Federal Obstacles to State Cannabis Research

Although State law encourages cannabis research, the federal Controlled Substances Act is a substantial impediment. The conflict between federal and state law has been a problem for courts throughout our history. Any analysis of a specific conflict starts with a review of federal preemption law.

The Supremacy Clause of the U.S. Constitution provides that federal law is "the supreme law of the land."[1] Under the Supremacy Clause, Congress has the power to preempt state law that "obstructs, contradicts, impedes, or conflicts with federal law."[2] Congress's preemption power is limited by the Tenth Amendment, which prohibits the federal government from forcing states to enact laws or by requiring state officers to assist the federal government in enforcing its own laws within the state.[3]

Courts have identified four ways in which a federal law can preempt a state law: express, field, conflict, and obstacle preemption.[4] First, express preemption arises when Congress provides a preemption clause that explicitly preempts state law. Second, field preemption arises when Congress intends to occupy an entire field, leaving no room for the state to supplement it. Third, conflict preemption is found when a state law conflicts with federal law, making it impossible to comply with both the state and federal law at the same time.[5] Finally, obstacle preemption arises when "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[6]

The language of the CSA makes clear that Congress did not intend for the CSA to *generally* preempt state law.[7] Section 903 states that:

> No provision of [the CSA] shall be construed as indicating an intent on the part of 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.[8]

However, courts have struggled to determine whether Congress intended for the CSA to preempt challenged state laws under conflict preemption, obstacle preemption, or both.[9]

State laws are preempted when simultaneous compliance with federal and state law is impossible. The CSA prohibits the use, distribution, possession, or cultivation of any

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[1] U.S. CONST., art. VI, cl. 2.
[2] Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1445 (2009).
[3] *Id*.
[4] *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 862 (2010).
[5] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73, (2000).
[6] *Id*. at 373.
[7] *See e.g., Qualified Patients Assn. v. City of Anaheim*, 187 Cal. App. 4th 734, 758 (2010).
[8] 21 U.S.C. § 903.
[9] *Compare County of San Diego v. San Diego NORML* 165 Cal. App. 4th 798, 823 (2008) (concluding that the federal CSA would preempt any state or local law which fails the test for conflict preemption) *with Qualified Patients Assn. v. City of Anaheim*, 187 Cal. App. 4th 734, 758 (2010) *and Pack v. Sup. Ct.*, 199 Cal. App. 4th 1070, (2011) (concluding that the federal CSA preempts conflicting laws under both conflict and obstacle preemption).

marijuana.[10] Conflict preemption issues may arise when public universities employ personnel to conduct research that inevitably violates the CSA. California law provides that public universities have the authority to "[p]rovide all technical and personnel services practicable or necessary for research, analysis, study or other action … including use of university facilities, collaboration and innovation among secondary level teachers, faculty, and instructors from various disciplines from the University." This section it raises concerns about whether public university personnel engaging in cannabis-related research will trigger a positive conflict with the CSA. It is difficult to predict how a court will resolve the federal preemption issue, since there is no universal agreement on the appropriate analysis.

In *People v. Crouse*, 388 P.3d 39 (2017), the Supreme Court of Colorado considered whether the Colorado Constitution, which required law enforcement officers to return medical marijuana seized from an individual acquitted of a state drug charge, was preempted by the CSA. The Court concluded that the return provision was preempted because it required law enforcement officers to return marijuana in violation of the CSA, creating a positive conflict.

While the Colorado case can be distinguished from our efforts, if the federal government challenges a university engaged in cannabis-related research, based on a claim that the research will require public university personnel to violate the CSA, a court might employ the Colorado analysis. As one commentator noted in reference to medical marijuana, "[A] positive conflict would seem to arise anytime a state engages in, requires, or facilitates conduct or inaction that violates the CSA. In the same way that a state law requiring X cannot be reconciled with a federal law banning X, state laws that engage in, require, or facilitate the possession, use, distribution, or manufacture of drugs cannot consistently stand together with the CSA."[11]

States can ignore conduct Congress forbids by exempting that conduct from state punishment, since Congress cannot order states to criminalize behavior in the first instance.[12] However, "granting state police (or other state officials) immunity … for distributing or manufacturing marijuana would render the express preemption language … meaningless."[13] "[S]tates may not engage in, conspire to engage in, nor aid and abet conduct that violates the CSA."[14] Indeed, "no state has yet directly participated in the manufacture or distribution of marijuana, and for good reason" since "such state distribution programs are clearly preempted by federal law, and if they were ever executed, they would expose state agents to federal criminal liability."[15]

The second prong of the implied preemption analysis assesses whether a state law "creates an unacceptable 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[16] "If the federal act's operation would be frustrated and its provisions refused their natural effect by the operation of the state or local law, the latter must yield."[17]

The legislative history shows that Congress intended to distinguish between legitimate and illegitimate channels of drug trafficking and control the distribution chain through a

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[10] *See* 21 U.S.C. §§ 841(a), 844(a).
[11] Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1451 (2009).
[12] *Id*.
[13] *Id*. at 1458.
[14] *Id*.
[15] *Id*. at 1432.
[16] *Wyeth*, 555 U.S. at 563-64 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).
[17] *Qualified Patients Assn. v. City of Anaheim*, 187 Cal. App. 4th 734, 760 (2010).

