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Citation: 22 Stan. L. & Pol'y Rev. 633 2011

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This work was originally published as Robert A. Mikos, A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana in 22 Stan. L. & Pol'y Rev. 633 2011.

A CRITICAL APPRAISAL OF THE DEPARTMENT OF JUSTICE'S NEW APPROACH TO MEDICAL MARIJUANA

Robert A. Mikos*

INTRODUCTION

The Obama Administration has embarked upon a much-heralded shift in federal policy toward medical marijuana. Eschewing the hardball tactics favored by earlier administrations, Attorney General Eric Holder announced in October 2009 that the Department of Justice (DOJ) would stop enforcing the federal marijuana ban against persons who comply with state medical marijuana laws.

On the surface, the Non-Enforcement Policy (NEP) signals a welcome reprieve for the more than 400,000 people now using marijuana legally under state law and the thousands more who supply them. Under the Clinton and George W. Bush administrations, the DOJ had campaigned vigorously against medical marijuana programs. For example, the Drug Enforcement Administration (DEA) raided hundreds of medical marijuana dispensaries and threatened to derail the careers of physicians who recommended marijuana to their patients. Under the Obama Administration, it would seem, patients, physicians, and dispensaries can breathe a lot easier.

What is more, the NEP appears to cede an important policy domain to the states. Medical marijuana has been one of the most salient and contentious federalism battlegrounds of the past fifteen years. Federal officials have railed against the intransigence of the states; state officials have protested overreaching by the national government; and the Supreme Court has twice weighed in to settle jurisdictional disputes over the drug. The NEP seemingly calls a truce in this war, but its impact could extend more broadly. The states' pioneering efforts regarding medical marijuana have already fueled calls for

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even more ambitious drug law reforms, including proposals to legalize marijuana outright. The NEP could bolster calls for reform and accelerate the pace of change.

Given the significance of the medical marijuana issue in both criminal law and federalism circles, this Article sets out to provide the first in-depth analysis of the changes wrought by the NEP. In a nutshell, the Article suggests that early enthusiasm for the NEP is misguided; on close inspection, the NEP represents at most a very modest change in federal policy. To begin, the Article suggests that the NEP will not necessarily stop federal law enforcement agents from pursuing criminal prosecutions. In a twist of irony, the non-enforcement policy itself is not enforceable. It does not create any legal rights a court could invoke to dismiss a criminal case. Even the DOJ will have a difficult time ensuring that federal prosecutors comply with the agency's own stated policy.

Even assuming the NEP ends all criminal prosecutions against state-law-abiding dispensaries and users, federal law could still obstruct state medical marijuana programs by imposing—or allowing others to impose—a wide range of civil and private sanctions on medical marijuana users and suppliers. At bottom, the problem is that the NEP does not repeal the federal ban on marijuana—marijuana technically remains illegal under federal law and that ban triggers a host of *civil* sanctions on top of the criminal sanctions controlled by the DOJ. For example, the Department of Housing and Urban Development (HUD) can deny federal housing subsidies to medical marijuana users, and pharmaceutical companies could potentially bring civil RICO actions against marijuana dispensaries. What is more, the federal ban arguably preempts states from shielding marijuana users and dispensaries from sanctions imposed by private parties. For example, as long as marijuana remains illegal under federal law, employers can likely avoid liability under state law for discriminating against employees who use the drug for medical purposes. Metaphorically, the federal ban is a hydra, only one head of which has been severed by the NEP (and one that could too easily be regrown). The labor of ending federal prohibition is not yet complete.

I do not mean to overstate the threat federal law poses to the medical marijuana movement. As I have argued elsewhere, the federal government lost the war against medical marijuana long before the NEP.¹ It never had enough law enforcement resources to quash medical marijuana on its own, and it could not compel the states' assistance. "Medical marijuana use . . . survived and indeed thrived in the shadow of the federal ban."² The question now is whether the federal government will allow the states to construct a sensible regulatory regime free of federal interference or whether it will instead wage an ongoing guerilla-style campaign against medical marijuana—one with many casualties,

1. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1464-68 (2009).

2. *Id.* at 1482.

but with no real victory possible.

The Article proceeds as follows. Part I provides some background on medical marijuana laws, state and federal. It also details the NEP and the apparent shift in federal enforcement policy. Part II explains why the NEP does not necessarily preclude federal criminal prosecutions, even when defendants faithfully comply with state law. Part III then discusses other civil sanctions that could still be levied against medical marijuana dispensaries and users. It also examines the possibility that certain state laws that purport to shield marijuana users and suppliers from private sanctions could be successfully challenged as preempted.

I. BACKGROUND

This Part provides a brief introduction to federal and state medical marijuana laws and enforcement practices.³ Subpart A discusses the substance of federal and state law. Subpart B details the federal law enforcement response to state medical marijuana programs under the Clinton and George W. Bush administrations. Subpart C then discusses the details of the Obama Administration's apparent change in course, embodied in the NEP.

A. Marijuana Law

Since the Controlled Substances Act (CSA) was passed in 1970, the federal government has banned the possession, cultivation, and distribution of marijuana.⁴ Violations of the ban can trigger harsh criminal and civil sanctions, especially for trafficking offenses.⁵

Federal law does not distinguish between medicinal and recreational uses of marijuana: both are forbidden. Lawmakers have repeatedly rebuffed campaigns to reschedule marijuana under the CSA, a step that would permit marijuana to be used for some medical purposes.⁶ Likewise, courts have refused to carve out exceptions to the CSA, even for individuals who claim a dire need for the drug.⁷

3. *See id.* at 1427-36 (providing a more in-depth discussion of state and federal medical marijuana laws and enforcement practices).

4. 21 U.S.C. §§ 841, 844 (2006).

5. *Id.* *See also* Mikos, *supra* note 1, at 1435 (discussing sanctions imposed under the CSA).

6. *See* Mikos, *supra* note 1, at 1434-35 (discussing failed legislative and administrative proposals to reschedule marijuana at the federal level).

7. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001) (concluding that the terms of the CSA "leave no doubt that the [medical necessity] defense is unavailable" under the statute, given Congress's necessary determination that "marijuana has no medical benefits worthy of an exception"). President Jimmy Carter did create a compassionate use program in 1978 which allowed enrolled individuals to use marijuana legally for therapeutic purposes. That program, however, has enrolled only thirty-six

Despite the federal government's steadfast opposition to recognizing marijuana as medicine, a large and growing number of states have reformed their own laws regarding medical marijuana. Starting with California in 1996, fifteen states have now legalized medical marijuana under state law.⁸

The particulars of these state laws vary, but as a general matter, all of them permit a resident to possess, consume, and grow marijuana by obtaining a qualifying diagnosis and recommendation from a board-licensed physician. Most states have also adopted regulations to help curb abuses of the laws. For example, states require physicians to conduct a bona fide medical examination before recommending marijuana to a patient.⁹ Every state except California requires that recommendation to be in writing¹⁰—in California, an oral recommendation will do.¹¹ In twelve states, an agency must review the diagnosis and recommendation before a patient may begin treatment.¹² And every state except—you guessed it, California—limits the quantity of marijuana that qualified patients may legally possess at one time.¹³

A handful of states also permit third-party vendors to supply marijuana to qualified patients.¹⁴ Regulations on the operation of such dispensaries vary widely across states and even within individual states. For example, some states restrict the compensation that dispensaries may receive for providing marijuana.¹⁵ Some states also limit the number of patients that each dispensary may serve.¹⁶ California requires patients to form cooperatives and permits these

participants since its inception, and it stopped admitting new participants under the George H. W. Bush Administration. See Mikos, *supra* note 1, at 1433 (discussing program).

8. California (1996); Oregon (1998); Washington (1998); Alaska (1999); Maine (1999); Colorado (2000); Hawaii (2000); Montana (2004); Nevada (2004); Vermont (2004); Rhode Island (2006); New Mexico (2007); Michigan (2008); New Jersey (2009); and Arizona (2010).

9. *E.g.*, ALASKA STAT. § 17.37.010(c) (2010).

10. *E.g.*, WASH. REV. CODE § 69.51A.010 (2010).

11. CAL. HEALTH & SAFETY CODE § 11362.5(d) (West 2010) (requiring the “written or oral recommendation or approval of a physician”).

12. *E.g.*, N.M. CODE R. §§ 7.34.3.3, 7.34.3.9 (LexisNexis 2010).

13. *E.g.*, ME. REV. STAT. tit. 22, § 2383-A (2009) (stating that a patient may possess up to 2.5 ounces of usable marijuana and six plants). The California Supreme Court recently invalidated (modest) legislatively-imposed quantity limitations. *People v. Kelly*, 222 P.3d 186, 196 (Cal. 2010).

14. *E.g.*, OR. REV. STAT. § 475.304 (2010); N.M. STAT. ANN. § 26-2B-4(F) (West 2010) (“A licensed producer shall not be subject to arrest, prosecution or penalty, in any manner, for the production, possession, distribution or dispensing of cannabis pursuant to the . . . Compassionate Use Act.”).

15. OR. REV. STAT. § 475.304 (2010) (stating that growers may be reimbursed only for the cost of materials and utility bills, and not their labor); N.M. CODE R. § 7.34.4.8 (LexisNexis 2010) (requiring that licensed growers be non-profit and not provide volume discounts).

16. OR. REV. STAT. § 475.320(2)(c) (2010) (requiring that each grower may serve at most only four qualified patients).

cooperative dispensaries to supply only cooperative members.¹⁷ Few states have yet adopted comprehensive regulations of dispensaries, but local governments have increasingly sought to fill in the regulatory gaps. Many local communities have imposed zoning and licensing requirements on marijuana dispensaries.¹⁸ A few have even sought to banish dispensaries from their jurisdictions.¹⁹

States also purport to shield patients, physicians, and dispensaries from sanctions that could otherwise be imposed by private actors. For example, every state bars licensing boards, hospitals, and other health-care entities from sanctioning physicians for recommending marijuana to their patients.²⁰ A few states also shield tenants from being evicted for possessing, using, or cultivating marijuana on rental property.²¹ And a few states are now seeking to bar employers from discriminating against employees who use marijuana legally under state law.²²

B. The Early Federal Response to State Medical Marijuana Laws

The federal government responded swiftly to the passage of the first state medical marijuana law in California in 1996.²³ In February 1997, the Clinton Administration's drug czar, former General Barry McCaffrey, issued a harsh statement outlining the steps the federal government would take to thwart the nascent medical marijuana movement.²⁴ Among other things, McCaffrey threatened to vigorously prosecute persons who supplied medical marijuana, revoke the prescription writing authority of physicians who recommended marijuana to patients, and deny various federal benefits (including licenses) to

17. CAL. HEALTH & SAFETY CODE § 11362.765 (West 2010) (exempting cooperatives that grow marijuana on behalf of qualified patients from legal sanctions).

18. *E.g.*, *Ams. for Safe Access v. City of Los Angeles*, No. BC433942 (Cal. Super. Ct. Dec. 10, 2010) (unpublished) (discussing—and enjoining—restrictions imposed by the city of Los Angeles).

19. *E.g.*, John Hoeffel, *Medical Marijuana Case Appears Headed Back to Trial*, L.A. TIMES (Dec. 6, 2010, 6:08 PM), <http://latimesblogs.latimes.com/lanow/2010/12/medical-marijuana-case-appears-headed-back-to-trial.html> (discussing legal challenge to Anaheim's ban on medical marijuana dispensaries).

