STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL August 6, 2012	No. I12-001 (R12-008) Re: Preemption of the Arizona Medical Marijuana Act (Proposition 203)

To: The Honorable John Kavanaugh,
State Representative
Sheila Polk,
Yavapai County Attorney
Ken Angle,
Graham County Attorney
Brad Carlyon,
Navajo County Attorney
Daisy Flores,
Gila County Attorney
Barbara LaWall,
Pima County Attorney
Bill Montgomery,
Maricopa County Attorney
Ed Rheinheimer,
Cochise County Attorney
George Silva,
Santa Cruz County Attorney
Jon R. Smith,
Yuma County Attorney
Matt Smith,
Mohave County Attorney
James P. Walsh,
Pinal County Attorney
Michael Whiting,
Apache County Attorney
Derek Rapier,
Greenlee County Attorney

Question Presented

The following question has been presented to this Office by a member of the Legislature and thirteen of Arizona's fifteen county attorneys: Is the Arizona Medical Marijuana Act ("the AMMA") preempted by the federal Controlled Substances Act ("the CSA")?

Summary Answer

Yes, in part. The Supremacy Clause of the United States Constitution provides that federal law "shall be the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. Because of federal prohibitions, those AMMA provisions and related rules that authorize any cultivating, selling, and dispensing of marijuana are preempted. However, the AMMA provisions and related rules that pertain to the issuance of registry identification cards for patients and caregivers are not preempted because they merely serve to identify those individuals for whom the possession or use of marijuana has been decriminalized under state law and, therefore, are not authorizations to violate federal law.

Background

The AMMA was passed narrowly by voters in 2010 as Proposition 203. The purpose of the proposition, as explained by the Arizona Legislative Council's ballot measure analysis provided to all voters, was to "allow a 'qualifying patient' who has a 'debilitating medical condition' to obtain an 'allowable amount of marijuana' from a 'nonprofit medical marijuana dispensary' and to possess and use the marijuana to treat or alleviate the debilitating medical condition or symptoms associated with the condition." Ariz. Sec'y of State, Ariz. Ballot Prop. Guide, Gen. Election—Nov. 2, 2010, at 83 (quoting Ariz. Rev. Stat. ("A.R.S.") § 36-2801), *available at* http://azsos.gov/election/2010/info/PubPamphlet/english/prop203.pdf. In order to

facilitate its implementation, the AMMA requires that "[t]he Arizona Department of Health Services ["DHS"] . . . adopt and enforce a regulatory system for the distribution of marijuana for medical use, including a system for approving, renewing and revoking the registration of qualifying patients, designated caregivers, nonprofit dispensaries and dispensary agents." *Id.*; *see also* A.R.S. § 36-2803. After the Act took effect, DHS promulgated rules related to its implementation. *See* Ariz. Admin. Code §§ R9-17-101 to R9-17-323 (2011).

Following the AMMA's passage, the State brought questions relating to preemption to two different courts. In *Arizona v. United States*, No. 2:11-cv-01072-SRB (D. Ariz. 2011), the State expressed concern that while the "employees and officers of the State of Arizona have a mandatory duty to implement" the AMMA (subject to a legal action in mandamus), state officials "risk prosecution and penalties under federal criminal statutes if they faithfully comply with Arizona law." *See* Compl. at 15, ¶ 81. The Complaint sought declaratory relief and asked the federal court to determine whether the AMMA was preempted by federal law or whether implementation of the AMMA was subject to a "safe harbor" by virtue of certain actions of the federal government. *See generally id.* The district court judge, however, concluded that the State had not met "the constitutional or prudential components of ripeness" and dismissed its complaint. Order, *Arizona v. United States*, No. 2:11-cv-01072-SRB at 10 (D. Ariz. January 4, 2012). Similar issues were raised in a mandamus action against DHS in Superior Court for Maricopa County. *See* Minute Entry, *Compassion First LLC v. State*, No CV 2011-011290 at 5 (January 17, 2012). In that case the superior court judge recognized "the State's dilemma" explaining that "it is caught between the proverbial rock and hard place, between the AMMA and the CSA." *Id.* Nevertheless, the court declined to "determine issues of preemption and federal criminal liability," instead concluding that the "sole issue before [it was] whether the

State has discretion to put the implementation of the AMMA on hold while it" sought relief on those issues in federal court.[1] *Id.*