registration system.[18] The Report of the Senate Judiciary Committee on the Controlled Substances Act of 1969 states that "[t]he control of *drug abuse* and of both the *legitimate and illegitimate traffic in drugs* is the main objective of the bill."[19] The House Committee Report provides that the goal of the CSA is to "reduce the availability of drugs subject to abuse except through legitimate channels of trade and for legitimate uses" and notes the importance of maintaining "effective controls against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels."[20]

The Supreme Court in *Gonzales v. Raich*, 545 U.S. 1 (2005), reaffirmed Congress's concerns "with the need to prevent the diversion of drugs from legitimate to illicit channels. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels."[21] "To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA."[22] The Court explained that "[b]y classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study."[23]

The federal government will likely maintain that state law frustrates the purpose and operation of the CSA. The closed registration system was used to "effectual [the] goals" of Congress by controlling drug abuse and drug trafficking. Congress stressed the importance of the closed registration system by implementing penalties for registrants for illegal distribution. The closed registration system allows for the monitoring of a highly interconnected distribution system by enabling the Department of Justice "to keep track of all drugs subject to abuse manufactured or distributed in the United States in order to prevent diversion of these drugs from legitimate channels of commerce."[24] If state law is not preempted by the CSA, states could easily circumvent the closed registration system and compromise the stability and integrity of the system. This would not only frustrate the purpose of the CSA, but it would also hinder the enforcement power of the CSA.

The federal government may also argue that the CSA provides specific exceptions allowing for the lawful distribution of drugs by certain registered persons for the purpose of conducting research. Congress was well aware of the question of legitimate handling of drugs and carved out the exceptions to address such concerns.[25] Allowing for states to circumvent the registration process completely frustrates the purpose of these exceptions.

However, even if the court finds that the proposed legislation is preempted by the CSA, it may still be valid and enforceable if research falls within the specific exception of CSA section 885(d) exemption, which provides:

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[18] *See* U.S. v. Cortes-Caban, 691 F.3d 1,44 (2012) *citing* H.R. Rep. 91–1444, at 4569 (stating the bill requires "registration of manufacturers, wholesalers, retailers, and all others in the legitimate distribution chain, and makes transactions outside the legitimate distribution chain illegal").
[19] S.Rep. No. 91–613, at 4 (1969) (emphasis added).
[20] H.R.Rep. No. 91–1444, at 1970 U.S.C.C.A.N. 4566 at 4574, 4607.
[21] *Gonzales v. Raich*, 545 U.S. 1, 13 (2005).
[22] *Id*. *citing* 21 U.S.C. §§ 841(a)(1), 844(a).
[23] *Gonzales v. Raich*, 545 U.S. 1, 14 (2005).
[24] H.R.Rep. No. 91–1444 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4589.
[25] *See* 21 U.S.C. § 822(b).

(d) Immunity of Federal, State, local and other officials
… no civil or criminal liability shall be imposed by virtue of this subchapter upon … any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

This exception is narrow. As Kenneth Baumgartner notes, "while law enforcement officials are exempt from registration [with the DEA], law enforcement analytical laboratories are not; even the DEA and FBI laboratories are registered."[26] This requirement is required to "maintain the integrity of the closed distribution system."[27] The general rule is that any person who handles controlled substances must be registered with DEA.[28] The exception is typically understood to protect law enforcement tactics like sting operations in which officers handle drugs, transfer drugs to DEA laboratory agents for analysis, or to a clerk of court at trial."[29] Section 885 is subject to two limitations, both of which apply to exceeding authority in procuring or executing a search warrant.[30] These limitations support the federal government's assertion that section 885(d) was intended for law enforcement officers only.

Courts have generally rejected attempts to expand the scope of section 885(d). In *U.S. v. Rosenthal,*[31] the Court ruled that the defendant, a cultivator who was "deputized" by the City of Oakland to assist in implementing its medical marijuana ordinance, could not assert an immunity defense since his cultivating marijuana for medical use did not constitute "enforcement" of a law or ordinance relating to controlled substances. The Court noted that "enforcement" means "to compel compliance with the law." The Court also noted that "[s]ection 885(d) cannot reasonably be read to cover acting pursuant to a law which itself is in conflict with [the CSA]."[32] The Court in *County of Santa Cruz v. Ashcroft*[33] rejected the claim that a city ordinance could immunize city-authorized marijuana cooperative because it conflicted with CSA. The Court noted that any other result "would mean that a state or municipality could exempt itself from the Controlled Substances Act."[34]

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[26] *See* Kenneth Baumgartner, *Controlled Substances Handbook*, 2006 WL 3432484, §1301.24(c).
[27] *Id*.
[28] *Id*.
[29] *U.S. v. Cortes-Caban*, 691 F.3d 1, 20 (2012).
[30] *Id*. *citing* 21 U.S.C. § 885(d).
[31] 454 F.3d 943 (9th Cir. 2006)
[32] *U.S. v. Rosenthal*, 454 F.3d 943, 1239 (9th Cir. 2006).
[33] 279 F. Supp. 2d 1192 (N.D. Cal. 2003),
[34] *See County of Santa Cruz, Cal. v. Ashcroft*, 279 F. Supp. 2d 1192, 1212 (2003).