# Ethical Issues in the Budding Cannabis Industry

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**Presented By:**
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# NEW YORK STATE BAR ASSOCIATION

# ENVIRONMENTAL & ENERGY LAW SECTION

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Ethical Issues in the Budding Cannabis Industry

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United States Justice Department Memorandum – October 19, 2009

Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana

The "Ogden Memo"

**U.S. Department of Justice**

Office of the Deputy Attorney General

The Deputy Attorney General

*Washington, D.C. 20530*

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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United States Justice Department Memorandum – June 29, 2011

# Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use

**U.S. Department of Justice**

Office of the Deputy Attorney General

*Washington, D.C. 20530*

June 29, 2011

MEMORANDUM FOR UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use

Over the last several months some of you have requested the Department's assistance in responding to inquiries from State and local governments seeking guidance about the Department's position on enforcement of the Controlled Substances Act (CSA) in jurisdictions that have under consideration, or have implemented, legislation that would sanction and regulate the commercial cultivation and distribution of marijuana purportedly for medical use. Some of these jurisdictions have considered approving the cultivation of large quantities of marijuana, or broadening the regulation and taxation of the substance. You may have seen letters responding to these inquiries by several United States Attorneys. Those letters are entirely consistent with the October 2009 memorandum issued by Deputy Attorney General David Ogden to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana (the "Ogden Memo").

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 that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large scale criminal enterprises, gangs, and cartels. The Ogden Memorandum provides guidance to you in deploying your resources to enforce the CSA as part of the exercise of the broad discretion you are given to address federal criminal matters within your districts.

A number of states have enacted some form of legislation relating to the medical use of marijuana. Accordingly, the Ogden Memo reiterated to you that prosecution of significant traffickers of illegal drugs, including marijuana, remains a core priority, but advised that it is likely not an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or their caregivers. The term "caregiver" as used in the memorandum meant just that: individuals providing care to individuals with cancer or other serious illnesses, not commercial operations cultivating, selling or distributing marijuana.

The Department's view of the efficient use of limited federal resources as articulated in the Ogden Memorandum has not changed. There has, however, been an increase in the scope of

commercial cultivation, sale, distribution and use of marijuana for purported medical purposes. For example, within the past 12 months, several jurisdictions have considered or enacted legislation to authorize multiple large-scale, privately-operated industrial marijuana cultivation centers. Some of these planned facilities have revenue projections of millions of dollars based on the planned cultivation of tens of thousands of cannabis plants.

The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA. Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws.

The Department of Justice is tasked with enforcing existing federal criminal laws in all states, and enforcement of the CSA has long been and remains a core priority.

cc: Lanny A. Breuer
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United States Justice Department Memorandum – August 29, 2013

Guidance Regarding Marijuana Enforcement

The "Cole Memo"

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

*Washington, D.C. 20530*

August 29, 2013

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. Thus, this memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.[1]

Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity

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[1] These enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA. By way of example only, the Department's interest in preventing the distribution of marijuana to minors would call for enforcement not just when an individual or entity sells or transfers marijuana to a minor, but also when marijuana trafficking takes place near an area associated with minors; when marijuana or marijuana-infused products are marketed in a manner to appeal to minors; or when marijuana is being diverted, directly or indirectly, and purposefully or otherwise, to minors.

must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

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New York State Bar Association Ethics Opinion – September 29, 2014

Counseling Clients in Illegal Conduct; Medical Marijuana Law

NEW YORK STATE BAR ASSOCIATION

*Serving the legal profession and the community since 1876*

# ETHICS OPINION 1024

New York State Bar Association
Committee on Professional Ethics

Opinion 1024 (9/29/14)

Topic: Counseling clients in illegal conduct; medical marijuana law.

Digest: In light of current federal enforcement policy, the New York Rules permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana.

Rules: 1.2(d), 1.2(f), 1.2 cmt 9, 1.16(c)(2), 6.1 cmt 1, 8.4(b).

FACTS

1. In July 2014, New York, following the lead of 22 other states, adopted the Compassionate Care Act ("CCA")[1], a law permitting the use of medical marijuana in tightly controlled circumstances. The CCA regulates the cultivation, distribution, prescription and use of marijuana for medical purposes. It permits specially approved organizations such as hospitals and community health centers to dispense medical marijuana to patients who have been certified by a health care provider and who have registered with the state Department of Health, and it further provides for the regulation and registration of organizations to manufacture and deliver marijuana for authorized medical uses.

2. At the same time, federal criminal law forbids the possession, distribution, sale or use of marijuana, and the federal law provides no exception for medical uses. The U.S. Department of Justice takes the position that the federal law is valid and enforceable even against individuals and entities engaged in the cultivation, transportation, delivery, prescription or use of medical marijuana in accordance with state regulatory law; however, the U.S. Department of Justice has adopted and published formal guidance restricting federal enforcement of the federal marijuana prohibition when individuals and entities act in accordance with state regulation of medical marijuana.

