STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

October 30, 2018

Opinion No. 18-46

Legalization of Marijuana

Question 1

Specifically address any and all considerations [emphasis in original opinion request] that must be covered by any proposed Tennessee legislation with the direct or indirect purpose of authorizing possession, prescription or other distribution, transportation or use of cannabis/marijuana or its constituent parts and extracts in a non-medical-research setting.

Opinion 1

There is currently no proposed Tennessee legislation authorizing the possession, prescription, distribution, transportation, or use of marijuana in a non-medical-research setting. It is, therefore, difficult to provide a meaningful response to this question. "Any and all considerations" would include policy considerations and choices—which are the prerogative of the Legislature and not of this Office—as well as practical and legal considerations, all of which could vary significantly depending on the intent of the legislation, the scope of the legislation, and the precise text of the legislation.[1] Similarly incapable of determination are considerations related to hypothetical legislation that might have an indirect purpose of authorizing the use of marijuana. And since marijuana is known to contain over 480 constituents, see Drugs of Abuse, A U.S.

[1] Nine States (Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Vermont, and Washington) plus the District of Columbia have legalized the use of marijuana for both medical and recreational use. The laws legalizing marijuana in these States are far from uniform; they demonstrate the variety of issues that such legislation may take into consideration. See "Marijuana: Comparison of State Laws Legalizing Personal, Non-Medical Use" published by the National Alliance for Model State Drug Laws (NAMSDL) and available at http://www.namsdl.org/library/33FD7B09-D862-91A9-48FFEFD87F5D4611/ (providing a more than 50-page overview of the variations in the laws reflecting different concerns addressed by the state legislatures that have legalized non-medical use of cannabis).

Twenty-one other States have legalized the use of marijuana for medicinal purposes, i.e., Arizona, Arkansas, Connecticut, Delaware, Florida, Illinois, Louisiana, Maryland, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, and West Virginia. The NAMSDL publication "Marijuana: Comparison of State Laws Allowing Use for Medicinal Purposes" can be accessed at http://www.namsdl.org/library/5E330F37-EFA5-DDDE-0EF7018E59FC7C95/. It provides over 200 pages of information reflecting the various considerations addressed by state legislatures that have enacted laws allowing marijuana to be used for medicinal purposes.

We are in no way vouching for the accuracy or completeness of the information in the NAMSDL publications. We cite to them merely as an example of one of many available sources that purport to track the different laws and compare them.

DOJ/DEA Resource Guide: *2017 Edition*, p. 74, it would be a herculean task to address any and all considerations related to each of those constituent parts.

Question 2

More specifically, except for authorized medical research, address requirements that give, or appear to give, authority to prescribe or delegate the prescription of cannabis/marijuana or its constituent parts and extracts to any entity or individual.

Opinion 2

It is not possible to respond to this request in a meaningful way since there are virtually no limits on the scope of the question. "Requirements" could include every federal, state, and local law, rule, and regulation. And there is no way of determining what "requirement" might "appear" to give authority to prescribe or delegate the prescription of the entire family of cannabis and its derivatives to any entity or individual.

Question 3

Additionally, specifically address whether non-research prescribing of cannabis/marijuana by any Tennessee licensed physician, dentist, optometrist, podiatrist, veterinarian, pharmacist, advanced practice registered nurse with a certificate of fitness issued under title 63, chapter 7, or physician assistant is a violation of state or federal law.

Opinion 3

In general, current Tennessee law does not authorize these professionals to prescribe cannabis/marijuana for non-research purposes. Beyond that, there is no way to determine how every "state or federal law" might apply to each person to whom a license or certificate of fitness has been issued.

Question 4

Additionally, address requirements that give, or appear to give, authority to any entity other than a licensed and authorized medical research facility to dispense any cannabis/marijuana or its constituent parts and extracts.

Opinion 4

Please see Opinion 2, above.

Question 5

If enacted into law, would legislation attempting to authorize possession, prescription or other distribution, transportation, sale or use of cannabis/marijuana or its constituent parts and extracts in a non-medical-research setting with THC concentrations and uses other than, [sic] in Tennessee Code Annotated § 39-17-402 violate the Supremacy Clause of the United States Constitution?

Opinion 5

The Supremacy Clause provides that the federal Constitution and the laws and treaties of the United States "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2.

But the Supremacy Clause does not necessarily preempt every state law that conflicts with federal law. There is a presumption that "the historic police powers of the States" are not preempted by federal law "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This presumption applies to the States' historic police powers in the areas of public health and safety, since those powers are among the police powers traditionally left to the States. *See Gonzalez v. Oregon*, 546 U.S. 243, 270 (2006).