20. *E.g.*, ALASKA STAT. § 17.37.030(c) (2010) (providing that a physician shall not be subjected to any sanction for recommending marijuana); HAW. REV. STAT. §§ 329-121, 329-123(c) (2010) (same); WASH. REV. CODE § 69.51A.030 (2010) (same).

21. *E.g.*, OR. REV. STAT. § 90.396(1)(f)(B)(i) (2010).

22. *E.g.*, S.B. 129, 2011-12 Leg. Sess. (Cal. 2011), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0101-0150/sb_129_bill_20110127_introduced.html (proposing to ban employment discrimination against medical marijuana users in California).

23. *See Mikos, supra* note 1, at 1463-69 (providing a more complete discussion of the federal response to state medical marijuana laws).

24. Administrative Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (Feb. 11, 1997).

anyone who used marijuana pursuant to California law.²⁵

The campaign against medical marijuana continued throughout the George W. Bush Administration. U.S. Attorneys prosecuted several high-profile medical marijuana suppliers.²⁶ The DEA employed an arsenal of weapons against medical marijuana dispensaries, which had begun to proliferate in California (and elsewhere). For example, the DEA conducted nearly two hundred raids on medical marijuana dispensaries in California alone,²⁷ and it warned landlords that it would seize their property if they did not immediately evict marijuana-dispensing tenants.²⁸

Stymied in their efforts to reschedule marijuana or at least suspend enforcement of the federal ban, medical marijuana proponents turned to the federal courts for protection. Invoking the rights of the states and of the people, proponents hoped to overturn—or at least narrow the application of—the federal marijuana ban. But when the Supreme Court weighed in on the issue, it repeatedly upheld the federal government’s power to prosecute persons caught possessing, growing, or distributing marijuana for medical purposes. In *United States v. Oakland Cannabis Buyers’ Cooperative*, for example, the Court rejected the medical necessity defense of a city-licensed medical marijuana dispensary.²⁹ In *Gonzales v. Raich*, the Court declared that Congress could regulate even the non-commercial, intra-state cultivation and consumption of marijuana.³⁰ These decisions left no doubt that the federal government could continue to sanction anyone who cultivated, distributed, or possessed marijuana.

C. The Obama Non-Enforcement Policy (NEP)

In 2009, however, the Obama Administration broke with its predecessors and announced a new federal policy toward medical marijuana—a policy to cease DOJ enforcement of the federal ban. The new NEP was formally promulgated in an October 2009 memorandum to U.S. Attorneys from Deputy Attorney General David Ogden.³¹ The memorandum urged federal prosecutors

25. *Id.*

26. See, e.g., Bob Egelko, *Pot Advocate Gets 1 Day in Jail and Gives Judge a Piece of His Mind*, S.F. CHRON., July 7, 2007, at B3 (detailing Bush II Administration’s prosecution of Ed Rosenthal, the so-called guru of ganga).

27. MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS, at S1 (2008), available at http://docs.mpp.org/pdfs/download-materials/SBSR_NOV2008_1.pdf.

28. Wyatt Buchanan, *Pot Dispensaries Shut in Response to Federal Threat*, S.F. CHRON., Feb. 7, 2008, at B1 (reporting that DEA had recently warned dispensary landlords that they could face forfeiture and possible criminal sanctions for renting property to drug cooperatives).

29. 532 U.S. 483, 491 (2001).

30. 545 U.S. 1 (2005).

31. Memorandum from David W. Ogden, Deputy Attorney Gen., to Selected U.S. Attorneys (Oct 19, 2009) [hereinafter “NEP Memorandum”], available at

not to enforce the federal marijuana ban against persons who act in “clear and unambiguous compliance” with state medical marijuana laws.³² Ogden simultaneously affirmed the Administration’s commitment to the war on drugs; the memorandum, for example, urges U.S. Attorneys to continue to target “significant traffickers” of illegal narcotics and “manufacturing and distribution networks.” But he suggested that prosecuting medical marijuana defendants was not the most efficient use of the federal government’s scarce capacity to wage that war.³³

At first glance, the NEP seemingly represents a ground-breaking shift in federal drug policy—and much commentary welcomed it as such.³⁴ It appears to suspend the federal government’s longstanding campaign against medical marijuana. Indeed, it represents only the first time since the ban was adopted that the federal government has explicitly renounced enforcement, albeit only against persons who use the drug pursuant to state law.

Ultimately, the success of the policy can only be measured against its chief objectives. First, the NEP is designed to reprioritize the use of the federal government’s scarce criminal justice resources.³⁵ One could say that it does not constitute an endorsement of medical marijuana. Instead, it merely reflects the

<http://blogs.usdoj.gov/blog/archives/192>. The full text of the memorandum appears in the Appendix to this Article.

32. *Id.*

33. *Id.*

34. For commentary on the NEP, see, for example, Editorial, *Medical Marijuana’s Merit: Obama Administration’s Policy Change Is Right Call*, DALLAS MORNING NEWS, Oct. 26, 2009, at A12 (“[The NEP memorandum] reverses longstanding federal policy and marks a step toward separating those who could be helped by marijuana’s therapeutic properties from those who criminally distribute or use it.”); Editorial, *Good Sense on Medical Marijuana*, N.Y. TIMES, Oct. 21, 2009, at A30 (“Attorney General Eric Holder Jr. has made the right decision, calling off prosecutions of patients who use marijuana for medical purposes or those who distribute it to them—provided they comply with state law. It is a welcome reversal of the Bush administration’s ideologically driven campaign to prosecute dispensaries.”); Christopher Beam, *Will Obama’s New Medical Marijuana Directive Actually Change Anything?*, SLATE (Oct. 19, 2009), <http://www.slate.com/id/2232915/> (suggesting the NEP will end federal prosecutions of medical marijuana dispensaries); Chris Weigant, *Holder’s Baby Step on Medical Marijuana*, HUFFINGTON POST (Oct. 19, 2009), http://www.huffingtonpost.com/chris-weigant/holders-baby-step-on-medi_b_326603.html (calling the NEP a “historic shift in the War on Drugs,” but one that “does not go far enough”). Commentators had similar reactions to earlier statements made by the Obama Administration suggesting the DOJ would suspend raids of medical marijuana dispensaries. *E.g.*, Ryan Grim, *Holder Vows to End Raids on Medical Marijuana Clubs*, HUFFINGTON POST (Feb. 26, 2009), http://www.huffingtonpost.com/2009/02/26/holder-vows-to-end-raids_n_170119.html (suggesting that the decision to no longer conduct raids “marks a major shift from the previous administration”); Josh Meyer & Scott Glover, *Medical Marijuana Dispensaries Will No Longer Be Prosecuted, U.S. Attorney General Says*, L.A. TIMES (Mar. 19, 2009), <http://articles.latimes.com/2009/mar/19/local/me-medpot19> (reporting how policy advocates viewed statements as a “sweeping change in federal drug policy” and a “landmark turnaround” from the approach of the George W. Bush Administration).

35. NEP Memorandum, *supra* note 31.

new Administration's belief that federal law enforcement resources could be better spent enforcing other federal criminal laws (e.g., terrorism crimes). Second, the NEP is also designed to empower state governments to regulate medical marijuana according to local preferences. It implicitly recognizes that some states do not share the federal government's hostility toward marijuana. And while it does not legalize medical marijuana under federal law, it does seemingly allow these states to do so under state law—ostensibly free of the obstacles imposed by prior administrations. To users and their suppliers, then, the NEP is arguably as good as federal legalization, at least in states that allow the drug.

The next two Parts analyze the NEP against these dual objectives. I ultimately conclude that the NEP does not accomplish either goal satisfactorily. In Part II, I explain why the NEP does not necessarily stop federal law enforcement agents from pursuing criminal prosecutions. And in Part III, I explain why the NEP does not clear away all of the legal obstacles confronting state medical marijuana programs. In short, the NEP is a step—but only a very small one.

II. THE NEP AND CRIMINAL PROSECUTIONS

The NEP is intended to curb criminal prosecutions of medical marijuana dispensaries that comply with state law. I argue, however, that the NEP will not necessarily accomplish this goal. Subpart A explains that the NEP does not create any legally enforceable rights that a court could use to dismiss a criminal prosecution brought by non-conforming federal agents. Subpart B then explains that the NEP also will not necessarily deter federal agents from pursuing such prosecutions, because the DOJ's power to detect and sanction non-compliance with its own policy is quite limited.

A. The Legal Impact of the NEP

The NEP does not create a legal defense to a CSA violation. No defendant could cite the policy as the basis for dismissing a criminal prosecution brought by the United States.

First, by its own terms, the NEP does not create any legally enforceable rights. Indeed, an entire paragraph of the NEP Memorandum is devoted to debunking any claim to a legal defense based on the NEP. It reads, in relevant part:

This guidance regarding resource allocation does not “legalize” marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law . . . create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum

is intended solely as a guide to the exercise of investigative and prosecutorial discretion.³⁶

To be sure, a handful of defendants facing federal charges have sought to dismiss their prosecutions by invoking the NEP Memorandum and related statements made by Attorney General Holder and President (or candidate) Obama. But the lower federal courts have uniformly rejected NEP-based defenses, at least in part by invoking the language of the NEP itself.³⁷

Second, even assuming the NEP more plainly and forcefully sought to foreclose prosecutions, there's arguably nothing that a federal court (or criminal defendant) could do to enforce it against the DOJ. In fact, one court has already ruled that the NEP would be unenforceable on separation of powers grounds, even assuming that its language had more plainly sought to bar the prosecution of the defendant at hand.³⁸

The federal courts have consistently refused to dismiss criminal prosecutions on the basis of violations of similar DOJ internal guidelines.³⁹ The courts' treatment of the DOJ's *Petite* Policy, which precludes initiation of a federal prosecution "following a prior state or federal prosecution based on substantially the same act(s) or transaction(s)," exemplifies the point.⁴⁰ Like the NEP, the *Petite* Policy contains language explicitly denying that it creates any legally enforceable rights,⁴¹ and "[a]ll of the federal circuit courts that have considered the question have held that a criminal defendant can not invoke the . . . policy as a bar to federal prosecution."⁴²

Third, a defendant would fare no better by reframing the argument as an

36. *Id.*

37. *E.g.*, *United States v. Stacy*, 696 F. Supp. 2d 1141, 1148-49 (S.D. Cal. 2010) (holding that the NEP did not bar criminal prosecution of defendant for distributing medical marijuana commercially).

38. *Id.* at 1149 ("Even if Defendant's prosecution were contrary to the guidance set forth in the [NEP] Memorandum, dismissal of the Indictment would not be warranted. Defendant has not pointed to any authority for dismissing an indictment because it is contrary to internal Department of Justice guidelines.").

39. For an excellent analysis of litigation over DOJ guidelines, see Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice"*, 13 CORNELL J.L. & PUB. POL'Y 167 (2003) (finding variety of internal DOJ guidelines, including the *Petite* Policy, unenforceable).

40. The *Petite* Policy is outlined in the *U.S. Attorneys' Manual*. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-2.031 (2010) [hereinafter U.S. ATTORNEYS' MANUAL], available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031.

