to workplace accommodation, drug tests and discrimination (after a failed test). Supra, 22-23. These cases demonstrated that a person's right to use medical marijuana "cannot be converted into a sword that would require another party, such as [a worker's compensation carrier], to engage in conduct that would violate the CSA." Bourgoin, 24.

The claimants here, and in Bourgoin, raised the so-called Ogden Memo (and its progeny). That was a Department of Justice memo that instructed its prosecutors to forgo prosecuting marijuana users. The Bourgoin Court noted (as did the CAB, it should be noted) that "Such a policy is transitory, as is irrefutably demonstrated by its recent revocation by the current administration". Supra at 26. But the Court concluded that even if the Ogden memo were "still alive today", it could not weaken the conclusion that there is positive conflict between the CSA and [medical marijuana law] as applied here." 27.

It continued: "Most importantly, however, the magnitude of the *risk* of criminal prosecution is immaterial in this case. Prosecuted or not, the fact remains that [the carrier] would be forced to commit a federal crime" if ordered to pay for the claimant's medical marijuana. 28.

This leads us to another argument made by the claimant. He notes that since 2014, Congress has added a rider that provides for no funding for the prosecution of participants in medical marijuana. That rider has changed only in adding states as they pass such legalization. One must reflect to the words of the Bourgoin court. Risk is not

the issue, forcing the carrier to commit a federal crime is. The ephemeral nature of the rider and the Ogden memo is underscored by the provision of the CSA that allows for prosecution of crimes up to five years old.

DECISION

The panel unanimously finds that were the carrier to pay for Mr. Panaggio's prescription medical marijuana it would commit a federal crime (violation of CSA) by aiding and abetting Mr. Panaggio's illicit purchase and possession. As such, it can not be ordered to pay for Mr. Panaggio's medical marijuana. The panel adopts the reasoning in Bourgoin v. Twin Rivers Paper Company, LLC in full.

Richard Mitchell, Esq., Panel Chair
Compensation Appeal Board

RM/tb

Office of the Attorney General
Washington, D. C. 20530

January 4, 2018

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: Jefferson B. Sessions, III
Attorney General

SUBJECT: Marijuana Enforcement

In the Controlled Substances Act, Congress has generally prohibited the cultivation, distribution, and possession of marijuana. 21 U.S.C. § 801 *et seq*. It has established significant penalties for these crimes. 21 U.S.C. § 841 *et seq*. These activities also may serve as the basis for the prosecution of other crimes, such as those prohibited by the money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act. 18 U.S.C. §§ 1956-57, 1960; 31 U.S.C. § 5318. These statutes reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime.

In deciding which marijuana activities to prosecute under these laws with the Department's finite resources, prosecutors should follow the well-established principles that govern all federal prosecutions. Attorney General Benjamin Civiletti originally set forth these principles in 1980, and they have been refined over time, as reflected in chapter 9-27.000 of the U.S. Attorneys' Manual. These principles require federal prosecutors deciding which cases to prosecute to weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.

Given the Department's well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately.[1] This memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion in accordance with all applicable laws, regulations, and appropriations. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

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[1] Previous guidance includes: David W. Ogden, Deputy Att'y Gen., Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009); James M. Cole, Deputy Att'y Gen., Memorandum for United States Attorneys: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011); James M. Cole, Deputy Att'y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013); James M. Cole, Deputy Att'y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014); and Monty Wilkinson, Director of the Executive Office for U.S. Att'ys, Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014).

Statement on Signing the Consolidated Appropriations Act, 2020
December 20, 2019

Today, I have signed into law H.R. 1158, the "Consolidated Appropriations Act, 2020" (the "Act"), which authorizes appropriations to fund the operation of certain agencies in the Federal Government through September 30, 2020.

Certain provisions of the Act (such as Division A, section 8070) purport to restrict the President's constitutional authority as Commander in Chief to control the personnel and materiel that the President believes to be necessary or advisable for the successful conduct of military missions. Others provisions (such as Division A, sections 8075, 8078, 8110, 9013, and 9016) purport to require advance notice to the Congress before the President may direct certain military actions or provide certain forms of military assistance.

In addition, Division C, section 534 and Division D, section 516 of the Act restricts transfers of detainees held at United States Naval Station Guantanamo Bay. I fully intend to keep that detention facility open and to use it, as necessary or appropriate, for detention operations. Consistent with the statements I have issued in signing other bills, my Administration will treat these, and similar provisions, in a manner consistent with the President's constitutional authority as Commander in Chief. I also reiterate the longstanding understanding of the executive branch that requirements of advance notice regarding military or diplomatic actions encompass only actions for which providing advance notice is feasible and consistent with the President's constitutional authority and duty as Commander in Chief to ensure national security.

Certain provisions of the Act (such as Division B, sections 509, 516, and 526; Division D, section 523) could, in certain circumstances, interfere with the exercise of the President's constitutional authority to conduct diplomacy. My Administration will treat each of these provisions consistent with the President's constitutional authorities with respect to foreign relations, including the President's role as the sole representative of the Nation in foreign affairs.

Division B, section 531 of the Act provides that the Department of Justice may not use any funds made available under this Act to prevent implementation of medical marijuana laws by various States and territories. My Administration will treat this provision consistent with the President's constitutional responsibility to faithfully execute the laws of the United States.

Certain provisions of the Act within Division D, title II, under the heading "Office of Management and Budget—Salaries and Expenses," impose restrictions on supervision by the Office of Management and Budget (OMB) of work performed by executive departments and agencies, including provisos that no funds made available to OMB "may be expended for the altering of the annual work plan developed by the Corps of Engineers for submission to the Committees on Appropriations"; that "none of the funds provided in this or prior Acts shall be used, directly or indirectly, by the Office of Management and Budget, for evaluating or determining if water resource project or study reports submitted by the Chief of Engineers acting through the Secretary of the Army are in compliance with all applicable laws, regulations, and requirements relevant to the Civil Works water resource planning process"; and that "none of the funds appropriated in this Act for the Office of Management and Budget may be used for the purpose of reviewing any agricultural marketing orders or any activities or regulations under the provisions of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq*.)." The President has well-established authority to supervise and oversee the executive branch and to rely on subordinates, including aides within the Executive Office of the President, to assist in the exercise of that authority. Legislation that significantly impedes the President's ability to

supervise the executive branch or obtain the assistance of aides in this function violates the separation of powers by undermining the President's ability to fulfill his constitutional responsibilities, including the responsibility to faithfully execute the laws of the United States. My Administration will, therefore, treat these restrictions consistent with these Presidential duties.

Certain provisions of the Act (such as Division C, sections 713 and 743) purport to prohibit the use of appropriations to supervise communications by employees of the executive branch to the Congress and to Inspectors General. Other provisions (such as Division C, section 616) purport to prohibit the use of funds to deny an Inspector General access to agency records or documents. My Administration will treat these provisions in a manner consistent with the President's constitutional authority to control the disclosure of information that could impair foreign relations, national security, law enforcement, the deliberative processes of the executive branch, or the performance of the President's constitutional duties, and to supervise communications by Federal officers and employees related to their official duties, including in cases where such communications would be unlawful or could reveal confidential information protected by executive privilege.

In addition, certain provisions of the Act (such as Division B, section 112) purport to mandate or regulate the dissemination of information that may be protected by executive privilege. My Administration will treat these provisions consistent with the President's constitutional authority to control information, the disclosure of which could impair national security, foreign relations, the deliberative processes of the executive branch, or the performance of the President's constitutional duties.

