KLEINBARD LLC

Memorandum

TO	Pennsylvania Cannabis Coalition	CC	
FROM	Kleinbard LLC	DATE	March 19, 2025
RE	Preemption principles implicated by LCB sale of recreational marijuana		

The Pennsylvania Cannabis Coalition, a trade organization composed of medical marijuana permit holders in the Commonwealth of Pennsylvania has requested that we assess whether the sale of recreational marijuana in stores operated and managed by the Pennsylvania Liquor Control Board (the "LCB") would likely be preempted by federal laws.

A. Overview.

Over time, various amendments to the Pennsylvania Liquor Code, *see* 47 P.S. §§ 1-101, *et seq*. have suggested the legalization of adult-use cannabis; the procurement, distribution, and sale of which would be overseen by the LCB and the state-run liquor stores under LCB's purview. Presumably the LCB's duties and powers in this respect would largely mirror the regulatory authority it presently exercises relative to the distribution and sale of wine and liquor.

B. The Federal Controlled Substances Act and its preemptive effect.

In order to understand the preemption problem with an LCB role, it is first necessary to briefly discuss the contours of federal preemption in the context of controlled substances. Under the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, *see* 21 U.S.C. §§ 801-971 (the "CSA"), cannabis and substances containing "cannabimimetic agents" are Schedule I controlled substances.[1] Accordingly, it is a federal crime to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" such substances. 21 U.S.C. § 841(a)(1). While its application to purely intrastate activity was initially in doubt, in

[1] *See* 21 U.S.C. §§ 812(c)(10) & 812(d)(1).

Gonzales v. Reich, 545 U.S. 1 (2005), the United States Supreme Court confirmed that the CSA's prohibition on marijuana was a proper exercise of Congress's power to regulate interstate commerce. Of course, as evidenced by the legalization of marijuana in various states under their respective state laws, the CSA does not necessarily preempt every law that is inconsistent with it. Rather, state laws are preempted only insofar as "there is a positive conflict" with the CSA, such that "the two cannot consistently stand together."[2] As explained below, where a state entity engages in conduct that is plainly prohibited by federal law, a "positive conflict" is likely to occur.

C. Analysis.

Any framework carving out an LCB role is unlikely to pass muster under precepts of federal preemption because, unlike many de-criminalization statutes which merely refuse to take state action in furtherance of the CSA, an LCB role ***requires*** state action that plainly violates the CSA. Specifically, the LCB, which is a Commonwealth agency, *see* 71 P.S. § 732-102, would be directly responsible for procuring, marketing, distributing, and selling cannabis in state-owned liquor stores. Courts, however, have repeatedly invalidated provisions requiring affirmative actions prohibited by the CSA. In fact, many of the "positive conflicts" have been found by courts under far more attenuated circumstances.

For instance, in *People v. Crouse*, 388 P.3d 39 (Colo. 2017), the Colorado Supreme Court held the state constitutional amendment permitting the use of medical cannabis was preempted by the CSA insofar as it required police officers to return marijuana seized from patients acquitted of state charges. Specifically, explaining that the CSA prohibits "the actual, constructive, or attempted transfer of a controlled substance[,]" the Court concluded that "when law enforcement officers return marijuana in compliance with section 14(2)(e), they distribute marijuana in violation of the CSA." *Id.* at 42 (citing 21 U.S.C. §§ 802(8) & 802(11)).

Similarly, in *Garcia v. Tractor Supply Co.*, 154 F. Sup. 3d 1225 (D.N.M. 2016), the United States District Court for the District of New Mexico invalidated aspects of the state's legalization scheme requiring an employer to accommodate an employee's use of marijuana, holding that those provisions were pre-empted by Federal law because they "would mandate [the employer] to permit the very conduct the CSA

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[2] 21 U.S.C. § 903 ("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.").

proscribes." *Garcia*, 154 F. Supp. 3d at 1230; *see also Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 529 (Or. 2010) (holding that Oregon's medical marijuana statute was pre-empted and, therefore invalid insofar as it required employers to provide reasonable accommodations under the Americans With Disabilities Act for use of medicinal cannabis (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992))).

By contrast, courts have almost universally held that statutes generally regulating the possession, use, or sale of cannabis – including those establishing licensing schemes, identification programs, and zoning restrictions – are not pre-empted by Federal law because they do not ***mandate*** a direct violation of the CSA.