41. *Id.* § 9-2.031(F).

42. *Id.* See also NORMAN ABRAMS ET AL., FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 107 (5th ed. 2010) (noting that "[d]efendants have alleged *Petite* violations in many cases, and the courts have universally refused to grant relief."). The courts have refused to enforce the *Petite* Policy against U.S. Attorneys because of (1) the express language in the policy rejecting its enforceability, (2) separation of powers concerns, and (3) the lack of judicially manageable guidelines for determining whether criteria for making exceptions to the policy have been satisfied. *Id.*

entrapment by estoppel defense.⁴³ The entrapment by estoppel defense is based on the Due Process Clause of the Constitution, so it arguably mitigates the separation of powers concerns cited by courts in refusing to enforce internal DOJ guidelines. The NEP, however, does not support the defense.

To prevail on the defense, a defendant must show that she reasonably relied upon an official, albeit erroneous, *interpretation* of federal criminal law when committing a federal offense.⁴⁴ To illustrate, suppose Attorney General Holder had issued a memorandum opinion declaring the following:

Upon careful review of the relevant statutes, regulations, legislative history, and judicial decisions, I have determined that federal law does not proscribe the cultivation, distribution, or possession of marijuana for medical purposes.

This would be an erroneous interpretation of the CSA: the statute proscribes the aforementioned activities. Nonetheless, a defendant could arguably assert a valid defense against marijuana charges, as long as she had reasonably and in good faith relied upon the statement when committing her offense.

The actual NEP issued by the DOJ, however, does not constitute an *official statement of law*, reliance on which would excuse criminal conduct. It is guidance regarding how the DOJ will enforce the law, not a declaration of what the law means.⁴⁵ Governments cannot retroactively change the meaning of criminal statutes, at least to the detriment of defendants. Doing so runs afoul of the Constitution's Ex Post Facto Clause. However, governments can change enforcement practices at will—increasing or reducing the probability of detecting, charging, prosecuting, and sanctioning violations of the law, including past violations.⁴⁶ Official statements about enforcement practices do not bind law enforcement officials; they do not create a valid legal defense.⁴⁷

43. At least one defendant has attempted to raise an entrapment by estoppel defense based on campaign statements made by Barack Obama that laid the foundation for the NEP. *United States v. Stacy*, 734 F. Supp. 2d 1074, 1077-81 (S.D. Cal. 2010) (rejecting the defendant's assertion of the defense).

44. *See United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000) (holding that a defense of entrapment by estoppel is established when the defendant shows "that the government affirmatively told him the proscribed conduct was permissible, and that he reasonably relied on the government's statement"); *United States v. Duggan*, 743 F.2d 59, 83 (2d Cir. 1984); *see also United States v. Laub*, 385 U.S. 475, 487 (1967) ("Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach."); *Cox v. Louisiana*, 379 U.S. 559 (1965) (dismissing indictment of demonstrators because the police had assured them their planned demonstration location did not violate city ordinance).

45. *See Stacy*, 734 F. Supp. 2d at 1080 (rejecting entrapment by estoppel defense based on statements made by President Obama, because "there is still no affirmative statement that Defendant's conduct is *lawful* under federal law").

46. *Cf. id.* ("A reasonable belief that one will not be *prosecuted* is not the same thing as a reasonable belief that one's actions *do not violate federal law*.")

47. On top of this seemingly insurmountable legal flaw with the entrapment by estoppel defense, it would be next to impossible for any criminal defendant to prove she *reasonably* relied upon the NEP in distributing (possessing, etc.) marijuana. Marijuana is

The distinction between statements interpreting the law and statements outlining enforcement practices is highly formalistic—and one could argue that both types of statements should be treated alike. The distinction, however, is entrenched in extant doctrine, and, barring a major shift in jurisprudence, it dooms any entrapment by estoppel defense based on the NEP.

In short, the NEP does not create a valid legal defense to a criminal marijuana charge under federal law.

B. The Practical Impact of the NEP

Of course, one might expect the DOJ to heed its own policy, in which case judicial enforcement of the NEP would be unnecessary. In reality, however, the DOJ is a fragmented agency, one in which several autonomous decision-makers help shape enforcement policy. U.S. Attorneys in particular have tremendous power over federal criminal law enforcement and a great deal of independence from the DOJ in Washington. As a formal matter, it is the U.S. Attorneys—and not the DOJ in Washington—that decide what charges (if any) to bring in criminal cases. And not all U.S. Attorneys necessarily support the decrees emanating from Washington.

To be sure, the DOJ wields some practical influence over charging decisions, and, in theory, it could use that influence to encourage U.S. Attorneys to abide by the NEP.⁴⁸ Perhaps most importantly, U.S. Attorneys are nominated by the President⁴⁹ and are thus likely to share the President's vision of federal criminal justice, including the President's views concerning the wisdom of criminally prosecuting medical marijuana cases. In any event, the President may always remove a U.S. Attorney who disregards DOJ policy.⁵⁰ Indeed, as the Office of Inspector General recently explained, "U.S. Attorneys are Presidential appointees who may be dismissed for any reason or for no reason."⁵¹ The Attorney General can also encourage compliance, for example,

clearly an illicit drug under federal law, and nothing in the NEP purports to change that status.

48. See ABRAMS ET AL., *supra* note 42, at 110-12 (discussing DOJ control over U.S. Attorneys); JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS (1978) (examining the relationship between U.S. Attorneys and the DOJ).

49. 28 U.S.C. § 541 (2006).

50. *Id.* See also *Parsons v. United States*, 167 U.S. 324 (1897) (upholding the President's unfettered removal power).

51. OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, at 330 (2008), available at <http://www.justice.gov/opr/us-att-firings-rpt092308.pdf>. See also *id.* at 335 ("It is the President's and the Department's prerogative to remove a U.S. Attorney who they believe is not adhering to their priorities or not adequately pursuing the types of prosecutions that the Department chooses to emphasize.").

by removing Assistant U.S. Attorneys (AUSAs) who disregard DOJ policy⁵² or by slashing the budgets of non-conforming districts.⁵³ She can even (arguably) move to vacate convictions she believes were obtained in violation of DOJ policy.⁵⁴

Generally speaking, these tools give the DOJ some leverage over charging decisions. For purposes of enforcing the NEP, however, they are largely unavailing, because the DOJ cannot easily monitor compliance with that policy.⁵⁵ The NEP discourages employees from prosecuting defendants who have complied with state law, but determining whether any given defendant has actually done so proves remarkably difficult, for several reasons. First, some defendants operate in a legal vacuum. Many states have neglected to address such rudimentary issues as how patients are supposed to obtain marijuana legally and who may supply it to them.⁵⁶ Hence, it may be an open question whether a particular defendant (say, a dispensary) is operating in compliance with state law. Second, even if an authoritative regulation exists, it could prove extremely difficult to find. State medical marijuana laws are a mash-up of referenda approved by the voters, statutes passed by state legislatures, regulations issued by state agencies, ordinances passed by local governments, and judicial interpretations of all of the above. Third, complicating matters, some state and local laws are of dubious legal status. The California Supreme Court, for example, has invalidated portions of a state statute (S.B. 420)⁵⁷ that imposed modest restrictions on medical marijuana (e.g., limits on the quantity of marijuana patients could legally possess).⁵⁸ Similarly, lower state courts

52. 28 U.S.C. § 542 (2006). Short of removal, the Attorney General may instead reprimand or suspend Assistant U.S. Attorneys. See U.S. ATTORNEYS' MANUAL, *supra* note 40, §§ 3-4.752.

53. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 U.C.L.A. L. REV. 757, 781 (1999).

54. See Podgor, *supra* note 39, at 189-90 (noting that courts permit the DOJ to correct its mistakes).

55. Various auditing and reporting requirements normally help the Attorney General to monitor compliance with DOJ policies. See Tom Rickoff, *The U.S. Attorney: Fateful, Powers Limited*, 28 ST. MARY'S L.J. 499, 504-05 (1997).

56. Mikos, *supra* note 1, at 1431 ("Although states have adopted fairly detailed regulations specifying who may possess and use marijuana, they have been far more circumspect regarding how qualified patients are actually supposed to acquire marijuana in the first instance and far more reticent to shield marijuana suppliers from state sanctions. In the vast majority of states, there is simply no legal way for qualified patients to obtain usable marijuana or even the plants or seeds needed to grow their own supply."); see also David Harrison, *The Buying and Selling of Legal Marijuana*, STATELINE (Sept. 9, 2010), <http://www.stateline.org/live/details/story?contentId=511628> (noting that state laws are poorly written and fail to provide clear legal avenues by which patients may legally obtain marijuana for medical use).

57. S.B. 420, 2002-03 Leg. Sess. (Cal. 2003).

58. E.g., *People v. Kelly*, 222 P.3d 186, 196 (Cal. 2010) (holding that legislated quantity limits constituted unconstitutional amendment of 1996 referendum because the original law passed by the voters imposed none).

have recently enjoined enforcement of local ordinances that restricted the number and location of medical marijuana dispensaries.⁵⁹ Given the uncertain status of such regulations, the DOJ cannot easily discern whether the prosecution of someone who violated one of them constitutes a breach of the NEP. Fourth, even when the legal rules are clear, determining whether a given defendant has complied with them may be impractical. For example, a state might criminalize the sale of marijuana to anyone other than a qualified patient, but there may be no easy, reliable way to determine who is a qualified patient. In states like California, where patients are not required to register or even obtain a physician's recommendation in writing, judging whether a dispensary has complied with such restrictions in any given transaction could be enormously time-consuming.

These factors make it unlikely that the DOJ can accurately gauge whether any given medical marijuana prosecution brought by a U.S. Attorney was warranted by the NEP. Indeed, for similar reasons, the U.S. Attorney would find it a challenge to follow the policy in good faith. And if the DOJ is unable to gauge compliance with the NEP, it cannot credibly pressure U.S. Attorneys to adhere to the policy.

Moreover, even if President Obama is able to constrain U.S. Attorneys from pursuing medical marijuana cases during his administration, nothing about the NEP bars the next administration from reviving such prosecutions, *even if the charged violations took place during the Obama Administration*. As explained above, no defendant could cite the NEP to block prosecution. If, for example, President Obama is defeated by a more hawkish Republican contender in 2012, any drug offense committed during his four-year administration could be prosecuted by the new President's U.S. Attorneys—the statute of limitations on federal drug charges is five years long. And even if President Obama is reelected, any offense committed after 2011 could be prosecuted by the next administration. In other words, even if the DOJ has severed the head of the prohibition hydra that represents criminal prosecutions, that head could be regrown, with no more than the press of the delete button.

The same problems would not arise if President Obama had taken a different, bolder step: legalizing marijuana. As discussed in the Conclusion, the CSA empowers the Attorney General to reschedule, and thereby, to legalize, marijuana. Of course, the next President could undo that change; but for reasons discussed above, she could not apply it retroactively—namely, to marijuana “offenses” that occurred before the drug was “recriminalized.”

