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February 20, 2019

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Re: H.B. 3001 Requirement that Health Department Employees Commit Federal Felonies - Preemption and Invalidity of State Central Fill and Participation by Health Departments in Procurement, Purchase, Storage, Distribution, Transportation, and Sale of Marijuana

> *The CSA [federal Controlled Substances Act] 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 . . . .* ***Nor does any state law "legalize" possession, distribution, or manufacture of marijuana. Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. U.S. Const. art. VI, cl. 2. Thus, while the CSA remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana. Such activity remains prohibited by federal law.***
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> – *United States v. McIntosh*, 833 F.3d 1163, 1179, n.5 (9th Cir. 2016).

Dear Gentlemen and Ladies:

By the passage of H.B. 3001, the Utah Legislature has mandated that all local health departments, which are financed in part by the counties (Utah Code Ann. § 26A-1-115(1)), designate one or more location as a "**state central fill shipment distribution location**" and designate "a sufficient number of personnel to ensure that at least one individual is

available at all times during business hours." § 26-61a-607(1)(a), (b). That unfunded mandate by the Utah Legislature[1] is a legally invalid mandate for *you* and many others to violate, or aid and abet the violation of, federal criminal laws.

The Utah Legislature, in a bill entirely different than medical cannabis laws passed in states throughout the nation, has *required* the Utah Health Department and local health departments, to participate in what, under current federal law, constitutes a felonious, full-service drug cartel.

For instance, H.B. 3001 requires local health departments "to *distribute* state central fill shipments."[2] (Emphasis added.) "State central fill shipment" is defined in H.B. 3001 as "a shipment of cannabis"[3]—that is, a shipment of marijuana. Under H.B. 3001, the health departments are to participate in arranging for the purchase, distribution, transportation, storage, and sale of a Schedule 1 controlled substance—all of which is absolutely forbidden by the federal Controlled Substances Act. Each violation is a federal felony.[4]

It gets even worse. As Kim Carson, a member of the Summit County Council noted, "75% of our funding in our health department comes from federal grants. . . . [T]hose funds

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[1] *See, e.g.,* Katie England, "Utah County looking for medical cannabis implementation funding this legislative session," *Daily Herald*, January 27, 2019 ("Hiring more personnel and making the security changes needed to distribute the medicine from its current location in downtown Provo means the Utah County Health Department is looking for funding to be allocated this year in order to be up and running the mandated implementation date of March 1, 2020.")

[2] Utah Code Ann. § 26-61a-607(1)(b)(ii).

[3] Utah Code Ann. § 26-61a-102(39).

[4] 21 U.S.C. § 841 (a) provides, in part: "Except as authorized by this subchapter, 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 U.S.C. § 841 (b)(1)(C) provides, in part: "In the case of a controlled substance in schedule I [where marijuana is listed] . . . , such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both."
21 U.S.C. § 841(b)(1)(D) provides, in part: "In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, . . . 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 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both."

could be at risk since cannabis is still a schedule one drug."[5] Yes, indeed. To have marijuana on the premises of any entity, or for that entity to distribute, dispense, possess, or store marijuana, could mean the termination of any federal benefits, including all federal grants, to that entity for up to five years.[6]

As demonstrated below, the Legislature is absolutely without power to compel anyone to violate federal law, regardless of the likelihood of prosecution. Hence, the provisions of H.B. 3001 that set up a DABC-like organization for the purchase, storing, transportation, distribution, and sale of marijuana are preempted by federal law and wholly invalid.

Every dollar spent and every minute devoted to planning for the implementation of H.B. 3001 is an utter waste of precious resources because the law will never—can never—be put into operation.

The only legitimate aim and effect of recent *state* laws *permitting* the purchase, sale, cultivation, and distribution of marijuana under certain circumstances is to provide that people will not be prosecuted by *state or local authorities* under *state* laws for certain

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[5] Rick Brough, "State Medical Marijuana Law Offers Challenges To Summit County, KPCW, February 8, 2019, found at https://www.kpcw.org/post/state-medical-marijuana-law-offers-challenges-summit-county#stream/0.

[6] 41 U.S.C. § 8103 (Drug-free workplace requirements for Federal grant recipients) provides, in part:

(a)

(1) A person other than an individual shall not receive a grant from a Federal agency unless the person agrees to provide a drug-free workplace by—(A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violations of the prohibition; . . . (D) notifying the employee in the statement required by subparagraph (A) that as a condition of employment in the grant the employee will—(i) abide by the terms of the statement . . . (G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A) to (F).