Certain provisions of the Act (such as Division D, section 536) purport to require recommendations regarding legislation to the Congress. Because the Constitution gives the President the authority to recommend only "such Measures as he shall judge necessary and expedient," my Administration will continue the practice of treating provisions like these as advisory and non-binding.

Certain provisions of the Act (such as Division C, sections 101, 112, 113, 116, 117, 201, 541, 608, 609, 717, 730, 803(a), and 815) purport to condition the authority of officers to spend or reallocate funds on the approval of one or more congressional committees. These are impermissible forms of congressional aggrandizement in the execution of the laws other than by the enactment of statutes. My Administration will make appropriate efforts to notify the relevant committees before taking the specified actions and will accord the recommendations of such committees all appropriate and serious consideration, but it will not treat spending decisions as dependent on the approval or prior consultation with congressional committees.

DONALD J. TRUMP

The White House,
December 20, 2019.

NOTE: H.R. 1158, approved December 20, was assigned Public Law No. 116–93. An original was not available for verification of the content of this statement.

Categories: Statements by the President : Signing the Consolidated Appropriations Act, 2020.

Subjects: Armed Forces, U.S. : Servicemembers :: Deployment; Drug abuse and trafficking : Illegal drugs, interdiction efforts; Foreign policy, U.S. : Diplomatic efforts, expansion; Government organization and employees : Federal regulations, review; Legislation, enacted : Consolidated Appropriations Act, 2020; Presidency, U.S : Constitutional role and powers; Terrorism : Transfer of detainees at Guantanamo Bay.

DCPD Number: DCPD201900881.

STATE OF MICHIGAN

BILL SCHUETTE, ATTORNEY GENERAL

MICHIGAN MEDICAL MARIHUANA ACT:	Return of marihuana to patient or caregiver upon release from custody
PREEMPTION:	

Section 4(h) of the Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26424(h), which prohibits the forfeiture of marihuana possessed for medical use, directly conflicts with and is thus preempted by, the federal Controlled Substances Act, 21 USC 801 *et seq*., to the extent section 4(h) requires a law enforcement officer to return marihuana to a registered patient or primary caregiver upon release from custody.

Opinion No. 7262

November 10, 2011

Honorable Kevin Cotter
State Representative
The Capitol
Lansing, Michigan

You have asked whether a law enforcement officer[1] who arrests a patient or primary caregiver registered under the Michigan Medical Marihuana Act (MMMA or Act), Initiated Law 1 of 2008, MCL 333.26241 *et seq.,* must return marihuana[2] found in the possession of the patient or primary caregiver upon his or her release from custody.

Under the MMMA, the medical use of marihuana is permitted by "state law to the extent that it is carried out in accordance with the provisions of [the] act." MCL 333.26427(a), 333.26424(d)(1) and (2). Pursuant to section 7(e), "[a]ll other acts and parts of acts inconsistent with [the MMMA] do not apply to the medical use of marihuana as provided for by this act." MCL 333.26427(e). The Act "constitutes a determination by the people of this state that there should exist a very limited, highly restricted exception to the statutory proscription against the manufacture and use of marihuana in Michigan." *People v King*, ___ Mich App ___; ___ NW2d ___ (Docket No. 294682, issued February 3, 2011), lv gtd 489 Mich 957 (2011). "All the MMMA does is give some people limited protection from prosecution by the state, or from other adverse state action in carefully limited medical marijuana situations." *Casias v Wal–Mart Stores, Inc*, 764 F Supp 2d 914, 922 (WD Mich, 2011). Thus, by enacting the MMMA, the people did not repeal any statutory prohibitions regarding marihuana. The possession, sale, delivery, or manufacture of marihuana remain crimes in Michigan. *Id*., citing *People v Redden*, 290 Mich App 65, 92; 799 NW2d 184 (2010) (O'Connell, J., concurring.).[3] The same is true under federal law. The Controlled Substances Act (CSA), 21 USC 801 *et seq.*, makes all marihuana-related activity illegal, including the possession, manufacture, and distribution of marihuana. See 21 USC 812(c), 823(f), and 844(a).[4]

The MMMA protects from state prosecution or other penalty registered qualifying patients, MCL 333.26424(a), and registered primary caregivers, MCL 333.26424(b), who engage in the "medical use" of marihuana in accordance with all conditions of the Act. MCL 333.26427(a), 333.26424(d)(1) and (2). The term "medical use" is broadly defined and includes the "acquisition, possession, cultivation, manufacture,

use, internal possession, delivery, transfer, or transportation of marihuana." MCL 333.26423(e). In order to qualify for full protection under the Act, patients and caregivers must apply for and receive a registry identification card from the Michigan Department of Licensing and Regulatory Affairs. MCL 333.26424(a) and (b).[5]

A qualifying patient with a valid registry identification card may possess up to 2.5 ounces of usable marihuana, and cultivate up to 12 marihuana plants, unless the patient has designated a primary caregiver and specified that the caregiver will cultivate marihuana for the patient. MCL 333.26424(a). A primary caregiver who has a valid registration card may possess up to 2.5 ounces of usable marihuana per patient, and may also cultivate 12 marihuana plants per patient if the patients have so specified. MCL 333.26424(b), 333.26426(d).[6] Thus, registered patients and primary caregivers are not subject to arrest, prosecution, or other penalty as long as they are in possession of the statutorily permitted amounts of marihuana, and are in compliance with the remaining provisions of the Act.

Relevant to your question, the MMMA specifically prohibits the forfeiture of marihuana possessed in connection with the medical use of marihuana. Section 4(h) of the Act provides:

> Any marihuana, marihuana paraphernalia, or licit property that is possessed, owned, or used in connection with the medical use of marihuana, as allowed under this act, or acts incidental to such use, *shall not be* seized or *forfeited*. [MCL 333.26424(h); emphasis added.]

The term "forfeited" is not defined in the Act. An undefined statutory term must be accorded its plain and ordinary meaning. MCL 8.3a; *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). Resort to lay or legal dictionaries is appropriate in interpreting statutes. *Oakland County Bd of County Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998). The word "forfeit" has a well-understood meaning in the law. It means "[t]o lose, or lose the right to, by some error, fault, offense, or crime." Black's Law Dictionary (6th ed), p 650. Thus, as used in section 4(h), "forfeited" means the permanent loss of marihuana or related property as a consequence of having done something improper.

According section 4(h) its plain meaning, and reading it in conjunction with section 7(e), MCL 333.26427(e), which renders conflicting state statutes subject to the MMMA, section 4(h) prohibits the forced or involuntary surrender of marihuana if the person in possession is a registered patient or caregiver in complete compliance with all other provisions of the MMMA. Therefore, if a registered patient or caregiver's marihuana is confiscated by law enforcement during the course of an arrest, if the person's registration card is valid and the possession complies with the MMMA, the officer must return the marihuana to the patient or caregiver upon release from custody.

But this does not conclude the analysis because, as stated above, federal law prohibits the manufacture, distribution, or possession of marihuana. The CSA provides that "[e]xcept as authorized by this title, it shall be unlawful for any person knowingly or intentionally -- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ." 21 USC 841(a)(1). The CSA categorizes marihuana as a Schedule I controlled substance. 21 USC 812(c) (Schedule I) (c)(10). And its use remains a federal crime. See 21 USC 812(c)(10).[7] Simple possession of marihuana is also a crime, 21 USC 844(a), and possession for "personal use" renders the offender "liable to the United States for a civil penalty in an amount not to exceed $10,000." 21 USC 844a(a).[8]

"As a state law authorizing the use of medical marihuana, the MMMA cannot negate, nullify or supersede the federal Controlled Substances Act, which criminalized the possession and distribution of marihuana throughout the entire country long before Michigan passed its law." *United States v Michigan Dep't of Community Health,* ___ F Supp 2d ___ (WD Mich, amended opinion, June 9, 2011), (2011 US Dist LEXIS 59445; 2011 WL 2412602). "Thus, the MMMA has no effect on federal law, and the possession of marijuana remains illegal under federal law, even if it is possessed for medicinal purposes in accordance with state law." *United States v Hicks*, 722 F Supp 2d 829, 833 (ED Mich, 2010).