* * *

In sum, the NEP may not have much influence over criminal prosecutions

59. *E.g.*, *Ams. for Safe Access v. City of Los Angeles*, No. BC433942 (Cal. Super. Ct. Dec. 10, 2010), *available at* http://americansforsafeaccess.org/downloads/LA_Injunction.pdf (granting preliminary injunction against city ordinance that sought to limit the number of marijuana dispensaries operating in Los Angeles).

brought by U.S. Attorneys. It is not a legally enforceable policy. No court would block a federal criminal prosecution on its account. The NEP might pressure U.S. Attorneys to curtail medical marijuana prosecutions, but it is too anemic to stop them altogether. Indeed, perhaps most tellingly, it appears that federal agents continue to raid medical marijuana dispensaries and prosecute medical marijuana cases,⁶⁰ much as they did before non-enforcement became the DOJ's official policy.

III. THE NEP AND CIVIL ACTIONS

The NEP only constrains officials in the DOJ. It does not bind federal officials in other executive branch agencies, nor does it bind state officials or private citizens. Although these other actors are not authorized to bring *criminal* prosecutions under the CSA,⁶¹ they could pursue *civil* actions to sanction marijuana users/dispensaries and disrupt state programs. This Part considers the merits of three such actions: (1) civil sanctions imposed by agencies outside of the DOJ; (2) civil RICO actions; and (3) preemption challenges brought by private citizens and state officials that challenge state participation in marijuana programs or state protection from private sanctions. It also examines who would have standing to bring the civil RICO actions and preemption challenges.

A. Civil Sanctions Imposed by Agencies Outside DOJ

Federal law gives the DOJ exclusive authority to criminally prosecute violators of the federal marijuana ban. However, it empowers other federal agencies to withhold benefits from and impose harsh *civil* sanctions on

60. See Robert J. Corry, Jr., *The Audacity of Dope: Obama Breaks Medical Marijuana Promise*, HUFFINGTON POST (Oct. 11, 2010), http://www.huffingtonpost.com/robert-j-corry-jr/wont-get-fooled-again-oba_b_758389.html (detailing recent DEA raids on medical marijuana dispensaries in Colorado); Kris Hermes, *Has the Federal Government Changed Its Policy on Medical Marijuana Enforcement or Just Changed Its Reasons for Continued Interference?*, AMERICANS FOR SAFE ACCESS (Feb. 3, 2011, 8:22 AM), <http://safeaccessnow.org/blog/?p=1228> (reporting that DEA has conducted at least forty-three raids of medical marijuana dispensaries in California, Colorado, Michigan, and Nevada since promulgating the NEP in October 2009); cf. Michael Montgomery, *Obama Administration Warns Oakland on Pot Farms*, CALIFORNIA WATCH (Dec. 6, 2010), <http://californiawatch.org/dailyreport/obama-administration-warns-oakland-pot-farms-7234> (detailing federal threats against city-licensed medical marijuana dispensaries).

61. A suit based on 21 U.S.C. § 841 would likely be dismissed for failure to state a claim, because it does not provide for causes of action brought by non-federal actors. See, e.g., *Diamond v. Charles*, 476 U.S. 54, 64-65 (1986) (noting that private citizens cannot compel enforcement of criminal law; holding that physician lacked standing to enforce abortion ban); *Tesi v. Chase Home Fin., LLC*, No. 4:10-CV-272-Y, 2010 WL 2293177, at *5 (N.D. Tex. June 7, 2010) (“Generally, a criminal statute does not provide a basis for civil liability and a private citizen has no standing to enforce a criminal statute.”).

marijuana users.⁶² Just as importantly, the NEP does not suspend enforcement of these actions.

For example, federal law bars anyone who uses illicit drugs from serving in various safety-sensitive transportation positions, ranging from bus driver to flight instructor.⁶³ Strict compliance with state law does not shield medical marijuana users from the sanction.⁶⁴ In fact, soon after the NEP was formally announced, the Department of Transportation (DOT) made it clear that the “DOJ guidelines will have no bearing on the Department of Transportation’s regulated drug testing program.”⁶⁵

Similarly, federal law prohibits anyone who uses illicit drugs from receiving federal housing assistance.⁶⁶ The Department of Housing and Urban Development (HUD) requires public housing agencies (PHAs) to deny admission to new applicants who violate the drug policy.⁶⁷ It also authorizes (though does not require) PHAs to evict current tenants who violate the policy.⁶⁸ Like the DOT, HUD has refused to suspend enforcement of the sanction against marijuana users who obey state law.⁶⁹

As a final example, federal law bars “unlawful user[s] of . . . any controlled substance” from possessing firearms.⁷⁰ The law makes no exception for

62. Indeed, at the outset of the medical marijuana movement, the federal government adopted a strategy that expressly called upon a diverse array of federal agencies—including the DOJ, the Internal Revenue Service, Customs, the Postal Service, the Department of Transportation, the Department of Defense, the Department of Health and Human Services, the Department of Housing and Urban Development, and the Department of Labor, among others—to quash state medical marijuana programs. Administrative Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (Feb. 11, 1997) (outlining strategy).

63. 49 U.S.C. § 5331 (2006).

64. *Id.* § 5331(f).

65. Notice from Jim Swart, Dir., Office of Drug & Alcohol Policy & Compliance, to Emp’s of U.S. Dep’t of Transp. (Oct. 22, 2009), available at <http://www.fmcsa.dot.gov/documents/Medical-Marijuana-Notice.pdf>.

66. 42 U.S.C. § 13661 (2006).

67. 24 C.F.R. § 5.854(b) (2010).

68. *Id.* § 5.858 (2010).

69. Letter from Gail Laster, Gen. Counsel, U.S. Dep’t of Hous. & Urban Dev., to William C. Apgar, Assistant Sec’y, Office of Hous./Fed. Hous. Comm’r (Sept. 24, 1999). HUD encourages landlords to review medical marijuana infractions on a case-by-case basis before pursuing eviction. *Id.* at 8-9 (outlining factors to be considered in eviction determination). See also Jessica Dyer, *Medical Pot User Can Keep Housing Subsidy*, ALBUQUERQUE J., Nov. 25, 2010 (reporting that public housing authority in New Mexico spared medical marijuana user from termination of Section 8 housing subsidy); Holly Kluft, *Woman Evicted from Federally Subsidized Apartment for Using Medical Marijuana*, JACKSON CITIZEN PATRIOT, Jan. 13, 2011, available at http://www.mlive.com/news/jackson/index.ssf/2011/01/woman_evicted_from_federally_s.html (reporting that private apartment complex in Michigan evicted Section 8 tenant for possession of marijuana).

70. 18 U.S.C. § 922(g)(3) (2006).

marijuana users who comply with state law.⁷¹ Of course, only the DOJ may criminally prosecute violators of the ban. However, the NEP does not shield marijuana users from being prosecuted for federal *firearms* violations. In any event, even if the DOJ would not criminally prosecute them, some firearms dealers will not sell to users because the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) could revoke their federal licenses for doing so.⁷²

In short, marijuana users face a host of civil sanctions under federal law—sanctions that hinge on marijuana’s continued illegal status under federal law. These sanctions are enforced mostly by non-DOJ agencies, which are not obliged to follow the NEP. Indeed, as far as I am aware, only one other agency—the Department of Veterans Affairs (VA)—has followed the DOJ’s lead and suspended sanctions against medical users of marijuana. In July 2010, the VA announced that it would no longer bar patients who use marijuana legally under state law from receiving pain medications from the VA.⁷³ Otherwise, agencies continue to wage their own battles against medical marijuana, unhindered by the DOJ-promulgated NEP.

For marijuana users, the civil sanctions just discussed are potentially even more worrisome than the criminal sanctions actually covered by the NEP. First, civil enforcement agencies arguably have a much greater capacity to detect drug use by regulated parties than does the DOJ. The DOT, for example, regularly subjects safety-sensitive transportation workers to drug tests,⁷⁴ making it almost certain that medical marijuana users who fall under its jurisdiction will be caught and sanctioned. The DOJ’s monitoring and enforcement capacity, by contrast, is quite limited. Even before the NEP, the DOJ rarely (if ever) criminally prosecuted marijuana users, medical or otherwise; it simply lacked the resources (including monitoring capacity) needed to perform the task, and instead, it focused its resources almost

71. See *United States v. Stacy*, No. 09CR3695 BTM, 2010 WL 4117276, at *6 (S.D. Cal. Oct. 18, 2010) (holding that § 922(g)(3) criminalizes possession of firearms, even by marijuana users who comply with state laws).

72. Scott Mobley, *Is it Legal for Medical Marijuana Patients to Buy Guns?*, RECORD SEARCHLIGHT (Feb. 20, 2010), <http://www.redding.com/news/2010/feb/20/is-it-legal-for-medical-marijuana-patients-to/> (reporting that a Redding, California gun dealer refused to sell firearms to known medical marijuana patients, in order to comply with federal law). Although the ATF is part of the DOJ, the NEP was not addressed to the Bureau and does not mention firearms regulations.

73. Dan Frosch, *V.A. Easing Rules for Users of Medical Marijuana*, N.Y. TIMES, July 24, 2010, at A1. Even within the VA, however, this is a fairly modest step. The agency, for example, continues to bar its physicians from recommending marijuana to patients, meaning that VA patients must seek external medical advice (on their own dime) to take advantage of state law. *Id.*

74. OFFICE OF DRUG & ALCOHOL POLICY & COMPLIANCE, U.S. DEP’T OF TRANSP., WHAT EMPLOYEES NEED TO KNOW ABOUT DOT DRUG & ALCOHOL TESTING, *available at* http://www.dot.gov/ost/dapc/testingpubs/Employee_handbook.pdf (explaining DOT’s testing policy).

exclusively on large-scale marijuana distributors.⁷⁵ Second, for some users, the loss of federal privileges can be even more severe than the criminal sanctions that would typically be imposed if they were actually prosecuted for simple possession under federal law. Failing a DOT-required drug test, for example, could end a user's entire career. A conviction for simple possession of marijuana—though no laughing matter—typically triggers criminal sanctions that are slight by comparison, such as a short term of probation or a small fine.

In sum, the NEP at most severs only one head of the federal prohibition hydra. Until there is a change in marijuana's illicit status under federal law, users of marijuana will face a variety of federal civil sanctions—some far worse than the criminal sanctions arguably suspended by the NEP.

B. Civil RICO Actions

On top of the sanctions just discussed, marijuana dispensaries could also be held liable under the Racketeer Influenced and Corrupt Organization (RICO) statute. The RICO statute makes it a crime to conduct an enterprise through a pattern of racketeering activity. Unlike the CSA, it also creates a civil cause of action against racketeers and authorizes enforcement by private persons injured by the racketeering activity.⁷⁶

In this Subpart, I analyze whether such a civil RICO claim could be brought against a medical marijuana dispensary. On the one hand, I conclude that a typical dispensary almost certainly commits a substantive RICO violation. What is more, there are clearly persons who have been injured by dispensaries' racketeering activity. On the other hand, however, it seems highly unlikely that any plaintiff would have standing to bring the RICO claim. Nonetheless, I suggest the threat of civil RICO litigation poses an ongoing concern for marijuana dispensaries—one that the NEP does nothing to allay.

1. The RICO Cause of Action

The core RICO statute delineates four distinct crimes, but for present purposes, it suffices to focus on the provision that serves as the basis for most civil RICO actions: section 1962(c).⁷⁷ To simplify somewhat, section 1962(c)

75. See Mikos, *supra* note 1, at 1465; see also Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 560-65 (2010).

76. 18 U.S.C. § 1964(c) (2006).