Congressional intent with regard to preemption may be expressed in various ways. First, Congress may expressly state in the federal legislation itself that it supplants all state law on the same subject matter. *Arizona v. U.S.*, 567 U.S. 387, 399. Second, Congress may indicate an intent to occupy the entire field covered by the federal law, in which case state law must yield. *Id.* This is referred to as "field preemption." Third, federal law will preempt state law to the extent that the two are in actual conflict. Such a preempting conflict arises either when it is impossible to comply with both the state and the federal law or when the state law "stands as an obstacle to the accomplishment of the full purposes and intent of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

In this case, the federal law which might conflict with the hypothetical Tennessee law referred to in the question is the Controlled Substances Act of 1970, 21 U.S.C. § 801 *et seq*, ("CSA"). The CSA is designed to combat drug abuse and to control both legitimate and illegitimate traffic in certain narcotics, stimulants, depressants, hallucinogens, anabolic steroids, and other chemicals. To that end, the CSA creates a comprehensive, closed regulatory regime criminalizing the unauthorized manufacture, importation, use, distribution, dispensing, and possession of specified controlled substances. 21 U.S.C. § 841 (2000 ed. and Supp. II); 21 U.S.C. § 844. All those who handle or intend to handle any controlled substance must register with the U.S. Drug Enforcement Agency ("DEA"), which implements the CSA and may prosecute violators.

Each substance controlled under the CSA is placed in one of five schedules based on its potential for abuse or dependence, its accepted medical use, and its accepted safety for use under medical supervision. Schedule I imposes the most severe restrictions on access and use, and Schedule V the least. 21 U.S.C. § 812. Accordingly, Schedule I drugs generally may be used in the United States only in research situations and are supplied by only a limited number of firms to

properly registered and qualified researchers. Congress classified a host of substances when it enacted the CSA, but those classifications are not necessarily static. The CSA provides procedures for adding, removing, and rescheduling controlled substances. *See, e.g.*, 21 U.S.C. § 811 (2000 ed. and Supp.V).

Tetrahydrocannabinol ("THC"), which is the active ingredient in the marijuana plant, is a controlled substance subject to the CSA. THC is currently listed as a Schedule I substance, which indicates that it is considered by DEA to have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. Marinol, a synthetic version of THC, is listed as a Schedule III substance. Marinol can be prescribed for the control of nausea and vomiting caused by chemotherapeutic agents used in the treatment of cancer and to stimulate appetite in AIDS patients.

Although some States allow the use of marijuana for medicinal—and even non-medicinal—purposes (*see* footnote 1), THC remains a Schedule I controlled substance under federal law.

In the CSA itself Congress has expressly disclaimed an intent to preempt the field but has declared its intent to preempt state laws that positively conflict with the CSA:

> 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.

Thus, the CSA would only preempt a state law when there is an actual conflict between the state law and the CSA that prevents the two from consistently co-existing. Of course, whether such an actual, positive conflict exists will depend entirely on the precise language of the state law. Accordingly, without knowing the precise language of a proposed Tennessee law, this Office can offer no meaningful opinion as to whether that law might be preempted by the CSA—or by any other federal law.[2]

In short, absent the text of the specific legislation, it is not possible to provide a meaningful response to this question. Moreover, there are at least two pieces of federal legislation currently pending in Congress that, if passed, will significantly alter the legal landscape and fundamentally affect any legislation Tennessee would/could propose.

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[2] The United States Supreme Court's most recent and detailed examinations of the interaction between the CSA and state law have not addressed preemption or otherwise indicated that the underlying state laws were preempted by the CSA. *See, e.g., Gonzalez v. Raich*, 545 U.S. 1 (2005) (holding, pursuant to the Commerce Clause, that federal agents had authority to seize cannabis plants the defendant cultivated for medical purposes under a purely intrastate medical marijuana law) and *Gonzalez v. Oregon*, 546 U.S. 243 (2006) (holding that the CSA did not support the Attorney General's Interpretive Rule prohibiting doctors from prescribing controlled substances for use in physician-assisted suicide as permitted under state law).

First, the Marijuana Justice Act of 2018, S.B. 1689, 115th Cong. (2017-2018), would amend the CSA to remove marijuana and tetrahydrocannabinols from Schedule 1 (the CSA's list of banned substances) and to eliminate criminal penalties for anyone who imports, exports, manufactures, distributes, or possesses with intent to distribute marijuana. It would prohibit or reduce certain federal funds for any state without a statute legalizing marijuana if the Bureau of Justice Assistance determines that the State has a disproportionate arrest or incarceration rate for marijuana offenses. It directs federal courts to expunge convictions for marijuana use or possession. And it creates a fund to be used by HUD to establish a grant program to reinvest in communities most affected by the war on drugs.

Second, the Strengthening the Tenth Amendment Through Entrusting States ("STATES") Act, S.B. 3032, 115th Cong. (2017-2018), which is sponsored by a bipartisan group of legislators, would protect States that legalize cannabis from federal interference by creating an exemption from the CSA, which currently includes marijuana as a controlled (i.e., generally banned) substance. The Act would also remove industrial hemp from the CSA entirely.