The question thus centers on the relationship between section 4(h) of the MMMA, which prohibits the forfeiture of marihuana, and the provisions of the CSA.

"The doctrine of federal preemption has its origin in the Supremacy Clause of article VI, cl 2, of the United States Constitution, which declares that the laws of the United States 'shall be the supreme Law of the Land . . . .'" *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), abrogated in part on other grounds by *Sprietsma v Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002). Whether a federal statute preempts state law is a question of federal law. *Allis–Chalmers Corp v Lueck*, 471 US 202, 214; 105 S Ct 1904; 85 L Ed 2d 206 (1985). There is a strong presumption against preemption of state law, and preemption may be found only where it is the clear and unequivocal intent of Congress. *Cipollone v Liggett Group, Inc,* 505 US 504, 516; 112 S Ct 2608; 120 L Ed 2d 407 (1992). This is especially true in the area of health and safety, which has historically been left to state regulation. *Ryan*, 454 Mich at 27, citing *Hillsborough County v Automated Medical Labs, Inc,* 471 US 707, 715; 105 S Ct 2371; 85 L Ed 2d 714 (1985). Nevertheless, "[w]here state and federal law 'directly conflict,' state law must give way." *PLIVA, Inc v Mensing*, ___US ___; 131 S Ct 2567, 2577; 180 L Ed 2d 580 (2011) (citation omitted); *Gonzales*, 545 US at 29.[9]

In any preemption case, the ultimate test is the intent of Congress in passing the federal law. *Wyeth v Levine*, 555 US 555, 565; 129 S Ct 1187; 173 L Ed 2d 51 (2009); *Medtronic, Inc v Lohr*, 518 US 470, 494; 116 S Ct 2240; 135 L Ed 2d 700 (1996). Congress's intent may be express or implied; either through express language in the federal statute or through the federal statute's structure and purpose. *Altria Group v Good*, 555 US 70, 76; 129 S Ct 538; 172 L Ed 2d 398 (2008).

Under conflict preemption principles,[10] where state and federal law "directly conflict," state law must give way. *Wyeth*, 555 US at 583 (Thomas, J., concurring in judgment); see also *Crosby v Nat'l Foreign Trade Council*, 530 US 363, 372; 120 S Ct 2288; 147 L Ed 2d 352 (2000) ("state law is naturally preempted to the extent of any conflict with a federal statute"). State and federal law conflict where it is "impossible" to "comply with both state and federal requirements." *PLIVA, Inc,* 131 S Ct at 2577, quoting *Freightliner Corp v Myrick*, 514 US 280, 287; 115 S Ct 1483; 131 L Ed 2d 385 (1995) (internal quotation marks omitted).

Section 4(h) of the MMMA, forbidding forfeiture of marihuana, directly conflicts with the CSA's prohibition against possession or distribution of marihuana because it is impossible for a law enforcement officer to comply with both federal and state law.

As discussed above, under section 4(h) a law enforcement officer must return marihuana to a registered patient or caregiver if the individual's possession complies with the MMMA. But the CSA prohibits the possession or distribution of marihuana under any circumstance. If a law enforcement officer returns marihuana to a patient or caregiver as required by section 4(h), the officer is distributing or aiding and abetting the distribution or possession of marihuana by the patient or caregiver in violation of the CSA. Thus, a Michigan law enforcement officer cannot simultaneously comply with the federal prohibition against distribution or aiding and abetting the distribution or possession of marihuana and the state prohibition against forfeiture of marihuana.[11] In other words, it is "impossible" for state law enforcement officers to comply with their state-law duty not to forfeit medical marihuana, and their federal-law duty not to distribute or aid in the distribution of marihuana. See *PLIVA,* 131 S Ct at 2577-2578 (holding state statutes preempted where it was impossible for drug manufacturers to comply with state law and applicable federal law).[12] Under these circumstances, the unavoidable conclusion is that section 4(h) of the MMMA is preempted by the CSA to the extent it requires law enforcement officers to return marihuana to registered patients or caregivers.[13] As a result, law enforcement officers are not required to return marihuana to a patient or caregiver.

By returning marihuana to a registered patient or caregiver, a law enforcement officer is exposing himself or herself to potential criminal and civil penalties under the CSA for the distribution of marihuana or for aiding or abetting[14] the possession or distribution of marihuana. Section 841(a) of the CSA applies to "any person," which, courts have presumed, covers government employees as well as private citizens.[15] While section 885(d) of the CSA, 21 USC 885(d), confers immunity on state law enforcement officers who violate its provisions while "lawfully engaged in the enforcement of any law . . . relating to controlled substances," returning marihuana to a registered patient or caregiver under the MMMA could not be considered lawful "enforcement" of a law related to controlled substances. "Enforcement" in this context means the prosecution of unlawful possession or distribution of controlled substances. See *United States v Rosenthal*, 266 F Supp 2d 1068, 1078-1079 (ND Cal, 2003), aff'd in part, reversed in part 445 F3d 1239, opinion amended and superseded on denial of rehearing 454 F3d 943 (2006). Otherwise, a state could contradict the fundamental purpose of the CSA and immunize any state officials who participate in the competing state regime. *Id.*[16] Moreover, the state officers' conduct would remain "unlawful" in any event because immunity does not decriminalize the underlying conduct, it only provides protection from prosecution or other penalty.

The people of this State, even in the exercise of their constitutional right to initiate legislation, cannot require law enforcement officers to violate federal law by mandating the return of marihuana to registered patients or caregivers. This conclusion is consistent with the federal district court's opinion in *United States v Michigan Dep't of Community Health,* ___ F Supp 2d ___, *supra*, which held that the MMMA's confidentiality provision, MCL 333.26426(h), was preempted by 21 USC 876 to the extent it precluded compliance with a federal subpoena sought in conjunction with an investigation under the CSA. It also accords with the Oregon Supreme Court's decision in *Emerald Steel Fabricators, Inc v Bureau of Labor and Industries*, 348 Or 159; 230 P3d 518, 529 (2010), which held that Oregon's medical marihuana law authorizing the use of marihuana and exempting its use from prosecution, was preempted by the CSA to the extent it "affirmatively authorizes the use of medical marijuana, . . . leaving it without effect."

It is my opinion, therefore, that section 4(h) of the Michigan Medical Marihuana Act, MCL 333.26424(h), which prohibits the forfeiture of marihuana possessed for medical use, directly conflicts with and is thus preempted by, the federal Controlled Substances Act, 21 USC 801 *et seq*., to the extent section 4(h) requires a law enforcement officer to return marihuana to a registered patient or primary caregiver upon release from custody.

BILL SCHUETTE
Attorney General

Atts.1
Atts.2

[1] Although this opinion uses the term "officer," the discussion applies to any employee or agent of a state or local law enforcement agency responsible for returning confiscated or seized items.