77. The RICO statute, *id.* § 1962, provides in relevant part:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

(b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire

makes it unlawful for a (1) person (2) to conduct (3) an enterprise (4) through a pattern of racketeering activity.⁷⁸

Consider how each of these elements would apply in a civil action brought against a marijuana dispensary. Suppose, for the illustration, that the dispensary is legally incorporated; that it is owned and operated by a single proprietor; and that it has been feloniously (under the CSA) distributing marijuana to several customers for at least one year.

a. RICO Person

In a RICO action, the RICO person is the defendant. It can be any “individual or entity capable of holding a legal or beneficial interest in property,”⁷⁹ though, under section 1962(c), it must be legally distinct from the RICO enterprise. For purposes of my hypothetical RICO suit, the proprietor would easily meet all of the legal requirements for being a RICO person. (The plaintiff’s choice of a defendant, of course, would be influenced by a variety of strategic considerations as well—such as the defendant’s wealth—but I leave those considerations aside for now.)

b. RICO Enterprise

The enterprise named in the suit could be any “individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”⁸⁰ In my case, the dispensary—a legal entity—could serve as the RICO enterprise.

c. Conduct

The defendant must also conduct the affairs of the RICO enterprise. In essence, this means that the defendant must “participate in the operation or management of the enterprise.”⁸¹ Once again, my plucky proprietor clearly

or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Id.

78. *E.g.*, *Chaset v. Fleer/Skybox Int’l*, 300 F.3d 1083, 1086-87 (9th Cir. 2002) (discussing elements of a § 1962(c) claim).

79. 18 U.S.C. § 1961(3) (2006).

80. *Id.* § 1961(4).

81. *E.g.*, *Reves v. Ernst & Young*, 507 U.S. 170 (1993).

satisfies this test, as she is the sole owner and employee of the dispensary.

d. Pattern of Racketeering Activity

Finally, the enterprise must commit a pattern of racketeering activity. Growing or distributing non-negligible quantities of marijuana clearly constitutes racketeering activity.⁸²

Committing such crimes repeatedly over the course of a year or more also constitutes a pattern. Indeed, a pattern may involve as few as *two* predicate acts, as long as there is a relationship and continuity in the crimes. In essence, this means the plaintiff must show the crimes had a common purpose, participants, or modus operandi, and occurred over a substantial period of time (one year is enough) or else were likely to recur again in the future.⁸³ In my hypothetical, distributing marijuana to several customers over the course of a year (or more) would easily constitute a pattern of racketeering activity.

2. RICO Standing

My hypothetical marijuana dispensary has almost certainly violated section 1962(c). To be sure, the dispensary and its proprietor probably do not need to worry about *criminal* RICO liability, because only the DOJ may initiate criminal RICO prosecutions. Civil RICO liability, however, is another matter. The RICO statute creates a *private* cause of action and it empowers anyone injured by racketeering activity to recover treble damages and attorneys' fees from defendants. The cause of action is found in 18 U.S.C. § 1964(c):

Any person injured in his business or property by reason of a violation of [18 U.S.C.] section 1962 . . . may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.⁸⁴

Importantly, a civil RICO claim is viable even if a defendant is never charged with nor convicted of the predicate criminal acts.⁸⁵ This means that the NEP will not protect dispensaries from civil RICO suits, even if it does protect them from criminal CSA prosecutions.

The only question remaining is whether any plaintiff could bring a RICO claim against a marijuana dispensary. Plaintiffs seeking to bring civil RICO

82. 18 U.S.C. § 1961(1)(D) (2006) (defining racketeering activity, in relevant part, as the "felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance . . . punishable under any law of the United States").

83. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989) (interpreting 18 U.S.C. § 1961(5)).

84. 18 U.S.C. § 1964(c) (2006).

85. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 488-90 (1985).

actions must satisfy onerous standing requirements. Most importantly, for present purposes, a plaintiff must show that it (1) suffered an injury to its business or property (2) that was proximately caused by the defendant's predicate crimes.⁸⁶

First, a RICO plaintiff must allege injury to its *business or property*. This concept includes harm to any recognized property or business interest, such as the loss of plaintiff's customers. However, it excludes other sorts of injury, such as personal injury or harm to a government's sovereign interest.⁸⁷

Second, and more dauntingly, the plaintiff must demonstrate that her injury was directly caused by the defendant's predicate crimes.⁸⁸ The Supreme Court has developed the proximate cause test in a series of recent cases. In *Anza v. Ideal Steel Supply Corp.*, for example, the Court dismissed a civil RICO claim brought by a company against its (allegedly) tax-evading competitor. The plaintiff claimed that the defendant was able to lower its prices and poach the plaintiff's customers (the injury) by evading state taxes (the racketeering activity). Yet the Court found that the plaintiff lacked standing to pursue the RICO claim. It reasoned that the state was a more direct victim of the defendant's tax-evasion scheme. It also foresaw difficulty in ascertaining what portion of the plaintiff's injury was attributable to the defendant's alleged predicate crimes, rather than other (legitimate) reasons for the defendant's price cuts.⁸⁹

Similarly, in *Hemi Group, LLC v. City of New York*,⁹⁰ the Court dismissed the city's civil RICO claim against an out-of-state online cigarette vendor. The claim alleged that defendant had failed to report its cigarette sales to state authorities, as required by state law. This failure constituted mail fraud under federal law (the racketeering activity) and had allegedly cost the city millions in lost cigarette tax revenues (the injury). In particular, the city claimed it needed the sales reports to enforce the city's cigarette tax against the defendant's customers—importantly, the defendant itself was not required to pay or collect any taxes on behalf of the city. The Court, however, dismissed the claim on the ground that the city lacked RICO standing. It reasoned that the state was a more direct victim of the defendant's mail fraud. It also found that the defendant's tax-evading customers were a more direct cause of the city's injury.⁹¹

86. For an excellent synopsis of civil RICO standing, see GREGORY P. JOSEPH, *CIVIL RICO: A DEFINITIVE GUIDE* (3d ed. 2010).

87. *Id.* at 42-49 (discussing relevant case law).

88. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (holding that § 1964(c) “demand[ed] . . . some direct relation between the injury asserted and the injurious conduct alleged”); *see also* *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (“When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff’s injuries.”).

89. *Anza*, 547 U.S. at 487-88.

90. 559 U.S. 1 (2010).

91. *Id.*

The proximate cause requirement clearly limits the universe of actionable civil RICO claims. In particular, several factors could sever a defendant's legal responsibility for injuries for which it was an actual (but-for) cause: (1) the existence of other, intervening causes for the plaintiff's injury; (2) difficulty in ascertaining the amount of harm attributable to the defendant; (3) a risk of duplicative recovery against the defendant; and (4) the existence of a more direct victim to bring the claim.⁹²

3. The Plaintiff

Given the aforementioned requirements, it is quite possible that no plaintiff would have standing to bring a civil RICO claim against a medical marijuana dispensary. Some prospective plaintiffs would not satisfy the first part of the standing inquiry—suffering an injury to business or property. Consider, briefly, a suit that might be brought by a local government that opposes medical marijuana.⁹³ Suppose, for example, that the intrepid Dispensary, Inc., operates in a socially conservative county situated in a medical marijuana state. Suppose as well, for sake of argument, that Dispensary's sale of marijuana has fueled a wave of destructive crime and reckless behavior in the county. In response, the county has been forced to increase the budget for local law enforcement.

In this scenario, the county has clearly been injured by Dispensary. But its claim would fail because the county did not suffer an injury to its *business or property*. The extra money it had to spend on law enforcement is considered a sovereign cost and is not actionable under RICO.⁹⁴ In one case, for example, a local government in Idaho brought a civil RICO action against four companies that allegedly hired undocumented workers. The county claimed, among other things, that the influx of undocumented workers had caused it to expend additional funds on public health and law enforcement. The Ninth Circuit, however, dismissed the claim, characterizing the injury as one to the government's regulatory interests and not to its business or property.⁹⁵

There are, of course, plaintiffs who could allege an injury to business or property. Imagine, for example, a drug company that has lost customers to a marijuana dispensary. Marijuana has been hawked as a treatment for ailments

92. See *Anza*, 547 U.S. at 466; see also JOSEPH, *supra* note 86, at 53 (listing the myriad criteria used by courts in determining whether proximate cause exists for civil RICO purposes).

93. State and local governments are authorized to file claims under civil RICO. *E.g.*, *Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985) (holding that a state government may bring a civil RICO claim). Some local governments do not support medical marijuana laws and have been aggressive in challenging medical marijuana suppliers and the state laws that protect them. See, *e.g.*, Hoeffel, *supra* note 19 (discussing the city of Anaheim's attempt to banish marijuana dispensaries).

94. JOSEPH, *supra* note 86, at 48-49.

95. *Canyon Cnty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 979 (9th Cir. 2008).

ranging from glaucoma to cancer—ailments for which patients now spend billions on patented pharmaceuticals. Many supporters of legalized marijuana claim it outperforms standard (i.e., legal) drug treatment regimens for these and many other ailments.⁹⁶ It seems reasonable to suppose that some patients have abandoned the drugs marketed by major pharmaceutical corporations and adopted marijuana as a course of treatment instead.⁹⁷

To illustrate, suppose that Pharmacology, Inc. hawks a patented medicine commonly prescribed for treating glaucoma. The medicine costs \$30,000 annually.⁹⁸ Now suppose that Dispensary, Inc. begins selling marijuana to Pharmacology's customers, touting it as an alternative glaucoma treatment. Suppose further that one hundred of Pharmacology's customers stop buying its glaucoma drug and begin using Dispensary's marijuana instead. The loss of one hundred customers and associated profits clearly constitutes an injury to Pharmacology's business or property, for purposes of RICO. Suppose as well that Dispensary is clearly the actual cause of Pharmacology's loss; in other words, but for Dispensary's marketing of marijuana, Pharmacology's former customers would have continued using its lucrative patented medicine.

Even though it might prove that Dispensary's racketeering activity actually caused it to lose \$3 million in revenue (annually), Pharmacology would still face considerable difficulty satisfying the second prong of the RICO standing inquiry—showing that Dispensary is the *proximate* cause of that injury. In my hypothetical, one could construct a chain of causation that severs Dispensary's legal responsibility for Pharmacology's loss. For example, Dispensary could claim that Pharmacology's customers are an intervening cause of its injury. After all, they were the ones who ultimately decided to defect and use marijuana in lieu of Pharmacology's drug.⁹⁹ And those customers might not

96. See, e.g., LESTER GRINSPOON & JAMES B. BAKALAR, MARIHUANA, THE FORBIDDEN MEDICINE, 23-162 (1997) (arguing that marijuana is superior to many drugs that are currently prescribed for treating a wide range of medical conditions).

97. *Id.* (discussing stories of patients who stopped taking prescription drugs and started using marijuana instead).

98. This figure, though high, is quite realistic. On average, brand-name prescription drugs cost \$2,000 annually, and specialty prescription drugs cost \$33,000 annually. See Duff Wilson, *Drug Makers Raise Prices in Face of Health Care Reform*, N.Y. TIMES, Nov. 16, 2009, at A1; AM. ASS'N RETIRED PERSONS PUB. POL'Y INST., DRUG PRICES CONTINUE TO CLIMB DESPITE LACK OF GROWTH IN GENERAL INFLATION RATE (2009), <http://assets.aarp.org/rgcenter/ppi/health-care/i36-watchdog.pdf>.