QUESTION

3. Under these unusual circumstances, do the New York Rules of Professional Conduct ("Rules") permit a lawyer to provide legal advice and assistance to doctors, patients, public officials, hospital administrators and others engaged in the cultivation, distribution, prescribing, dispensing, regulation,

possession or use of marijuana for medical purposes to help them act in compliance with state regulation regarding medical marijuana and consistently with federal enforcement policy?

OPINION

4. Lawyers may advise clients about the lawfulness of their proposed conduct and assist them in complying with the law, but lawyers may not knowingly assist clients in illegal conduct. Rule 1.2(d) provides: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client." Disciplinary Rule 7-102(A)(7), contained in the pre-2009 Code of Professional Responsibility, was to the same effect. As this Committee has observed, if a client proposes to engage in conduct that is illegal, "then it would be unethical for an attorney to recommend the action or assist the client in carrying it out." N.Y. State 769 (2003); *accord* N.Y. State 666 (1994).

5. This ethical restriction reflects lawyers' fundamental role in the administration of justice, which is to promote compliance with the law by providing legal advice and assistance in structuring clients' conduct in accordance with the law. *See also* Rule 8.4(b) (forbidding "illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer"). Ideally, lawyers will not only attempt to prevent clients from engaging in knowing illegalities but also discourage clients from conduct of doubtful legality:

> The most effective realization of the law's aims often takes place in the attorney's office, . . . where the lawyer's quiet counsel takes the place of public force. Contrary to popular belief, the compliance with the law thus brought about is not generally lip-serving and narrow, for by reminding him of its long-run costs the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose. . . .
>
> The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is immoral, unfair, or of doubtful legality.

Am. Bar Ass'n & Ass'n of Am. Law Sch., Professional Responsibility Report of the Joint Conference, 44 A.B.A. J. 1159, 1161 (1958). The public importance of lawyers' role in promoting clients' legal compliance is reflected in the attorney-client privilege, which protects the confidentiality that is traditionally considered essential in order for lawyers to serve this role effectively. *See, e.g., Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

6. It is counter-intuitive to suppose that the lawyer's fundamental role might ever be served by assisting clients in violating a law that the lawyer knows to be valid and enforceable. But the question presented by the state's medical marijuana law is highly unusual if not unique: Although participating in the production, delivery or use of medical marijuana violates federal criminal law as written, the federal government has publicly announced that it is limiting its enforcement of this law, and has acted accordingly, insofar as individuals act consistently with state laws that legalize and extensively regulate medical marijuana. Both the state law and the publicly announced federal enforcement policy presuppose that individuals and entities will comply with new and intricate state regulatory law and, thus, presuppose that lawyers will provide legal advice and assistance to an array of public and private actors and institutions to promote their compliance with state law and current federal policy. Under these unusual circumstances, for the reasons discussed below, the Committee concludes that Rule 1.2(d) does not forbid lawyers from providing the necessary advice and assistance.

Legal background

7. Much has been written elsewhere about the interrelationship between federal criminal narcotics laws and recent state medical marijuana laws. For purposes of this opinion, only the following basic understanding is needed.

8. Under federal criminal law, marijuana is a Schedule I narcotic, whose manufacture, possession and distribution is prohibited, and for which there is no approved medical use. Further, individuals and entities are forbidden by federal law not only from violating these laws as principals, but also, under principles of accessorial liability, from intentionally aiding and abetting others in violating the narcotics law, counseling others to violate the narcotics law, or conspiring with others to violate the narcotics law.[2]

9. For many years, states likewise criminalized the manufacture, possession and distribution of marijuana, allowing for concurrent federal and state enforcement of the criminal law. Most prosecutions of narcotics laws, especially with regard to marijuana, occurred at the state and local level. However, in recent years, more than 20 states have legalized marijuana for medicinal purposes to make it available by prescription. Colorado and Washington have gone farther, developing regulation permitting the sale and use of marijuana for recreational purposes.

10. The U.S. Department of Justice ("DOJ") takes the position that the manufacture, possession and distribution of marijuana remains a federal crime, and can be enforced by federal law enforcement officials, even when the conduct in question is undertaken in accordance with state medical marijuana laws. However, current federal policy restricts federal enforcement activity, including civil as well as criminal enforcement, concerning medical marijuana. The Deputy Attorney General's August 29, 2013 memorandum, titled "Guidance Regarding Marijuana Enforcement," acknowledges that "the federal government has traditionally relied on state and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws," and the federal government has concentrated its effort in accordance with federal enforcement priorities, such as preventing the distribution of marijuana to minors, preventing revenue from marijuana sales from going to criminal enterprises, and preventing marijuana activity from being used as a cover for trafficking other drugs. The memorandum directs Department attorneys and federal law enforcement authorities to focus their enforcement resources and efforts on these priorities, which are less likely to be threatened "[i]n jurisdictions that have

enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana." Although the memorandum makes plain that it is not intended to create any enforceable substantive or procedural rights, the memorandum might fairly be read as an expression by the current Administration that it will not enforce the federal criminal law with regard to otherwise-lawful medical marijuana activities that are carried out in accordance with a robust state regulatory law and that do not implicate the identified federal enforcement priorities. Over the period of more than a year since the memorandum was published, federal law enforcement authorities have acted consistently with this understanding.