[2] "Marijuana" and "marihuana" are both acceptable spellings for the name of this drug. The spelling "marihuana" is used in the MMMA and the Public Health Code, MCL 333.1101 *et seq*., but "marijuana" is the more commonly used spelling. The statutory spelling is used here except in quotes that use the more common spelling.

[3] Marihuana remains a Schedule 1 controlled substance under the Michigan Public Health Code, MCL 333.7212(1)(c), meaning that "the substance has a high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision," MCL 333.7211. Similarly, the manufacture, delivery, or possession with intent to deliver marihuana remains a felony, MCL 333.7401(1) and (2)(d), and possession of marihuana remains a misdemeanor offense, MCL 333.7403(2)(d).

[4] The MMMA acknowledges that it does not supersede or alter federal law. MCL 333.26422(c) provides, "[a]lthough federal law currently prohibits any use of marihuana except under very limited circumstances, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law."

[5] The MMMA expressly refers to the Department of Community Health. However, the authority, powers, duties, functions, and responsibilities under the Act were transferred from the Department of Community Health to the Department of Licensing and Regulatory Affairs under Executive Order 2011-4.

[6] A qualifying patient may designate one primary caregiver "to assist with [the] patient's medical use of marihuana." MCL 333.26423(g), 333.26424(b). A primary caregiver may only assist up to five registered patients, to whom he or she is connected through the registration process. MCL 333.26424(b) and 333.26426(d).

[7] "For marijuana (and other drugs that have been classified as 'schedule I' controlled substances), there is but one express exception, and it is available only for Government-approved research projects, § 823(f)." *United States v Oakland Cannabis Buyers' Coop*, 532 US 483, 490; 121 S Ct 1711; 149 L Ed 2d 722 (2001).

[8] A registered patient or caregiver has no right to the return of marihuana under federal law. First, 21 USC 881(a)(1) provides that "[a]ll controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title" "shall be subject to forfeiture to the United States and no property right shall exist in them." Second, the Supreme Court has held that no person can have a legally protected interest in contraband per se. See *United States v Jeffers*, 342 US 48, 53; 72 S Ct 93; 96 L Ed 59 (1951). And in *Cooper v City of Greenwood, MS*, 904 F2d 302, 305 (CA 5, 1990), the court held, "[c]ourts will not entertain a claim contesting the confiscation of contraband *per se* because one cannot have a property right in that which is not subject to legal possession." As explained in *United States v Harrell*, 530 F3d 1051, 1057 (CA 9, 2008), "[a]n object is contraband per se if its

possession, without more, constitutes a crime; or in other words, if there is no legal purpose to which the object could be put." Given that it is illegal under federal law for any private person to possess marihuana, 21 USC 812(c), 841(a)(1), 844(a), marihuana is contraband per se as a matter of federal law, which means no person can have a cognizable legal interest in it. See *Gonzales v Raich*, 545 US 1, 27; 125 S Ct 2195; 162 L Ed 2d 1 (2005) ("[t]he CSA designates marihuana as contraband for *any* purpose") (emphasis in original).

[9] The Supreme Court, however, has clarified that Congress does not have the authority to commandeer the processes of states "by directly compelling them to enact and enforce a federal regulatory program." *New York v United States*, 505 US 144, 161; 112 S Ct 2408; 120 L Ed 2d 120 (1992) (citation omitted). Thus, the preemption power is constrained by the Supreme Court's anti-commandeering rule. The CSA, however, contains no language compelling state action or attempting to commandeer state law enforcement employees.

[10] In answering your question, it is not necessary for this opinion to address other forms of preemption, such as express, field, or obstacle preemption.

[11] While appellate courts in California and Oregon have upheld the return of medical marihuana, *City of Garden Grove v Superior Court of Orange County*, 157 Cal App 4th 355; 68 Cal Rptr 3d 656 (2007), *State v Kama*, 178 Or App 561; 39 P3d 866 (2002), these decisions are of questionable value in light of recent decisions. See *Pack v Superior Court of Los Angeles County*, 199 Cal App 4th 1070 (2011), and *Emerald Steel Fabricators, Inc v Bureau of Labor and Industries*, 348 Or 159; 230 P3d 518, 529 (2010).

[12] Section 903 of the CSA contemplates that conflicting state laws will be preempted where "there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together." 21 USC 903.

[13] This office has previously found other state statutes preempted by federal law. See, e.g., OAG 2001-2002, No 7074, p 9 (January 24, 2001) (finding section 1905(3) of the Insurance Code preempted by the federal Liability Risk Retention Act of 1986); OAG 1991-1992, No 6679, p 28 (April 29, 1991) (finding section 23 of the Michigan Mortgage Brokers, Lenders and Services Licensing Act dealing with loan processing fees preempted by the federal Depository Institutions Deregulation and Monetary Control Act of 1980.); and OAG 1989-1990, No 6649, p 351 (July 11, 1990) (concluding that section 301(a) of the federal Labor Management Relations Act of 1947 preempted the Michigan Department of Labor from determining state law claims for wages and fringe benefits brought by employees under 1978 PA 390).

[14] 18 USC 2(a) states: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

[15] The CSA defines "distribute" as "to deliver . . . a controlled substance," and it further defines the terms "deliver" or "delivery" as "the actual, constructive, or attempted transfer of a controlled substance." 21 USC 802(11), 802(8). In *United States v Vincent*, 20 F3d 229, 233 (CA 6, 1994), the United States Court of Appeals for the Sixth Circuit held that in order to establish the knowing or intentional distribution of a controlled substance, "the government needed only to show that defendant knowingly or intentionally delivered a controlled substance. 21 USC § 802(11). It was irrelevant for the government to also show that defendant was paid for the delivery." Distributing a small amount of marijuana for no remuneration is treated as simple possession, and is a misdemeanor offense. See 21 USC 841(b)(4).

[16] This analysis is consistent with the views expressed by the United States Department of Justice. An April 14, 2011, letter from the two federal prosecutors in the State of Washington, advised the Governor of Washington that if a medical marihuana proposal became law that "state employees who conduct[ ] activities mandated by the Washington legislative proposals would not be immune from liability under CSA." Similarly, a June 29, 2011, memorandum issued by United States Deputy Attorney General James Cole provides that "[s]tate laws or local ordinances are not a defense to civil or criminal enforcement of federal law . . . including enforcement of the CSA." The letter and memorandum are attached to this opinion.

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http://opinion/datafiles/2010s/op10341.htm
State of Michigan, Department of Attorney General
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DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

January 19, 2012

Captain Steve Duvall
Oregon State Police
255 Capitol St. NE
4th Floor
Salem, OR 97310

Re: Opinion Request OP-2012-1

Dear Captain Duvall:

The Oregon Medical Marijuana Act authorizes the provision and possession of marijuana for medical use and requires law enforcement officers to return seized marijuana to persons who are entitled to the protections of the Act. ORS 475.304, 475.320, 475.323(2). The federal Controlled Substances Act, on the other hand, prohibits the distribution and possession of all marijuana, including marijuana that state law permits to be used for medical purposes. 21 USC § 841, 844; *United States v. Oakland Cannabis Buyers' Cooperative et al*, 532 US 483, 486, 494, 121 S Ct 1711, 149 LEd2d 722 (2001), *Gonzales v. Raich*, 545 US 1, 14, 125 S Ct 2195, 162 LEd2d 1 (2005).