99. A federal district court once used such reasoning to dismiss a similar competitive injury RICO claim brought by Eli Lilly against the manufacturer of a competing drug. *Eli Lilly & Co. v. Roussel Co.*, 23 F. Supp. 2d 460 (D.N.J. 1998). The court dismissed Lilly's RICO claim against competitors it alleged had stolen customers by defrauding the FDA into approving bulk sales of one of Lilly's patent-expired drugs (cefaclor). The court found Lilly failed to satisfy the proximate cause test, due to the presence of "many intervening acts and causes," including:

- (1) the FDA had to approve . . . [defendant's] cefaclor;
- (2) [manufacturer defendant] had to manufacture sufficient quantities of bulk cefaclor for commercial distribution;

have chosen to defect had their physicians not recommended marijuana in the first instance.

Considering the aforementioned difficulties, it is hardly surprising that no drug company has yet brought a RICO action against a dispensary (at least, as far as I am aware).¹⁰⁰ Nonetheless, civil RICO poses a very real threat to marijuana dispensaries. First, traditional drug firms have a strong (and growing) financial incentive to combat the medical marijuana movement. The nation spends \$300 billion annually on prescription drugs.¹⁰¹ Medical marijuana could eat away at those revenues—current estimates suggest that California residents alone spend \$1.4 billion annually on medical marijuana. It seems reasonable to suppose that at least some of that money is being diverted from traditional drug companies. The losses will only widen as more states legalize medical marijuana—and more citizens turn to marijuana as an alternative to standard drug regimens.

Second, marijuana dispensaries are becoming an increasingly attractive target for lawsuits. Although most states appear to limit dispensaries' profit-making potential, dispensaries are generating substantial returns on investment.¹⁰² These lofty returns have made dispensaries an appealing investment opportunity for hedge funds.¹⁰³ Not surprisingly, they also make dispensaries a lucrative target for RICO litigation.

Third, the NEP itself could fuel interest in civil litigation against marijuana dispensaries. Before the NEP, drug companies may have relied upon federal criminal sanctions to curb the appeal of marijuana dispensaries and their penetration into the mainstream market. The federal efforts have not succeeded, of course, but now that this last porous barrier has (seemingly) been removed, traditional drug companies might feel pressured to pursue civil litigation to

(3) [wholesaler defendants] had to purchase [defendant's] cefaclor and manufacture retail dosage units of cefaclor;

(4) pharmacies had to stock the product and doctors had to prescribe [defendant's] generic cefaclor instead of Lilly's [branded cefaclor]; and

(5) consumers had to decide to purchase finished cefaclor products manufactured by [defendants] instead of purchasing Lilly's [version].

Id. at 485. See also *Barr Labs., Inc. v. Quantum Pharmics, Inc.*, 827 F. Supp. 111 (E.D.N.Y. 1993) (dismissing RICO claim brought by a generic drug manufacturer against a rival that stole its customers by defrauding the FDA, because, *inter alia*, the plaintiff's injuries "depend[ed] on the intervening actions" of the FDA in approving the rival's drug and its customers in defecting).

100. On top of the difficulties outlined in the text, a drug company in a real RICO case would need to trace its losses to particular dispensaries—no easy task, considering that there are more than seven hundred dispensaries operating in Los Angeles County alone.

101. See Wilson, *supra* note 98.

102. *E.g.*, Josh Harkinson, *Weedmart: Marijuana Superstores. IPOs. Reality TV.*, MOTHER JONES (Jan./Feb. 2011), <http://motherjones.com/politics/2011/01/wegrow-dharmann-derek-peterson> (discussing the marijuana dispensary business).

103. *Id.* (discussing one fund's one-million dollar investment in the marijuana business).

prevent any further erosion of their market share.

Fourth, the proximate cause requirement outlined above—though daunting—is hardly an insurmountable barrier. In part, this is because proximate causation is such a notoriously slippery concept.¹⁰⁴ In weighing the policies served by proximate causation, for example, a district court might permit Pharmacology's claim against Dispensary to proceed, without obviously flouting Supreme Court precedent.¹⁰⁵ In any event, the Supreme Court could soften the proximate cause inquiry, or Congress could abrogate the Court's decisions legislatively, and thereby expose dispensaries to civil RICO actions (intentionally or not).

* * *

In the end, it is impossible to predict precisely how the federal courts would rule on the RICO standing question, in no small part due to the flexibility of the proximate cause inquiry. To be sure, a plaintiff would face a steep uphill battle to satisfy the proximate cause test, meaning a civil RICO suit is likely to falter, if litigated. However, it is possible that a drug company aggrieved by losing customers to an illicit rival could successfully bring a civil RICO claim against a medical marijuana dispensary. And the growing threat such dispensaries pose to drug company profits suggests someone may soon be tempted to try.

C. Preemption Challenges Against State Law

Civil RICO actions would target the private dispensaries that currently supply marijuana pursuant to state law. A second type of civil action would challenge state medical marijuana laws as preempted by the CSA.

In this Subpart, I consider the viability of a preemption challenge to two particular types of state law: (1) laws that would create state-run marijuana dispensaries to cultivate and distribute marijuana; and (2) laws that shield marijuana users from sanctions imposed by other private citizens. As I explain below, such laws are likely preempted by the CSA. I also discuss how private plaintiffs could satisfy standing requirements to bring a preemption cause of action, assuming that no federal official would do so (on account of the NEP).

104. For a classic statement attesting to the slipperiness of the proximate cause inquiry, see *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) (“What we do mean by the word ‘proximate’ is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.”).

105. Under the admittedly stylized facts of my hypothetical, Pharmacology's damages would be easy to ascertain; the court would only need to multiply its average profit per customer by the number of customers lost to Dispensary. The risk of duplicative recovery against Dispensary is also minimal. And no other victim seems more aptly suited to pursue a civil RICO claim against Dispensary.

1. The (Implied) Preemption Cause of Action¹⁰⁶

In a previous article, I analyzed the preemptive reach of the CSA in some depth.¹⁰⁷ Here, suffice to say that the CSA preempts state laws that positively conflict with the federal statute. Such a conflict arises only when a state engages in, requires, or otherwise aids and abets conduct that violates the CSA.¹⁰⁸ Importantly, the CSA does not (and indeed, *could not*) preempt state laws that merely allow residents to cultivate, distribute, or possess marijuana.¹⁰⁹ But the CSA likely does preempt two policies now under consideration or already on the books in some states.

a. State Cultivation/Distribution Programs

To date, states have successfully skirted most preemption challenges by adopting a purely passive approach to regulating the supply of marijuana. At most, they merely allow private parties to grow and distribute the drug. They have not directed state officials to participate in violations of the CSA. This passive approach is not preempted because the federal government cannot compel the states to criminalize the cultivation, possession, or distribution of marijuana by private citizens.

106. Although there is (arguably) no express statutory authorization, it is generally accepted that an implied right of action exists in federal court to challenge state laws as preempted. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 721 (6th ed. 2009) (suggesting that 42 U.S.C. § 1983 might authorize preemption challenges, but noting that federal courts have not relied upon that provision in recognizing an implied right of action); *id.* (noting a “body of decisions that routinely permits private parties to sue without express statutory authorization to prevent state officials from enforcing state laws on the ground that they are preempted by a federal statute”) (citing *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 (1983) (“It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights.”)); *id.* at 807 (“[T]he rule that there is an implied right of action to enjoin state or local regulation that is preempted by a federal statutory or constitutional provision—and that such an action falls within the federal question jurisdiction—is well-established.”).

107. Mikos, *supra* note 1. The CSA includes an express preemption provision:

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 (2006).

108. See Mikos, *supra* note 1, at 1451. The CSA’s express preemption test can be restated as follows: “States may not take any action that constitutes a violation of the substantive provisions of the CSA, nor may they fail to take any action required by the CSA, so long as that action is required of private citizens and states alike.” *Id.* at 1452.

109. Preempting exemptions from state-imposed sanctions would, in effect, compel the states to enact a ban on medical marijuana—a clear violation of the Court’s anti-commandeering rule. See Mikos, *supra* note 1, at 1453-55 (providing a more extensive discussion of the limits of Congress’s power to preempt state law).

Some states, however, are proposing to assert direct control over the supply of medical marijuana. Under one type of proposal, introduced in Colorado, New Jersey, New Mexico, and Oregon, a state agency would grow and/or distribute marijuana directly to qualified patients, essentially replacing private dispensaries.¹¹⁰ Under a second proposal, introduced in Maine and Vermont, state law enforcement agents would redistribute marijuana seized from drug dealers through state-operated or licensed dispensaries.¹¹¹

No state has yet created a state dispensary, but it appears the NEP has rekindled interest in such plans.¹¹² Before the NEP, it appears some states were deterred from opening state dispensaries by the threat of incurring federal criminal liability. In 2007, for example, New Mexico scuttled plans for a state-run marijuana farm and dispensary, at least in part out of concerns that its employees could be criminally prosecuted by the federal government.¹¹³ Not surprisingly, the NEP has seemingly assuaged such concerns. In fact, in the

110. Mikos, *supra* note 1, at 1432 (discussing the New Mexico proposal); Tracy Loew, *State May Take Over Growing Medical Pot*, STATESMAN J., Mar. 12, 2009, at C3 (discussing the Oregon proposal); Richard Perez-Pena, *New Jersey's Medical Marijuana Law Loses Planned Grower and Dispensers*, N.Y. TIMES, July 24, 2010, at A15 (discussing Governor Christie's proposal to have Rutgers University grow marijuana for state medical marijuana program); David O. Williams, *White Wants State of Colorado to Go into the Weed Business*, COLO. INDEP. (Nov. 6, 2009), <http://coloradoindependent.com/41680/white-wants-state-of-colorado-to-go-into-the-weed-business> (discussing Colorado lawmaker's proposal to create and operate a state marijuana cultivation/distribution facility for medical marijuana patients). In addition, at least two states have recently launched studies on whether to establish state marijuana dispensaries. H.R. Con. Res. 141, 25th Leg., Reg. Sess. (Haw. 2009) ("BE IT RESOLVED by the House of Representatives of the Twenty-fifth Legislature of the State of Hawaii, Regular Session of 2009, the Senate concurring, that the Legislative Reference Bureau is requested to study the issue of establishing a state facility to grow and distribute marijuana for medical use in Hawaii . . ."); H.B. 648, 2009 Sess. (N.H. 2009) (proposing to legalize medical marijuana and establishing a committee to study whether and how a state agency should be "authorized to cultivate and dispense marijuana" for medical purposes). What is more, Washington state legislators have proposed legalizing marijuana outright and selling the drug through state liquor stores. An Act Relating to Marijuana, H.B. 2401, 61st Leg., Reg. Sess. (Wash. 2010), *available at* <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/House%20Bills/2401.pdf>.

111. An Act Relating to Providing Medical Marijuana Through State-Licensed Liquor Stores, H.B. 651, 2009-2010 Leg. Sess. (Vt. 2009):

This bill proposes to permit the state to distribute marijuana seized in criminal cases to registered medical marijuana patients. The department of public safety would test marijuana in its possession and provide untainted marijuana to the department of liquor control. The department of liquor control would regulate the distribution of the medical marijuana through establishments that hold a state-issued second class liquor license. Only persons who are registered patients pursuant to chapter 86 of Title 18 would be eligible to purchase the medical marijuana.