(b)

(1) Payment under a grant awarded by a Federal agency may be suspended and the grant may be terminated, and the grantee may be suspended or debarred . . . if the head of the agency or the official designee of the head of the agency determines in writing that—(A) the grantee is violating, or has violated, the requirements of [sections of the statute]. . . .

(3) A grantee debarred by a final decision under this subsection is ineligible for award of a grant by a Federal agency, and for participation in a future grant by a Federal agency, for a period specified in the decision, not to exceed 5 years.

activities involving marijuana that previously were illegal under *state* law. **Those *state* laws** do not impact the status of *federal* laws prohibiting marijuana and **cannot, under any circumstances, *compel* the violation of those federal laws**, as H.B. 3001 does.

As you are no doubt well aware, **Section 6 of H.B. 3001 (the bill replacing Proposition 2) requires state and local health departments to participate in the procurement, purchase, storage, distribution, transportation, and sale of marijuana**. In other words, it requires what federal law prohibits—which, under the Supremacy Clause, it *cannot* do, even if there is little or no risk of prosecution for the federal offenses.

This is not a close question, subject to *any* legal question or doubt: **The provisions in Section 6 of H.B. 3001, compelling state and local health departments to procure, purchase, store, distribute, transport, and sell marijuana, are in violation of the Supremacy Clause of the United States Constitution and invalid since they are in direct conflict with federal law**, including the Controlled Substances Act ("CSA").

> **A handful of states have proposed supplying marijuana directly to qualified patients via state-operated farms and distribution centers . . . . The CSA, however, clearly preempts any such state program.**

Robert A. Mikos, *On the Limits of Supremacy: Medical Mariijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421, 1432 (2009).

Please ask anyone involved, including our legislators, to find *one* lawyer—or even a non-lawyer familiar with the Supremacy Clause and principles of federal preemption—who will opine in writing that H.B. 3001 is *not* preempted by the CSA.

State and County officials, particularly the Governor, Attorney General, Mayor Jenny Wilson, members of County Councils and County Commissions, and health department officials have a duty to understand that **the involvement of state or county health department officials in the marijuana distribution scheme under H.B. 3001 not only subjects all participants to possible prosecution under federal law (each violation of the CSA is a federal felony), but it also puts at risk many millions of dollars of federal grant money** paid to, or to be paid to, the State of Utah and counties. They also have a duty to ask the courts for a declaratory judgment as to the validity of H.B. 3001 without any further delay.

As the courts have made clear, **any assurances that people will not be prosecuted** for violations of federal law, even if such assurances are communicated by agents of the Department of Justice or the Drug Enforcement Agency, are **entirely irrelevant to the preemption question**. If state law conflicts with federal law—regardless of the risk of prosecution—the state law is invalid.

Please read the op-ed piece authored by me, which can be found at https://www.sltrib.com/opinion/commentary/2018/12/16/rocky-anderson-smoking/. Also, please consider carefully the following two cases addressing the precise issue involved here:

> ***People v. Crouse***, 2017 CO 5, 388 P.3d 39 (found at https://caselaw.findlaw.com/co-court-of-appeals/1653194.html) (state constitutional provision requiring police to return marijuana to those acquitted on drug charges is invalid and preempted by the federal Controlled Substances Act because state law would require "distribution" of marijuana in conflict with federal law)
>
> > [A Colorado constitutional provision] requires law enforcement officers to return seized marijuana and marijuana products to medical marijuana patients after an acquittal. . . . The CSA, however, prohibits the distribution of marijuana without regard to whether state law permits its use for medical purposes. 21 U.S.C. § 841. The CSA defines "distribute" to mean "to deliver a controlled substance or a listed chemical." . . . The CSA further defines "deliver" to mean "the actual, constructive, or attempted transfer of a controlled substance." . . . **An officer returning marijuana to an acquitted medical marijuana patient will be delivering and transferring a controlled substance. Therefore, based on the CSA definition, when law enforcement officers return marijuana in compliance with section 214(2)(e), they distribute marijuana in violation of the CSA. Because compliance with one law necessarily requires noncompliance with the other, there is a "positive conflict" between [the Colorado constitutional provision] and the CSA** such that the two cannot consistently stand together.
>
> * * *

> **We therefore hold that the return provision of [the Colorado constitutional provision] is in positive conflict with and thus preempted by the federal Controlled Substances Act.**

Id., ¶¶ 14, 19.