In *Emerald Steel Fabricators, Inc. v. BOLI*, 348 Or 159, 230 P3d 518 (2010), the Oregon Supreme Court held that the Oregon Medical Marijuana Act is preempted by the federal Controlled Substances Act to the extent that it affirmatively authorizes medical marijuana use. An Oregon federal district court subsequently relied on *Emerald Steel* to deny claims arising from a law enforcement officer's refusal to return medical marijuana to those entitled to possess it under the Oregon Medical Marijuana Act. *Butler v. Douglas County*, Civil No. 07-6241-H (D Or August 10, 2010). In light of those recent opinions, you ask the following questions.

QUESTIONS AND SHORT ANSWERS

Question 1: Does the federal Controlled Substances Act preempt the direction in ORS 475.323(2) to Oregon state and local law enforcement officers that they must return seized marijuana in certain circumstances?

Short Answer: Based on the reasoning in *Emerald Steel*, yes. The requirement in ORS 475.323(2) to return marijuana likely is preempted by provisions of the federal Controlled Substances Act that prohibit the distribution and possession of marijuana. Because a preempted statute is "without effect," the requirement in ORS 475.323(2) to return marijuana has no legal effect. But we caution that the law in this area is evolving.

Question 2: If a state or local law enforcement officer returns medical marijuana that was lawfully possessed under the Oregon Medical Marijuana Act, does the officer who returns the marijuana or the person who receives it violate federal law?

Short Answer: Based on the reasoning in *Emerald Steel*, the officer would violate federal law by returning the marijuana and may be subject to federal criminal prosecution. The recipient of the marijuana would violate federal law by possessing marijuana and also may be subject to federal criminal prosecution.

Question 3: Based on the current case law and statutes, what would be the appropriate response by the Oregon State Police or its officers, as appropriate, when a court orders the agency or the officer to return the marijuana?

Short Answer: The agency or the officer should appeal the order and request a stay of the order pending the appeal. If no stay is granted or if the appeal is unsuccessful, the agency or officer should return the marijuana.

Question 4: Assume an individual is arrested and has a lawful amount of medical marijuana under Oregon law in his or her possession; the individual is lodged at the county jail; and the jail staff inventories and stores the individual's marijuana along with the individual's other personal possessions for safekeeping. If a jail staff member returns the marijuana to the individual upon the individual's release from custody, does the jail staff member or the individual, or both, violate federal law?

Short Answer: Based on the reasoning in *Emerald Steel*, the officer would violate federal law by returning the marijuana and may be subject to federal criminal prosecution. The recipient of the marijuana would violate federal law by possessing marijuana and also may be subject to federal criminal prosecution.

DISCUSSION

I. Relevant Statutory and Case Law

A. The Oregon Medical Marijuana Act

Oregon's Uniform Controlled Substances Act prohibits the possession or delivery of marijuana. ORS 475.864, 475.860. But the Oregon Medical Marijuana Act exempts persons engaging or assisting in the medical use of marijuana from criminal liability for possessing or delivering marijuana. ORS 475.309(1), 475.319.

Under the Oregon Medical Marijuana Act, a person who wishes to engage in the medical use of marijuana must obtain a registry identification card. *See* ORS 475.306(1) (providing that cardholders "may engage" in the medical use of marijuana). Cardholders and their caregivers and producers may possess limited amounts of marijuana. *See* ORS 475.320 (specifying the amounts of marijuana that those persons "may possess").

ORS 475.323(2) prohibits the harm or forfeiture of any property interest connected with the medical use of marijuana that has been seized by any state or local law enforcement officer. That provision also requires law enforcement officers to return usable medical marijuana to those from whom it was seized if the district attorney determines that those persons are protected by the Oregon Medical Marijuana Act.[1/]

B. The Federal Controlled Substances Act

The federal Controlled Substances Act prohibits the possession and distribution of marijuana, except as part of a Food and Drug Administration (FDA) pre-approved research project. 21 USC § 844, 21 USC § 841(a). The federal law provides no exception for possession and distribution of medical marijuana that is permitted under state law. *See Gonzales v. Raich,* 545 US at 14 (sole exception for marijuana possession and distribution is as part of FDA study), *see also United States v. Oakland Cannabis Buyers' Cooperative*, 532 US at 486 (holding that there is no medical necessity exemption to the federal Act's prohibitions on marijuana manufacture and distribution). You ask whether the federal Controlled Substances Act, by prohibiting the possession and distribution of all marijuana except in FDA pre-approved studies, preempts ORS 475.323(2) to the extent that it requires law enforcement officers to return marijuana in certain circumstances.

By its terms, the federal Controlled Substances Act preempts state law only when there is a "positive conflict" between the state law and a provision of the Act "so that the two cannot consistently stand together." 21 USC § 903.[2/] No Oregon appellate case directly addresses whether the requirement to return medical marijuana imposed by ORS 475.323(2) is preempted by the federal Controlled Substances Act. The only Oregon case to address the apparent conflict between ORS 475.323(2) and the federal law is *State v. Kama*, 178 Or App 561, 39 P3d 866, *rev den* 334 Or 121 (2002). We first consider that case.

C. *State v. Kama*

In *Kama,* city officers refused to return medical marijuana as required by ORS 475.323(2), arguing that to do so would constitute delivery of a controlled substance in violation of the federal Controlled Substances Act.

The defendant argued that the city officers would be immune from criminal liability for delivery under section 885(d) of the federal Controlled Substances Act, which provides, in part that:

> No civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized Federal officer lawfully engaged in the enforcement of this subchapter or upon any duly authorized officer of any State, territory, political subdivision thereof, * * * who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

The court did not address whether returning the marijuana constitutes delivery under the federal act, instead holding that:

> Even assuming that returning the marijuana otherwise might constitute delivery of a controlled substance, the city does not explain – and we do not understand – why police officers would not be immune from any federal criminal liability that otherwise might arise from doing so.

178 Or App at 565. In support of its holding, the court cites *U.S. v. Fuller*, 162 F3d 256 (4th Cir 1998), which held that section 885(d) confers immunity on law enforcement personnel engaged in undercover drug operations. 178 Or App at 564. That citation is the whole of the court's analysis.

There is no discussion in *Kama* as to whether the federal Controlled Substances Act preempts ORS 475.323(2). Nor did the court analyze whether immunity applies to actions taken to carry out laws that conflict with the federal Controlled Substances Act (such as the Oregon Medical Marijuana Act, in part) as well as to actions taken to enforce laws that are consistent with that Act (such as the Oregon Uniform Controlled Substances Act). But given the court's holding, it necessarily assumed that the federal immunity did extend to actions to enforce laws that conflict with the federal Controlled Substances Act. In a subsequent case, however, the federal district and circuit courts reached the opposite conclusion.

D. *United States v. Rosenthal*

1. United States District Court

One year after *Kama* was decided, the United States District Court for the Northern District of California decided *United States v. Rosenthal,* 266 F Supp 2d 1068 (ND Ca 2003), *aff'd in part, rev'd in part*, 454 P3d 943 (9th Cir 2006). That case concerned whether section 885(d) conferred immunity on a person whom the City of Oakland had assured was exempt from criminal prosecution for growing medical marijuana for distribution under California's Compassionate Use Act.

Despite that assurance, the United States charged the grower with several violations of the Controlled Substances Act. In rejecting the grower's immunity claim, the court first reasoned that "enforcement" under section 885(d) means compelling compliance with a law, rather than merely facilitating the purposes of a law. *Id.* at 1078.