See also Mikos, *supra* note 1, at 1432 (discussing the Maine proposal).

112. *See, e.g.*, Kris Olson, *Former Federal Prosecutor Says 'Yes' To Measure 74, VOTERS' PAMPHLET* (Nov. 2, 2010), http://www.sos.state.or.us/elections/nov22010/guide/m74_fav.html (statement of former U.S. Attorney for the District of Oregon suggesting the NEP has opened the door for Oregon to regulate the supply of medical marijuana).

113. Mikos, *supra* note 1, at 1432.

wake of the NEP announcement, lawmakers in at least two states—Colorado and Oregon—proposed legislation to create state dispensaries, and lawmakers in two more states—Hawaii and New Hampshire—commenced studies to examine the option.¹¹⁴

Giving the state direct control—and perhaps even a monopoly—over the supply of medical marijuana has obvious advantages. The state could more easily prevent diversion of medical marijuana, and state police could more easily distinguish legal from illegal sales, if the state held exclusive license to grow and/or distribute the drug. Cash-strapped states could also generate new revenues by monopolizing the lucrative market for medical marijuana.¹¹⁵ Indeed, many states employed a similar tactic to control and profit from the sale of alcohol following the repeal of Prohibition in the 1930s.¹¹⁶ Even today, a handful of states continue to operate state liquor stores.

The problem is that state dispensaries are clearly preempted by the CSA. State agents may look askance when private citizens grow, distribute, or possess marijuana. However, they may not grow, distribute, or possess marijuana themselves—doing so creates a positive conflict with the CSA.¹¹⁷ Since the states would directly engage in action proscribed by federal law, and not merely tolerate the actions of others (e.g., private dispensaries), preemption of these programs does not raise the commandeering concerns noted above. This means that federal and state courts could enjoin state agents from growing or distributing marijuana. (This assumes, of course, that a proper plaintiff raises the claim—but more on *that* issue below.)

In short, if a state were to participate directly in the supply of marijuana—by growing, distributing, redistributing, or even subsidizing¹¹⁸ purchases of the

114. The Hawaii legislature left little doubt that the NEP had bolstered interest in state dispensaries. On March 17, 2009, just days following Attorney General Holder's initial announcement of the NEP, the state legislature directed a state agency to look into creating a state marijuana cultivation/distribution program. H.R. Con. Res. 141. The resolution calling for the study was accompanied by another resolution lauding Holder's announcement and urging federal law enforcement officials to comply. H.R. Con. Res. 165, 25th Leg., Reg. Sess. (Haw. 2009).

115. See Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL F. 223 (discussing how state ownership of dispensaries would bolster tax collections).

116. See Harry G. Levine & Craig Reinerman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, 69 MILBANK Q. 461, 473–82 (1991) (discussing how states owned retail distribution outlets as a means of controlling alcohol upon Prohibition's demise).

117. Mikos, *supra* note 1, at 1457–59 (“State cultivation and distribution of marijuana constitutes a departure from the state of nature. Though marijuana is available in the state of nature, the state distribution program would arguably provide something unique—a safe, cheap, consistent, and reliable supply of marijuana. Moreover, the CSA explicitly bars the cultivation and distribution of marijuana, leaving little doubt that Congress intended to preempt such state programs.”).

118. Some states are considering subsidizing marijuana for low-income residents. A recent Oregon ballot initiative, for example, would have created a state-funded program to

drug—its program could be challenged as preempted and enjoined.

b. State Shields Against Private Sanctions

A second type of state law could likewise be found preempted and enjoined. This type of law attempts to shield marijuana growers, distributors, users, and their associates from sanctions imposed by private parties:

Some states, for example, bar private hospitals and clinics from taking adverse action (such as denying privileges) against any physician who recommends marijuana to a patient. Some states also bar landlords from terminating the lease of any qualified patient, caregiver, or supplier for possessing, using, or growing marijuana on rental property in accordance with state law.¹¹⁹

To the extent state agents aid and abet CSA violations by enforcing such laws, the laws are preempted.¹²⁰ Under federal law, aiding and abetting requires: “(1) committing an overt act that assists the crime (the *actus reus*), (2) and having the specific intent of facilitating the crime of another (the *mens rea*).”¹²¹ Most courts hold that even trivial assistance satisfies the overt act requirement. For example, it seems reasonable to suppose that a judge who orders a landlord to reinstate a tenant evicted for growing marijuana has committed an overt act that assists the tenant’s crime of marijuana cultivation.¹²²

The *mens rea* requirement, however, presents a closer question. It boils down to the purpose motivating the state’s protection of dispensaries and marijuana users. In our hypothetical, the litigant claiming preemption (i.e., the landlord) must show that the state ordered reinstatement out of a desire to help the tenant cultivate marijuana. This would be the case, for example, if the state policy was designed to ensure adequate supplies of marijuana for qualified patients. If, however, the state merely sought to protect vulnerable residents from being evicted from their homes, the law would probably stand; in this case, one could say that the state acted *in spite* of its impact on marijuana use and not *because* of it.¹²³

assist low-income residents in obtaining marijuana for medical purposes from private dispensaries. The proposal was included as part of Measure 74, a ballot initiative that was rejected in the November 2010 election. *The Oregon Regulated Medical Marijuana Supply System*, VOTERS’ PAMPHLET, Nov. 2, 2010, at § 4.

119. Mikos, *supra* note 1, at 1456.

120. *Id.* at 1456-57.

121. *Id.* at 1452 (citing *United States v. Zafiro*, 945 F.2d 881, 887 (7th Cir. 1991) (“The crime of aiding and abetting requires knowledge of the illegal activity that is being aided and abetted, a desire to help the activity succeed, and some act of helping.”)).

122. Mikos, *supra* note 1, at 1457.

123. The Supreme Court of Oregon has recently ruled that a state law shielding medical marijuana users from employment discrimination is, in fact, preempted by the CSA. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 529 (Or. 2010). Although the Oregon court’s conclusion may be correct, it rested its decision on the

In sum, federal law seemingly authorizes suits challenging state medical marijuana laws as preempted. What is more, at least with respect to the two state laws considered herein, the challenges should probably prevail: a state marijuana cultivation/distribution operation is clearly preempted by the CSA and state tenant/employee protection laws are arguably preempted as well. As such, these laws could be enjoined.

2. Preemption Standing

Even if a meritorious preemption cause of action exists, however, it is possible that no plaintiff would have standing to challenge state law in federal court—especially if the federal government (per the NEP) refuses to do so. To assert standing in *federal* court, a plaintiff must demonstrate: “(1) a distinct and palpable injury to himself; (2) that this injury is caused by the challenged activity; and (3) that this injury is apt to be redressed by a remedy that the court is prepared to give.”¹²⁴ I consider who (if anyone) could satisfy these requirements in order to challenge: (1) a state cultivation/distribution operation; and (2) state protection against private sanctions.

a. State Cultivation/Distribution Operation

Although a state marijuana dispensary would clearly be preempted by federal law, it is doubtful whether any plaintiff *other than the federal government* would have standing to bring suit and enjoin its operation in *federal* court. The key barrier to standing in such a case would be the injury-in-fact requirement. The plaintiff would need to demonstrate a distinctive injury caused by the state program. In other words, she must have some interest beyond that of ensuring her state government complies with federal law—an interest shared by her state’s entire population. In addition, her injury must be imminent and not merely speculative. Though she need not have already suffered the injury, the threat of it must be sufficiently grave.

The number of persons who would plausibly meet the injury-in-fact requirements is quite slim. Start with an ordinary citizen. Every citizen has an interest in ensuring that her state government obeys the law. Yet that interest, standing alone, is not particularized enough to enable a citizen to claim that a state law is preempted by federal law, at least not in federal court. In most situations, the federal courts reject citizen standing.¹²⁵ A suit brought by a

mistaken proposition that a state could never “authorize” violations of federal law. *See* Mikos, *supra* note 1, at 1451 (explaining that states may permit—authorize, license, allow, etc.—activity Congress proscribes, as long as they do not also facilitate such activity).

124. 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.4 (3d ed. 1998) (elaborating upon standing requirements).

125. *See id.* § 3531.10 (“[N]either citizens nor taxpayers can appear in court simply to insist that the government and its officials adhere to the requirements of law.”).

citizen on no more grounds than her status as such (or, similarly, her status as a taxpayer) would be dismissed.

There is one plaintiff who would face a more distinct injury due to the operation of a state dispensary: a state employee who is required by law to cultivate and/or distribute marijuana. In theory, this person could be subjected to federal prosecution and federal sanctions simply for doing her job. After all, she would be violating federal criminal law by participating in the program. There is no immunity for a state employee who operates a state marijuana dispensary.¹²⁶ The threat of criminal sanctions constitutes a particularized injury, sufficiently distinct from the generalized grievance shared by ordinary citizens.

Nonetheless, even this employee would probably lack standing, due to a second requirement under the injury-in-fact test. Although the employee's injury is sufficiently particularized, it would probably be considered too speculative to satisfy the injury-in-fact requirement.¹²⁷ The employee does not have to be under arrest or facing indictment to challenge the state statute.¹²⁸ But she must face a reasonable threat of prosecution to satisfy the injury-in-fact inquiry. Typically, this requires some indicia that the government is considering prosecution, such as an explicit threat from government agents or a history of government prosecutions in similar situations.¹²⁹ The mere possibility that one could be prosecuted, standing alone, is not enough.

In light of the NEP, it would be difficult to establish a reasonable threat of prosecution for cultivating/distributing marijuana pursuant to state law. In the context of medical marijuana, the federal government has given no indication that it would actually pursue legal action against a state cultivation/distribution operation. In fact, it has suggested (albeit in an equivocal way) just the opposite: that it would decline to prosecute anyone who cultivates/distributes marijuana in compliance with state law. Hence, it seems unlikely that even a state official who is obligated by state law to violate the CSA would have standing to challenge the state law as preempted.¹³⁰

Despite the roadblocks in federal court, there remains the possibility that

126. See Mikos, *supra* note 1, at 1457-59 (discussing the limits of the immunity conferred by 21 U.S.C. § 885(d)).

127. In the alternative, one might say that the injury is not yet ripe.

128. *Steffel v. Thompson*, 415 U.S. 452 (1974) (declining to require that a plaintiff violate a city ordinance before challenging the law).

129. See *id.* at 459 (finding that the plaintiff satisfied the injury-in-fact requirement because he had been warned by police that he would be prosecuted if he distributed handbills and the police had, in fact, already prosecuted someone else under the ordinance).