Analysis

The Supremacy Clause of the United States Constitution declares that the "Constitution, and the Laws of the United States . . . shall be the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. "Under this principle, Congress has the power to preempt state law." *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012). In passing the CSA, Congress recognized that "[t]he 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." 21 U.S.C. § 801(2). Furthermore, Congress found that "[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate" and concluded that "it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate." *Id.* § 801(5). "The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug [under the Act], Congress expressly found that the drug has no acceptable medical uses." *Gonzales v. Raich*, 545 U.S. 1, 27 (2005). Consequently, although the CSA "expressly contemplates that many drugs 'have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people' . . . it includes no exception at all for any medical use of marijuana." *United States v. Oakland Cannabis Buyers'*

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[1] Subsequent litigation in other matters has raised similar issues. *See, e.g.*, *State v. Okun*, No. 1 CA-CV 12-0094 (App. Feb. 9, 2012), docket *available at* http://apps.supremecourt.az.gov/aacc/appella/1CA%5CCV%5CCV120094.PDF; Answer of County Defendants, *White Mountain Health Cntr., Inc. v. Cnty. of Maricopa,* CV2012-053585 (Ariz. Sup. Ct. June 19, 2012).

Coop., 532 U.S. 483, 493 (2001) (internal citation omitted) (rejecting medical necessity argument as defense to criminal prosecution).

This issue has been ruled on in two (2010, 2011) appellate court cases, one in California and one in Oregon. The legal analysis in these cases controls this opinion. *See* Mich. Op. Att'y Gen. No. 7262, 2011 WL 5848600, at *4 n.11 (2011) (concluding that the recent Oregon and California decisions render prior decisions related to medical marijuana "of questionable value").

First, the Oregon Supreme Court concluded, in analyzing Oregon's similar medical marijuana program, that those provisions of the Oregon law that authorized "a use that federal law prohibits stand[] as an obstacle to the implementation and execution of the full purposes and objectives of the [CSA]." *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 529 (Or. 2010). That court explained that under U.S. Supreme Court precedent, where a state law authorizes "conduct that the federal Act forbids, 'it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 478 (1984)).

Similarly, the California Court of Appeals has held that where an ordinance creates an application process that permits it to operate a medical marijuana collective, the ordinance's authorization "stands as an obstacle to the accomplishment of [the] purpose [of the CSA]." *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633, 651 (App. 2011), *rev. granted*, 268 P.3d 1063 (2012).[2]

In contrast, a state's decision concerning the decriminalization of certain conduct stands on a different footing because "[w]hen an act is prohibited by federal law, but neither prohibited

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[2] In addition, "Congress continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration." Act of Oct. 21, 1998, Pub. L. No. 105-277, Div. F., 112 Stat. 2681-2761.

nor authorized by state law, there is no obstacle preemption." *Id.*; *accord Emerald Steel*, 230 P.3d at 530 ("Congress lacks authority to require states to criminalize conduct that the states choose to leave unregulated, no matter how explicitly Congress directs the states to do so."). Here, the AMMA decriminalizes the possession and use of marijuana of up to 2.5 ounces for those individuals (patients and caregivers) who have been issued certain identification cards. A.R.S. § 36-2811. But the language of the statute does not authorize anything. This provision, by the terms of the statute, is not preempted because it is beyond Congress's power to dictate the parameters of state criminal conduct. However, to the extent that an identification card *purports to authorize* an individual to cultivate marijuana or otherwise violate federal law, such language is preempted.[3]

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[3] You have also asked whether state and other government employees face federal criminal sanctions for administering, implementing, or complying with the AMMA. I am unable to answer this question as it lies in the discretion of the U.S. Department of Justice. Under federal law it appears that state and other government employees could be subject to prosecution for actions required by the AMMA. For example, the most recent statement of the then-Acting U.S. Attorney for Arizona stated that "[c]ompliance with the AMMA and Arizona regulations will not provide a safe harbor or immunity from federal prosecution for anyone involved in the cultivation and distribution of marijuana . . . [a]s such, state employees who conduct activities authorized by the AMMA are not immune from liability under the CSA." Letter of Acting U.S. Attorney Ann Birmingham Scheel to Governor Janice K. Brewer (Feb. 16, 2012).

Conclusion

In light of the legal principles outlined above, and the continuing concerns raised by the chief law enforcement officers of thirteen of Arizona's fifteen counties throughout the state, I must issue this opinion concluding that those provisions of the AMMA and related rules authorizing any cultivating, selling, and dispensing of marijuana are preempted. However, the AMMA provisions and related rules that pertain to the issuance of registry identification cards for patients and caregivers are not preempted because they merely serve to identify those individuals for whom the possession or use of marijuana has been decriminalized under state law and, therefore, are not authorizations to violate federal law.

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