Bourgoin v. Twin Rivers Paper Co., 2018 ME 77, 187 A.3d 10 (found at https://scholar.google.com/scholar_case?case=18152109543534109944&hl=en&as_sdt=6&as_vis=1&oi=scholarr) (employer could not be *required* by the state medical marijuana act to reimburse an employee for medical marijuana because the state statute's requirement was in direct conflict with the CSA)[7]

> [T]he dispositive question presented here is whether [the employer] is necessarily in violation of the CSA if it were to comply with the [Workers' Compensation] Board's order to pay for the medical marijuana that [the employee] is authorized to use pursuant to the [state's medical marijuana act].
>
> * * *
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> [T]he CSA makes it a crime to knowingly or intentionally "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" marijuana . . . , as well as to "knowingly or intentionally . . . . possess a controlled substance. . . ."
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> * * *
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> It also bears noting that aside from the exposure to a federal conviction itself, the penalties for violation of the CSA can be significant.
>
> * * *
>
> **[C]an [the employer] be *required* to pay for [the employee's] acquisition and use of marijuana—conduct that is proscribed by federal law but allowed by the State** because a [medical marijuana act] certification had been issued to him?
>
> **Compliance with both is an impossibility. Were [the employer] to comply with the hearing officer's order and knowingly reimburse [the employee] for the cost of the medical marijuana as permitted by the**

[7] *See* Andrea L. Schlafer, "Court Holds That Federal Law Trumps State Marijuana Law," found at https://njworkerscompblog.com/court-holds-that-federal-law-trumps-state-marijuana-law/.

> **[state medical marijuana act], [the employer] would be aiding and abetting [the employee]—in his purchase, possession, and use of marijuana**—by acting with knowledge that it was subsidizing [the employee's] purchase of marijuana.
>
> * * *
>
> [S]tate laws, such as the [state medical marijuana act], provide safe harbor from *state* prosecution, but do not—and cannot—create a "state right to commit a federal crime," meaning that the state law protections have no bearing on *federal* criminalization or exposure to federal prosecution for that conduct.
>
> * * *
>
> The preemptive effect of the CSA on state marijuana laws has been addressed in several cases involving circumstances similar to the one presented here, where a party—such as [the employer]—was confronted with a **mandate to engage in conduct that would be violative of the CSA**.
>
> * * *
>
> As these cases demonstrate, **a person's right to use medical marijuana cannot be converted into a sword that would require another party, such as [the employer], to engage in conduct that would violate the CSA**.
>
> * * *
>
> **[T]he magnitude of the *risk* of criminal prosecution is immaterial in this case.** Prosecuted or not, the fact remains that [the employer] would be forced to commit a federal crime if it complied with the directive of the Workers' Compensation Board.
>
> * * *
>
> The Legislature . . . does not have the power to change or restrict the application of federal law that positively conflicts with state law. . . . So long as marijuana remains a Schedule I substance under the CSA. . . , **an employer that is ordered to compensate an employee for medical marijuana costs is thereby required to commit a federal crime defined by the CSA**. . . . This creates a positive conflict between the CSA and this application of the [state medical marijuana act]. As invoked against [the employer], **the [state medical marijuana act] requires what federal law forbids, and the authority ostensibly provided by the [state] law is "without effect."**

Id., ¶¶ 2, 15, 17, 19, 20, 21, 22, 24, 28, 29.

A simple means for testing the lawfulness of the requirement in H.B. 3001 that health departments and employees participate in procuring, storing, transporting, distributing, and selling marijuana in violation of the CSA is to ask the courts if these requirements in H.B. 3001 are preempted by the CSA and, if so, to declare the requirements set forth in H.B. 3001 "without effect."

If you are interested in joining or supporting patient advocates in asking the courts to determine the validity of H.B. 3001, please let me know at your earliest convenience. No one can blame anyone for simply asking the courts: Is the statute requiring me to violate federal law valid?

The people of this state deserve an answer to this question before more precious state resources are spent fulfilling the illegal requirements of H.B. 3001, while exposing health department employees and perhaps others to potential criminal liability under the CSA. Also, regardless of any risk of criminal prosecution, the people of this state are entitled to know that our state laws are not in conflict with federal laws, in violation of the Supremacy Clause of the United States Constitution.

Sincerely,

Ross C. Anderson