130. A state official could try to recast the injury as being forced to disobey the law, as opposed to being punished for disobeying the law. This might satisfy the injury-in-fact requirement, though I am aware of no plaintiff who has (successfully or not) cast an injury in such terms. In any event, it would be a very limited universe of persons who would have standing to raise the preemption claim under this theory or the one discussed in the text, and it is quite possible that no state agent would even want to sue in the first instance.

plaintiffs could pursue their preemption causes of action in *state courts* instead. State courts are not bound by Article III or the Supreme Court's rulings limiting access to the federal courts.¹³¹ In general, persons without an obvious, immediate stake in litigation have a much easier time challenging state laws in state court than in federal court.¹³² First, almost every state court allows taxpayers to challenge public expenditures "without any individual or particularized showing of injury in fact, and sometimes without even a showing that the expenditure will affect their tax burdens."¹³³ This permissive standing rule "empowers citizens, in their capacity as taxpayers, to counter the illegal expenditure of tax revenues and other threats to the public fisc."¹³⁴ Second, "[a] number of states go further and provide, either by constitutional provision, court-made rule, or legislation, for broad, general citizen standing to raise issues of great importance and interest to the public."¹³⁵ Third, many state courts grant state lawmakers standing to challenge state laws before they take effect.¹³⁶ Federal courts, by contrast, reject the claim that lawmakers have any special stake in ensuring the legality of their handiwork; such lawmakers must satisfy the same onerous standing requirements as everyone else.¹³⁷

These permissive standing rules virtually ensure that opponents could mount a challenge to state dispensaries in state courts, even if they could not necessarily do so in federal court. In California, for example, state law authorizes taxpayer suits to enjoin the illegal expenditure of funds by local governments.¹³⁸ Suppose the city of Oakland passes a new ordinance

131. See FALLON ET AL., *supra* note 106, at 126.

132. E.g., John C. Reitz, *Standing to Raise Constitutional Issues*, 50 AM. J. COMP. L. 437, 460 (2002) ("[S]tate courts tend to be more hospitable [than federal courts] to the raising of constitutional claims whether by private individuals and groups or by government officials."); Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003, 1006 (2001) ("State courts do not run 'public interest' and other ideological plaintiffs through the obstacle course erected by the U.S. Supreme Court under the guise of Article III. Most state courts are courts of general jurisdiction, unfettered by constitutional provisions analogous to Article III.")

133. Helen Hershkoff, *State Courts and the 'Passive Virtues': Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1854 (2001); see also Elmendorf, *supra* note 132, at 1007 ("Every state except New Mexico recognizes taxpayer standing; some even authorize taxpayer challenges to nonfiscal matters . . .").

134. Elmendorf, *supra* note 132, at 1007.

135. Reitz, *supra* note 132, at 459; see also Hershkoff, *supra* note 133, at 1856 (noting that "courts in some states allow broad citizen standing").

136. See Hershkoff, *supra* note 133, at 1857 ("State courts also afford legislators an opportunity to test the constitutionality of legislation after its enactment, but before enforcement begins.")

137. See FALLON ET AL., *supra* note 106, at 122-23 (discussing legislator standing); Hershkoff, *supra* note 133, at 1853-54 ("[E]lected representatives typically lack standing [in federal court] to challenge government action, unless they can demonstrate injury to themselves as individuals.")

138. CAL. CIV. PROC. CODE § 526a (West 2010) ("An action to obtain a judgment,

establishing a city-owned and operated marijuana dispensary.¹³⁹ Under state law, any Oakland taxpayer could sue to enjoin the dispensary, on the grounds that (1) it violates federal law by distributing marijuana and (2) city officials are illegally expending city funds by operating it. Indeed, even if the dispensary became self-sufficient or contributed positively to Oakland's finances (through user fees, etc.), the program could be enjoined.¹⁴⁰

In short, a state court could do what a federal court might not: it could reach the merits of a preemption challenge to a state marijuana dispensary program. Given that such a program would be illegal under federal law, the court would (presumably) find it preempted and enjoin its operation.¹⁴¹

b. State Employee/Tenant Protection Laws

It would be far easier to find a plaintiff who would have standing in federal court to challenge state laws protecting tenants and employees from eviction and employment sanctions. In particular, any employer sued for terminating a marijuana-using employee clearly suffers a particularized and immediate injury: the need to defend against the suit and (likely) pay damages under state law.¹⁴² Likewise, a landlord who is sued for evicting a marijuana-growing tenant faces a similarly distinct and immediate injury. Standing would pose no obstacle to raising the preemption claims brought by these parties.

restraining and preventing any illegal expenditure of . . . funds . . . of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein.”).

139. Oakland has stopped just short of doing this. The Oakland City Council recently licensed four industrial-sized medical marijuana dispensaries. Malia Wollan, *Oakland, Seeking Financial Lift, Approves Giant Marijuana Farms*, N.Y. TIMES, July 21, 2010, at A18. Unlike government-operated dispensaries, however, government-licensed dispensaries are not necessarily considered state actors and thus might not be preempted by the CSA. See Mikos, *supra* note 1, at 1481 n.211 (discussing relevant case law).

140. *Blair v. Pitchess*, 486 P.2d 1242, 1249 (Cal. 1971) (explaining how state courts have interpreted section 526a liberally to “enable a large body of the citizenry to challenge government action” (quoting Comment, *Taxpayers’ Suits: A Survey and Summary*, 69 YALE L.J. 895, 904 (1960))). As a fallback, any state official required by law to operate the dispensary would have standing to challenge the program as preempted. *E.g.*, *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656 (Ct. App. 2007) (holding that the city police have standing to challenge as preempted a state law requiring them to return marijuana seized from qualified medical marijuana patients).

141. I say *presumably* because the California state courts have, thus far, failed to properly analyze the preemptive impact of the CSA on the state’s medical marijuana laws. See Mikos, *supra* note 1, at 1442 n.89 (discussing and critiquing preemption analysis in state cases).

142. *Cf. Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983) (granting standing to employer-airline that sought to challenge state pregnancy discrimination law as preempted under ERISA).

* * *

To recap, some state medical marijuana laws could be blocked as a result of the federal ban, even if the federal government itself disavows interest in enforcing it criminally. While this preemption threat is fairly narrow—only laws that require state agents to violate the CSA are preempted by it—it could derail important measures that some states are now considering to augment their core medical marijuana exemptions. The viability of preemption lawsuits—and thus, the reforms they challenge—would be unaffected by the NEP. Instead, whether plaintiffs could proceed would depend entirely upon standing doctrines in state and federal courts—doctrines that will not likely prevent the preemption issue from being litigated.

CONCLUSION

In many respects, the NEP is an empty gesture. It does not necessarily prevent medical marijuana users or dispensaries from being criminally prosecuted, even if they comply with state law. No court would enforce the NEP, and even the DOJ cannot guarantee compliance. Nor does the NEP remove the threat of civil sanctions against medical marijuana users and dispensaries. Federal agencies outside of the DOJ's control can still strip marijuana users of valuable federal benefits, drug companies could still pursue civil RICO claims against dispensaries in federal court, and private citizens could still initiate preemption challenges to enjoin certain state laws and impose their own brand of justice on marijuana users and suppliers.

One could say that, if the goal of the NEP is to economize federal law enforcement resources, the mission has been accomplished. The NEP has probably reduced the number of medical marijuana cases brought, even if it has not eliminated them entirely. The gains of such a policy shift, however, hardly seem noteworthy. Medical marijuana cases probably consumed no more than a sliver of the DOJ's budget, even at the heights of enforcement. Even a more drastic cut in enforcement actions against medical marijuana seems unlikely to change the landscape of federal criminal law.

However, if the goal was to empower states to regulate medical marijuana according to local preferences—and to grant reprieve to patients and dispensaries operating pursuant to state law—the NEP falls far short. Federal law continues to impede the development of rational state medical marijuana programs. Users, suppliers, and caregivers remain vulnerable to a host of federal civil sanctions and private sanctions against which the states are currently unable to provide shelter.

Not surprisingly, the Obama Administration would have been more successful had it simply legalized medical marijuana.¹⁴³ In fact, the CSA

143. By most accounts, President Obama has shown little interest in doing so. *See, e.g.,* Kreit, *supra* note 75, at 561 (discussing President Obama's reluctance to reschedule

authorizes the Attorney General to do so, in consultation with the Secretary of Health and Human Services and the DEA.¹⁴⁴ In other words, the President would not need the consent of Congress to make this more fundamental change to federal law.

Such a move would sever the many heads of the prohibition hydra. Marijuana would be put on par with other medications—it would be legal, but controlled. Civil sanctions would no longer flow solely from the drug's illicit status. Civil RICO claims predicated on the distribution of medical marijuana would be dismissed *even more readily*. Preemption challenges would no longer threaten legal protections for marijuana users and dispensaries or derail proposed reforms designed to enhance state control over the medical marijuana trade. And DOJ officials could no longer prosecute medical marijuana users and dispensaries, regardless of where they lived in the country.

I remain agnostic on the ultimate question of whether this drug should be made legal. I am convinced, however, that the present system of regulation—combining a confusing and conflicting set of rules—is seriously flawed. The NEP, unfortunately, has not improved that assessment.

marijuana).

144. 21 U.S.C. § 811 (2006).

APPENDIX

October 19, 2009

MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS

FROM: David W. Ogden, Deputy Attorney General
SUBJECT: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana

This memorandum provides clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana. These laws vary in their substantive provisions and in the extent of state regulatory oversight, both among the enacting States and among local jurisdictions within those States. Rather than developing different guidelines for every possible variant of state and local law, this memorandum provides uniform guidance to focus federal investigations and prosecutions in these States on core federal enforcement priorities.

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. One timely example underscores the importance of our efforts to prosecute significant marijuana traffickers: marijuana distribution in the United States remains the single largest source of revenue for the Mexican cartels.

The Department is also committed to making efficient and rational use of its limited investigative and prosecutorial resources. In general, United States Attorneys are vested with “plenary authority with regard to federal criminal matters” within their districts. USAM 9-2.001. In exercising this authority, United States Attorneys are “invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority.” *Id.* This authority should, of course, be exercised consistent with Department priorities and guidance.

The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department’s efforts against narcotics and dangerous drugs, and the Department’s investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.

For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources. On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department. To be sure, claims of compliance with state or local law may mask operations inconsistent with the terms, conditions, or purposes of those laws, and federal law enforcement should not be deterred by such assertions when otherwise pursuing the Department's core enforcement priorities.

Typically, when any of the following characteristics is present, the conduct will not be in clear and unambiguous compliance with applicable state law and may indicate illegal drug trafficking activity of potential federal interest:

- unlawful possession or unlawful use of firearms;
- violence;
- sales to minors;
- financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law;
- amounts of marijuana inconsistent with purported compliance with state or local law;
- illegal possession or sale of other controlled substances; or
- ties to other criminal enterprises.

Of course, no State can authorize violations of federal law, and the list of factors above is not intended to describe exhaustively when a federal prosecution may be warranted. Accordingly, in prosecutions under the Controlled Substances Act, federal prosecutors are not expected to charge, prove, or otherwise establish any state law violations. Indeed, this memorandum does not alter in any way the Department's authority to enforce federal law, including laws prohibiting the manufacture, production, distribution, possession, or use of marijuana on federal property. This guidance regarding resource allocation does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.

Finally, nothing herein precludes investigation or prosecution where there is a reasonable basis to believe that compliance with state law is being invoked

as a pretext for the production or distribution of marijuana for purposes not authorized by state law. Nor does this guidance preclude investigation or prosecution, even when there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests.

Your offices should continue to review marijuana cases for prosecution on a case-by-case basis, consistent with the guidance on resource allocation and federal priorities set forth herein, the consideration of requests for federal assistance from state and local law enforcement authorities, and the Principles of Federal Prosecution.

cc: All United States Attorneys

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