Second, the court concluded that:

> Rosenthal's interpretation of Section 885(d) directly contradicts the purpose of the Controlled Substances Act. As the Supreme Court has held, the Act reflects a determination that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project). [citation omitted]. To hold that Section 885(d) applies to the cultivation of marijuana for a medical cannabis club would conflict with the stated purpose of the Controlled Substances Act. "Lawfully engaged" in "enforcing a law related to controlled substances" must mean engaged in enforcing, that is, compelling compliance with, a law related to controlled substances which is consistent – or at least not inconsistent – with the Controlled Substances Act. Section 885(d) cannot reasonably be read to cover acting pursuant to a law which itself is in conflict with the Act.

266 F Supp 2d at 1078-1079.

2. Ninth Circuit

Rosenthal appealed his convictions to the United States Court of Appeals for the Ninth Circuit, which agreed with both of the district court's grounds for denying immunity. The court first agreed that Rosenthal merely was "facilitating" not "enforcing" the law. In *dicta*, it distinguished the holding in *Kama* on the ground that, there, the officers were "enforcing a state law that *required* them to deliver the marijuana to that individual because he had a state-law right to its return." *United States v. Rosenthal*, 454 F3d 943, 948 (9th Cir 2006) (emphasis in original).

Second, the court "agree[d] with the district court's conclusion that Rosenthal's interpretation of the immunity provision contradicts the purpose of the [Controlled Substances Act,]" citing the district court's reasoning on that issue. *Id.*

Accordingly, the Ninth Circuit, like the district court, reasoned that section 885(d) did not confer immunity for enforcement of a law that contradicted the purposes of the Controlled Substances Act. The Ninth Circuit did not mention or attempt to distinguish *Kama* in making this point. It would be hard to distinguish *Kama* from *Rosenthal* in this regard as *Kama* too concerns a law that contradicts the purpose of the Controlled Substances Act.

No Oregon appellate court has reconsidered the holding in *Kama* in the light of the statements in the two *Rosenthal* decisions. But, as noted above, the court in *Kama* did not discuss whether ORS 475.323(2) is preempted by federal law. The Oregon Supreme Court recently concluded that another provision of the Oregon Medical Marijuana Act is preempted by the federal Controlled Substances Act. We turn to that case.

E. *Emerald Steel Fabricators v. BOLI*

In *Emerald Steel*, the court considered whether ORS 475.306(1), which states that registry cardholders "may engage" in the medical use of marijuana, is preempted by federal law. The court characterized the issue as one of "implied preemption." Implied preemption exists if there is an "actual conflict" between federal and state law, either because it is "physically impossible to comply with both state and federal law," or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 348 Or at 175. The court explained that because the "physical impossibility" prong is "vanishingly narrow," United States Supreme Court's decisions typically have turned on the "obstacle" prong. *Id.* at 176.

The court examined United States Supreme Court cases which had concluded that a state law stood as an obstacle to the accomplishment of federal purposes when it prohibited what a federal law permitted or when the state law permitted what a federal law prohibited. *Id.* at 176-177. Applying the reasoning of those cases, the court concluded that: (1) the Controlled Substances Act imposes a blanket federal prohibition on marijuana use without regard to state permission to use marijuana for medical purposes; (2) ORS 475.306(1) "affirmatively authorized" the use of medical marijuana; (3) by permitting what federal law prohibits, ORS 475.306(1) "stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act"; (4) therefore, ORS 475.306(1) is preempted; and, (5) because a preempted law is without effect, ORS 475.306(1) is without effect to the extent that it affirmatively authorizes the medical use of marijuana. *Id.* at 176-178.

The court rejected an argument that a state law stands as an obstacle to enforcement of the federal prohibition only if it attempts to prohibit the federal government from enforcing its own laws. *Id.* The court also distinguished between state law provisions like ORS 475.306(1) that affirmatively authorize what the federal law prohibits and provisions like ORS 475.309(1) and 475.319 that merely exempt medical marijuana use, possession and manufacture from state criminal liability. The court stated that, while Congress has the power under the Supremacy Clause of the United States Constitution to preempt state laws that affirmatively authorize what Congress has prohibited, Congress lacks authority to require states to criminalize conduct that states choose not to. *Id.* at 180 (quoting *Printz v. United States*, 521 US 898, 935, 117 S Ct 235, 138 L Ed 2d 914 (1992) ("Congress cannot compel the States to enact or enforce a federal regulatory program."). The court limited its holding accordingly: "[i]n holding that federal law does preempt [ORS 475.306(1)] * * *, we do not hold that federal law

preempts the other sections of the Oregon Medical Marijuana Act that exempt medical marijuana from criminal liability." *Id.* at172 n 12.[3]

F. *Willis v. Winters*

The Oregon Supreme Court decided another implied preemption case concerning medical marijuana use after *Emerald Steel.* In *Willis v. Winters*, 350 Or 299, 253 P3d 1053 (2011), *cert den* January 9, 2012 (No. 11-120) (2012 WL 33296), county sheriffs refused to issue concealed handgun licenses to persons who met all statutory conditions to obtain a license, but who admitted to medical marijuana use. Oregon's concealed handgun licensing law does not prohibit either lawful or unlawful users of controlled substance from obtaining a license. But the sheriffs argued that, to the extent that Oregon's concealed handgun law allowed licenses to be issued to medical marijuana users, it was preempted by a provision of the Federal Gun Control Act that prohibited unlawful users of controlled substances (which, as discussed above, include medical marijuana users) from possessing handguns. *Id.* at 302.

In deciding that issue, the court said the following about applying the analysis in *Emerald Steel*:

> Rather than employing th[e] basic federal approach to obstacle preemption problems, the parties (and the Court of Appeals) have couched their arguments primarily in terms of whether ORS 166.291 "affirmatively authorizes" possession of firearms by marijuana users or merely permits marijuana users to be exempted from criminal liability under ORS 166.250(1)(a) and (b) for Unlawful Possession of a Firearm. Those arguments clearly are directed at this court's decision in *Emerald Steel*, which held that a provision of the Oregon Medical Marijuana Act that "affirmatively authorized" the possession of marijuana for medical use was prohibited by the federal Controlled Substances Act, because it stood as an obstacle to the congressional purpose that inhered in the act – of prohibiting marijuana possession for *any* purpose. 348 Or at 178. However, *Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as "affirmatively authorizing" what federal law prohibits is preempted. Rather, it reflects this court's attempt to apply the federal rule and the logic of the most relevant federal cases to the particular preemption problem that was before it. And particularly where, as here, the issue of *whether* the statute contains an affirmative authorization is not straightforward, that analysis in *Emerald Steel* cannot operate as a simple stand-in for the more general federal rule.

350 Or at 309 n 6.

The court stated that "obstacle preemption" (the second prong of implied preemption analysis) is decided by examining the federal law to ascertain its purposes and intended effects, examining the state statute to determine its effects, and comparing the results to determine whether the latter statute in some way obstructs the accomplishment of the objectives that have been identified with respect to the former statute. *Id.* at 309.

Applying that test, the court held that Oregon's concealed handgun licensing statute was not preempted by the federal law. It reasoned that the relevant purpose of the federal law was to keep firearms away from all marijuana users. But Oregon's concealed handgun licensing statute did not concern *possession* of firearms, only concealment. The court also found significant that federal officials, and even state officials, could enforce the federal prohibition on possession of a firearm by a medical marijuana user. Therefore, the court concluded that Oregon's concealed handgun licensing law did not stand as an obstacle to the full accomplishment and exercise of the federal firearms statute's purpose. *Id.* at 311-12.