Unlike the Marijuana Justice Act, the STATES Act would not delist cannabis as a controlled substance under Schedule I. Instead, the STATES Act would amend the CSA to give each State the freedom to determine how best to address commercial cannabis activity within its own borders. State-approved commercial cannabis activity will cease to be considered drug trafficking, and proceeds from and assets used in legal cannabis operations would not be subject to forfeiture by the Department of Justice. The Act would also allow cannabis businesses legalized by the States to get federally protected trademarks and to take advantage of safe banking practices and other federal protections and benefits, including nondiscriminatory tax treatment.

Question 6

Can Tennessee legally authorize the prescribing or dispensing of a controlled substance in the FDA/DEA Schedule I for other than authorized medical research purposes?

Opinion 6

Please see Opinion 5, above.

Question 7

Is [Tennessee] House Bill 1749 and Senate Bill 1710, or similar legislation, in direct conflict with federal law, as well as other laws and licensure requirements for physicians and pharmacists?

Opinion 7

Tennessee H.B. 1749/S.B. 1710, 110th Gen. Assem. (2018), were taken off notice for consideration by both sponsors. There is no other proposed "similar" legislation. Please see Opinion 5, above.

Question 8

Given that the federal Controlled Substance Act prohibits possession, prescription, or other distribution, transportation, sale, or use of certain controlled substances, and each member of the Tennessee Senate and House of Representatives takes an oath or affirmation to support the Constitution of the United States, does the knowing and willful passage of laws that authorize possession, prescription, or other distribution, transportation, sale, or use of cannabis/marijuana or its constituent parts and extracts constitute a violation of the Supremacy Clause?

Opinion 8

This question presupposes that any law passed by the General Assembly authorizing "the possession, prescription, or other distribution, transportation, sale, or use of cannabis/marijuana or its constituent parts and extracts" is preempted by the CSA. That assumption is not necessarily correct; please see Opinion 5, above.

Question 9

Given that the federal Controlled Substance Act prohibits possession, prescription, or other distribution, transportation, sale, or use of certain controlled substances, and each member of the Tennessee Senate and House of Representatives takes an oath or affirmation to support the Constitution of the United States, and since the Centers for Disease Prevention and Control (CDC) have found the compounds in marijuana can adversely affect the circulatory system and may increase the risk of heart attacks and strokes with a significant increase in the risk of heart attack in the hours after marijuana use, does such knowing and willful passage of laws that authorize possession, prescription, or other distribution, transportation, sale, or use of a controlled substance potentially create a situation of failing to support the United States Constitution and of false swearing?

Opinion 9

Members of the Tennessee Senate and House of Representative are required to "take an oath or affirmation to support the Constitution of this State, and of the United States" and also to swear or affirm that, as a member of the General Assembly, they "will not propose or assent to any bill, vote or resolution, which shall appear to be injurious to the people, or consent to any act or thing, whatever, that shall have a tendency to lessen or abridge their rights and privileges, as declared by the Constitution of this State." Tenn. Const. art. X, § 2.

Even assuming that the assumption underlying the question is correct,[3] whether a member of the General Assembly has violated his or her oath of office is a determination that rests solely with that member's respective chamber, as does any decision about appropriate sanctions if a member is found to have violated the oath of office. *See* Tenn. Const. art II, § 12; Tenn. Att'y Gen. Op. 09-31; Tenn. Att'y Gen. Op. 05-106; Tenn. Att'y Gen. Op. 02-014.

[3] Based on the findings of the CDC cited in the question, the question regarding "false swearing" presupposes that any law passed by the General Assembly authorizing "the possession, prescription, or other distribution, transportation, sale, or use of a controlled substance" is "injurious to the people."

In any event, a legislator could not be sued for proposing or voting for legislation ultimately determined to be unconstitutional or otherwise detrimental. Tennessee legislators have immunity from suit for acts undertaken as part of the deliberative process in the General Assembly. *See* Tenn. Att'y Gen. Op. 02-014 (opining that a Tennessee legislator who voted in favor of allowing a charity to engage in a lottery despite a known constitutional ban on lotteries would be "absolutely immune from any kind of lawsuit arising out of an act that is part of the Legislature's deliberative process"). That legislative immunity is derived from the Tennessee Constitution and from the common law. *See, Mayhew v. Wilder*, 46 S.W.3d 760, 774-777 (Tenn. Ct. App. 2001) *perm. app. denied*.

Question 10

Given that Congress has declared in the Controlled Substance Act that the illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people; the Centers for Disease Prevention and Control (CDC) have found the compounds in marijuana can adversely affect the circulatory system and may increase the risk of heart attacks and strokes with a significant increase in the risk of heart attack in the hours after marijuana use; and each member of the Tennessee Senate and House of Representatives takes an oath or affirmation to not propose or assent to any bill, vote, or resolution, which shall appear to be injurious to the people, does knowing and willful passage of laws that authorize possession, prescription, or other distribution, transportation, sale, or use of a substance such as cannabis/marijuana or its constituent parts and extracts that has been declared injurious by numerous subject matter experts and federal government entities create a situation for which that controlled substance can be sufficiently injurious to the people and potentially create a situation of false swearing?

Opinion 10

Please see Opinions 8 and 9, above.

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