For instance, in *City of Palm Springs v. Luna Crest Inc.*, 200 Cal.Rptr.3d 128 (Cal. App. 4th 2016), the California Court of Appeals held that a City's regulation of medical marijuana dispensaries was not pre-empted by Federal law because the "permitting requirements [did] not require anything that the federal Controlled Substances Act forbids." *Luna Crest Inc.*, 200 Cal.Rptr.3d at 132. Notably, that panel rejected the argument that "the City's involvement not only in allowing a certain number of dispensaries to operate, but in overseeing their operation through regulations, including testing requirements regarding safety and potency of the marijuana and marijuana products being dispensed[,]" created a "positive conflict" with the CSA. *Id.* In this regard, the Court specifically explained that the CSA "does not direct local governments to exercise their regulatory, licensing, zoning, or other power in any particular way, so exercise of those powers with respect to the operation of medical marijuana dispensaries that meet state law requirements would not violate conflicting federal law." *Id.* (internal quotation marks omitted); *see also White Mountain Health Ctr., Inc. v. Maricopa Cty.*, 386 P.3d 416, 428 (Ariz. Ct. App. 2016) (reaching the same conclusion with regard to Arizona's law).

Similarly, in *County of San Diego v. San Diego NORML*, 81 Cal.Rptr.3d 461 (Cal. App. 4th 2008), the California Court of Appeals held that a provision of the California's statute requiring counties to issue identification cards to persons authorized to possess, transport, deliver, or cultivate marijuana under its medical marijuana laws was not pre-empted because the "the card merely identifies those persons California has elected to exempt from California's sanctions." *San Diego NORML*, 81 Cal.Rptr. 3d at 481.

Against this backdrop, a statutory role for LCB to distribute cannabis would likely be preempted in its entirety given that it requires a Commonwealth agency and its employees to violate the CSA. In particular, it would ***require*** the LCB and its employees to directly "distribute, or dispense, or possess with intent to . . . distribute, or dispense" cannabis in violation of the CSA. 21 U.S.C. § 841(a)(1). Indeed, one of the

leading legal scholars on the subject (who has suggested that many state laws permitting the sale or use of cannabis would escape preemption) has cautioned that "state distribution programs are clearly preempted by federal law, and if they were ever executed, they would expose state agents to federal criminal liability." Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421, 1432 (2009). In this regard, analyzing the above-described precepts of preemption, Professor Mikos further explains that "[t]he CSA's clear ban on state-run farms and dispensaries explains why states have thus far balked at supplying marijuana directly, in spite of the obvious advantages of directly controlling the growing and distribution of marijuana in medical use programs." *Id.* at 1459.

Notably, in Maine, proposed legislation that would directly involve the state in the distribution of marijuana "was abandoned out of concern that the program was preempted by federal law; state officials also feared the state might lose $19 million in federal grants and that its employees could be held criminally liable for violating federal law." *Id.* at 1459 n.135. As such, giving LCB a cannabis distribution role would likely be ineffectual and would also likely expose those employed by LCB to criminal sanctions.

These problems are further compounded by other considerations. For instance, federally-regulated financial institutions may not knowingly accept funds derived from the sale of marijuana. *See, e.g.*, *Fourth Corner Credit Union v. Fed. Reserve Bank of Kansas City*, 154 F. Supp. 3d 1185, 1188 (D. Colo. 2016), *vacated on other grounds*, 861 F.3d 1052 (10th Cir. 2017). Accordingly, the sale of marijuana at state-run liquor stores could taint the entirety of the State Stores Fund, which is the repository of "[a]ll moneys, except fees to be paid into the Liquor License Fund … collected, received or recovered under [the Liquor Code][.]" 47 P.S. § 8-802(a). In turn, comingling of these funds not only causes difficulties with the General Fund, but also jeopardizes the retirement and disability accounts of enforcement officers and other LCB employees. *See* 71 Pa.C.S. § 5937(a) ("Enforcement officers' benefit account"); *see also* 53 P.S. § 637(d)(2) ("Enforcement officer disability benefits").

In addition, an LCB role could have various adverse consequences on individuals and entities who regularly conduct business with the LCB. For instance, real estate owners who lease the buildings in which the state liquor stores are located would likely be barred from seeking bankruptcy protection. *See, e.g.*, *In re Rent-Rite Super Kegs W. Ltd.*, 484 B.R. 799, 805 (Bankr. D. Colo. 2012) (holding debtor who leased approximately 25% of its warehouse space to legalized marijuana cultivators was not entitled to seek bankruptcy protection).

D. Conclusion.

In sum, a statutory role for LCB in the legalization of cannabis is fundamentally defective and would be preempted by federal law.