G. *Butler v. Douglas County*

In the last case that is pertinent to your questions, *Butler v. Douglas County*, Civil No. 07-06241-H (D Or August 10, 2010), the United States District Court for the District of Oregon considered the effect of *Emerald Steel* on a sheriff's duty to return seized medical marijuana. In that case, Oregon medical marijuana users intervened in a state criminal action against their growers asking the court to order the sheriff to return their marijuana pursuant to ORS 475.323(2). Before the state court could rule on the motion, the federal government filed criminal complaints and took over prosecution of the case in federal court. The sheriff transferred the marijuana to the federal authorities and the state criminal matter was dismissed. At the time of these events, *Emerald Steel* had not yet been decided.

The *Butler* plaintiffs challenged the marijuana transfer on one federal and one state law ground. The federal claim alleged that the sheriff, knowing that the state court would require return of the marijuana to plaintiffs, encouraged federal authorities to assume jurisdiction of the case to prevent the plaintiffs from obtaining their medical marijuana. They claimed that the sheriff violated 42 USC § 1983 by taking that action in retaliation for their filing a motion to return the marijuana. The plaintiffs' state law claim asserted that they had a right to possess the marijuana under the Oregon Medical Marijuana Act and that the sheriff had committed conversion by transferring the marijuana to the federal government in order to avoid giving it back to them. *Butler* at 2.

The district court granted summary judgment in favor of the sheriff on both the federal and state law claims. *Id.* at 5. In denying the federal claim, the court reasoned that:

> To find that by asserting every means possible to fight what defendants believed to be illegal activity *and prevent violating federal law themselves by distributing the marijuana to plaintiffs,* defendant engaged in violation of the First Amendment would be an absurd result. There can be no doubt that federal law prohibits the use of medical marijuana. In addition, although the use of medical marijuana and limited growing for others' use is permitted under the OMMA, a recent decision of the Oregon courts confirms that federal law preempts the OMMA.
>
> Assuming that [the sheriff] did request federal assistance and that had he not, the motion for return would have been successful, *it could be argued that defendants would have violated federal law in returning the marijuana to plaintiffs*. The Ninth Circuit has indicated in dicta that the return of marijuana pursuant to OMMA would provide immunity to officers in compliance with OMMA. *See, United States v. Rosenthal*, 454 F3d 943, 948 (9th Cir. 2006) (implying that state law mandated return of marijuana to medical marijuana user by officers is entitled to immunity for prosecution under the Controlled Substances Act). *However, the Oregon Supreme Court has ruled that:*
>
> > *To the extent that OMMA affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it "without effect."*
>
> Thus, opposing a motion *premised on a law that is without effect* should not constitute First Amendment retaliation even if such opposition rises to the level of seeking to remove a case from state court in order to avoid the purported consequences of a state law. * * *. *Indeed, it could be argued that defendants had a duty to take such action.*

Butler at 3-4 (citations omitted) (emphasis added). The emphasized language is not definitive. The court states that "it could be argued" that the officers: (1) would have violated federal law in returning the marijuana; and, (2) had a duty to seek to remove the case to federal court. But the clear implication of that language is that, in light of *Emerald Steel*, the requirement to return marijuana was preempted and without effect, hence returning the marijuana might violate the federal prohibition against distributing marijuana.

The court used more definitive language in concluding that finding a constitutional violation would violate public policy. The court reasoned that "federal law preempts OMMA such that it has no effect. Thus, public policy dictates that failure to return marijuana in violation of federal law is not a constitutional violation." *Butler* at 4. Here the court definitively states that returning the marijuana would violate federal law, because the state law was preempted and without effect.

Finally, the court holds that "the [state law] conversion claim fails as well as Sheriff Brown thus did not have authority to turn over the marijuana." *Id.* Given that ORS 475.323(2) and *Kama* required the officers to return the marijuana, the court must necessarily have concluded that the provision's requirement to return marijuana was "without effect," because it was preempted by federal law.[4]

II. Questions and Answers

A. Preemption

You first ask if the requirement to return marijuana imposed by ORS 475.323(2) is preempted by the federal Controlled Substances Act. Applying the reasoning and holdings of *Emerald Steel*, *Willis*, and *Butler*, we conclude that the requirement to return marijuana in ORS 475.323(2) likely is preempted. As discussed, the relevant purpose and intended effect of the federal Controlled Substances Act is to prohibit the possession, distribution and use of marijuana for any purpose except as part of a FDA pre-approved research project.

Returning marijuana to users would constitute distribution of a controlled substance under the Controlled Substances Act. *See* 21 USC § 841(a)(1) (prohibiting distribution of controlled substances), 21 USC § 802(11) (defining "distribute" to mean "to deliver (other than by administering or dispensing) a controlled substance or a listed chemical"), 21 USC § 802(8) (defining "delivery" to mean "the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship.").

Applying the analysis in *Emerald Steel* and *Willis*, the requirement to return the marijuana obstructs the accomplishment of the Controlled Substances Act's purpose and intended effect to prohibit the distribution and possession of all marijuana outside of FDA-approved studies. ORS 475.323(2) is distinguishable from the provision that the court found to be preempted in *Emerald Steel* in that it does *more* than affirmatively authorize what the federal act prohibit – it *requires* it. Moreover, unlike in *Willis*, the Oregon provision directly requires what the federal law prohibits. Therefore, the requirement to return marijuana in ORS 475.323(2) appears to be preempted and without effect. The federal district court in *Butler* apparently reached the same conclusion in holding that the sheriff had no authority to return the marijuana.

The immunity provided to officers by section 885(d) does not change the conclusion. We doubt that Congress intended that provision to have any bearing on the extent to which the Controlled Substances Act preempts *the underlying law being enforced*. In other words, the purpose of the immunity provision was not to allow states to enact laws authorizing the distribution and possession of marijuana for medical use as long as law enforcement officers are the distributors. The purpose of the immunity provision simply is to shield law enforcement officers who are lawfully engaged in enforcing a controlled substances law from civil or criminal liability for doing so. The

immunity provision would not, for example, prohibit the federal government from seeking to enjoin law officer conduct.

The fact that ORS 475.323(2) does not prevent federal officers from enforcing federal law is not dispositive either. In *Emerald Steel,* the court rejected the argument that a state law is preempted only if it prevents federal enforcement of the federal law. It is true that the court in *Willis* considered that factor in its preemption analysis, but it did so only after concluding that the Oregon law did not authorize what federal law prohibited.

We caution only that this remains an evolving area of the law.

B. Exposure to federal criminal prosecution

You next ask two related questions, the first of which is whether the person to whom the marijuana is returned pursuant to ORS 475.323(2) violates federal law and is subject to criminal prosecution by federal authorities. As discussed above, the possession of marijuana, even for medical use permitted by state law, is a violation of the federal law. Unless and until possession of medical marijuana is made lawful under federal law, those who possess it are subject to criminal prosecution by federal authorities.

Your second question is whether officers would violate federal law and be subject to federal criminal prosecution for returning the marijuana. As discussed above, ORS 475.323(2)'s requirement to return medical marijuana likely is preempted and unenforceable. Therefore, immunity under section 885(d) would be unavailable because the return would not constitute enforcement of any valid law. *See Butler v. Douglas County* at 4 (concluding that officers had no "authority" to return the marijuana), *Emerald Steel*, 348 Or at 186 (holding that ORS 475.306(1) was preempted and without effect and "was not enforceable" thus "no enforceable state law" had authorized the marijuana use that happened at the time of the events in issue in that case). Consequently, officers could be subject to federal prosecution.[5/]

C. Appropriate response to court-ordered return

In light of the above conclusions, you ask what the appropriate response would be if the trial court ordered a state law enforcement officer to return marijuana pursuant to ORS 475.323(2). Such an order could be appealed immediately under ORS 19.205(5) as an order in a special statutory proceeding. *State v. Ehrensing*, 232 Or App 511, 516, 223 P3d 1060 (2009) (so stating). The state should appeal the order to seek resolution by the Oregon appellate courts of the issues discussed above that have been raised following *Emerald Steel* and *Butler.* At that time, it also would be prudent to apprise federal authorities of the matter and, particularly, of the pending challenge to the court's order.

The state should also ask for a stay of judgment pending the appeal. *See* ORS 19.330 (appeal does not automatically stay judgment, appellant must seek a stay).

If the trial court denies the stay request, the state should consider seeking a stay in the Court of Appeals. ORS 19.350. A stay would allow officers to avoid potential violation of the federal Controlled Substances Act pending resolution of the preemption issue. A stay would also likely be necessary to ensure that the appellate court does not consider the issue moot. Specifically, in *Ehrensing*, the court refused to review a pretrial order directing an officer to return marijuana on the ground that the issue was moot, because the state conceded that it would be unable to retrieve the marijuana that it had returned. 232 Or App at 518. For obvious reasons, it is unlikely that the state would be able to retrieve marijuana once it has been returned. Staying the order is likely necessary to obtain appellate review of the issue.

In the unlikely event that a stay is not granted – or if the appeal is unsuccessful – the officers would have to comply with the order or risk a contempt action. ORS 1.240(2) (judicial officers have power to compel obedience to lawful court orders); ORS 1.250 (judicial officers may punish for contempt to effectuate powers granted by ORS 1.240).

D. Return when marijuana taken for safekeeping

Your final question is whether the same conclusions apply when a cardholder who is arrested and jailed for an unrelated crime possesses a lawful amount of medical marijuana and the officer takes possession of the marijuana for "safekeeping." We conclude that the result is the same, but the analysis is more complicated.

We are not aware of any statute that expressly authorizes officers to take property into custody upon a person's admittance to a correctional facility, although at least one statute assumes the existence of that authority. *See* ORS 133.455 (which requires that a receipt for items taken be given to a person in custody when their possessions are taken for "safekeeping"). This authority on the state level comes from administrative rules.

We cannot speak to local policies, but Department of Correction rules authorize a person who is going to be admitted to a correctional facility to possess only a very limited number of items, and those do not include medical marijuana. OAR 291-117-0090.[6] The Department must package "unauthorized" property and mail it at the inmate's expense to a person designated by the inmate to receive it. OAR 291-117-0140(1)(a). If the inmate cannot afford to pay for shipping, arrangements can be made for a person designated by the inmate to pick up the items. *Id.*

Mailing or giving marijuana to a designated third party would constitute delivery under federal law. It also might constitute delivery under Oregon law and subject persons receiving the marijuana to prosecution for possession if those persons themselves are not entitled to the protections of the Oregon Medical Marijuana Act.[7] *See State v. Fries*, 344 Or 541, 185 P3d 453 (2008) (upholding defendant's conviction for unlawful possession of marijuana for helping a friend, who had a medical marijuana card, move marijuana plants to a new residence).

To the extent that the rule would require officers to deliver marijuana in violation of the federal Controlled Substances Act, the provision is preempted. Also, as this rule is not a law relating to controlled substances, carrying out the duties it specifies would not appear to constitute enforcement of a law relating to controlled substances that would provide a basis for immunity under section 885(d).

If, upon a person's release from custody, he or she files a motion to return the marijuana under ORS 475.323(2), the previous analysis in this opinion would apply.

Sincerely,

David E. Leith
Associate Attorney General and
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[1/] ORS 475.323(2) provides in full:

(2) Any property interest possessed, owned or used in connection with the medical use of marijuana or acts incidental to the medical use of marijuana that has been seized by state or local law enforcement officers may not be harmed, neglected, injured or destroyed while in the possession of any law enforcement agency. A law enforcement agency has no responsibility to maintain live marijuana plants lawfully seized. No such property interest may be forfeited under any provision of law providing for the forfeiture of property other than as a sentence imposed after conviction of a criminal offense. Usable marijuana and paraphernalia used to administer marijuana that was seized by any law enforcement office shall be returned immediately upon a determination by the district attorney in whose county the property was seized, or the district attorney's designee, that the person from whom the marijuana or paraphernalia used to administer marijuana was seized is entitled to the protections contained in ORS 475.300 to 475.346. The determination may be evidenced, for example, by a decision not to prosecute, the dismissal of charges or acquittal.

[2/] 21 USC § 903 provides:

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

[3/] Two justices dissented and would adopt a narrower test that finds preemption only if a state law directly affects the federal government's enforcement of its laws. *Id.* at 198 (Walters dissenting). A California Appellate Court used a similar test to conclude that an order to return medical marijuana to a qualified user under California law was not preempted by the Controlled Substances Act. *See City of Garden Grove v. Kha*, 68 Cal Rptr 3d 656, 676-678, 157 Cal App 4th 355 (2007) (holding that an order to

return marijuana to a person who lawfully could possess the drug under California law did not violate federal supremacy principles as it neither expressly exempted medical marijuana from prosecution under federal law nor would constitute a real or meaningful threat to the federal enforcement effort). But another California Appellate Court recently agreed with the majority's reasoning *in Emerald Steel* in holding that a City of Long Beach ordinance that provided for the issuance of permits to medical marijuana collectives was preempted by the federal Controlled Substances Act. *Pack v. Superior Court of Los Angeles County*, ___Cal Rptr 3rd ___, 2011 WL4553155 (Cal App 2d District), 11 Cal Daily Op Serv, 12, 643 (October 4, 2011) ("The[Emerald] court concluded that the law was preempted by the federal CSA, under obstacle preemption, to the extent that it authorized the use of medical marijuana rather than merely decriminalizing its use under state law. * * *. We agree with that analysis").

[4/] The plaintiffs appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. On November 3, 2011, the Ninth Circuit issued a memorandum opinion (which specifies that the "disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3"). *Butler v. Douglas County*, Case Number 10-35802, D.C. No. 6:07-cv-06241-HO (November 3, 2011). The opinion did not address dismissal of the state law conversion claim, but only dismissal of the 1983 claim. The court affirmed summary judgment on that claim on the basis of qualified immunity, reasoning that "[w]hile Brown was certainly on notice that he was legally required to return Appellants' medical marijuana, it cannot be said that he had fair warning that encouraging federal prosecution to thwart that end violated Appellants' First Amendment rights." *Id.* at 3. While that language appears to contradict the district court's conclusion that Brown was not legally required to return the marijuana, the language is *dicta* and there is no analysis or discussion of that issue; the case is decided, instead, on a different ground.

[5/] As a practical matter, federal authorities have focused their resources only on prosecutions of the commercial cultivation, sale and distribution of marijuana for medical purposes. They have shown little enthusiasm for using federal resources to prosecute individuals simply for possessing marijuana for their medical use. There is no reason to believe that federal authorities would be more eager to prosecute law enforcement officials for returning marijuana to medical users. But we stress that, our analysis is confined to the legal issue whether prosecution is authorized under the federal Controlled Substances Act, not whether federal authorities are in fact likely to pursue such prosecutions.

[6/] Our advice is limited to the duties and obligations of state officers. Local officers should seek tbe advice of their counsel to determine their legal obligations.

[7/] Mail carriers would be exempt from criminal liable for possession of a controlled substance under the Oregon Controlled Substances Act, because common or contract carriers and their employees may "lawfully possess controlled substances" if possession occurs "in the usual course of business or employment." ORS 475.125(3)(b).