11. The CCA allows specified licensed New York physicians to prescribe, and patients to use, medical marijuana only in pill form or in a form that may be inhaled as a vapor, but not in a form that may be smoked. Medical marijuana may only be prescribed for identified, documented medical conditions categorized as "severe[ly] debilitating or life-threatening." The regulation of medical marijuana under the law will be overseen by the Health Department, which, among other things, will authorize and register a limited number of organizations ("Registered Organizations") to manufacture and dispense marijuana for medical use, will issue registration cards to patients or their caregivers certified to receive medical marijuana, and will set prices. The law restricts who may be hired by Registered Organizations, regulates their production and dispensation of medical marijuana, establishes a tax on their receipts, and criminalizes various abuses. *See generally* Francis J. Serbaroli, "A Primer on New York's Medical Marijuana Law," NYLJ, July 22, 2014, p. 3.

The potential role of lawyers in providing legal assistance regarding compliance with the medical marijuana law

12. Lawyers might provide a range of assistance to clients seeking to comply with the CCA and to act consistently with federal law enforcement policy. Among the potential clients are public officials and agencies including the Health Department that have responsibility for implementing the law, health care providers and other entities that may apply to be selected or eventually be selected as Registered Organizations authorized to manufacture and dispense medical marijuana, physicians seeking to prescribe medical marijuana, and patients with severely debilitating or life-threatening conditions seeking to obtain medical marijuana. Any or all of these potential clients may seek legal assistance not only so that they may be advised how to comply with the state law and avoid running afoul of federal enforcement policy but also for affirmative legal assistance. The Health Department may seek lawyers' help in establishing internal procedures to conduct the registrations and other activities contemplated by the law. Entities may seek assistance in applying to become Registered Organizations as well as in understanding and complying with employment, tax and other requirements of the law. Physicians may seek help in understanding the severe restrictions on the issuance of prescriptions for medical marijuana and in navigating the procedural requirements for effectively issuing such prescriptions.

13. Leaving aside the federal law, the above-described legal assistance would be entirely consistent with lawyers' conventional role in helping clients comply with the law. Indeed, it seems fair to say that state law would not only permit but affirmatively expect lawyers to provide such assistance. In general, it is assumed that lawyers, by virtue of their expertise and ethical expectations, have a necessary role in ensuring the public's compliance with the law. "As our society becomes one in which rights and

responsibilities are increasingly defined in legal terms, access to legal services has become of critical importance." Rule 6.1, Cmt. [1]. This is especially true with regard to complex, technical regulatory schemes such as the one established by the CCA, and where, as in the case of the CCA, noncompliance can result in criminal prosecution.

14. However, the federal law cannot easily be left aside. The question of whether lawyers may serve their traditional role is complicated by the federal law. Assuming, as we do for purposes of this opinion, that the federal marijuana prohibition remains valid and enforceable notwithstanding state medical marijuana law, then individuals and entities seeking to dispense, prescribe or use medical marijuana, or to assist others in doing so, pursuant to the CCA would potentially be violating federal narcotics law as principals or accessories; in that event, the legal assistance sought from lawyers might involve assistance in conduct that the lawyer knows to be illegal.

Prior ethics opinions

15. Several other bar association ethics committees have confronted this problem but reached different conclusions under their counterparts to Rule 1.2(d). Most of these opinions pre-dated DOJ's August 2013 guidance, but took account of a 2009 DOJ memorandum suggesting that federal law enforcement would not be directed at patients and their caregivers who are in "clear and unambiguous compliance" with state medical marijuana laws.

16. In 2010, Maine's ethics committee took the view that although lawyers may assist clients in determining "the validity scope, meaning or application of the law," the rule "forbids attorneys from assisting a client in engaging in the medical marijuana business" because the rule "does not make a distinction between crimes which are enforced and those which are not. . . . [A]n attorney needs to . . . determine whether the particular legal service being requested rises to the level of assistance in violating federal law." Maine Op. 199 (July 7, 2010).

17. Connecticut's ethics committee similarly concluded that a lawyer may not assist a client insofar as its conduct, although authorized by the state's medical marijuana law, which created a broad licensing and registration structure to be implemented by the Department of Consumer Protection, violates federal law. Connecticut Op. 2013-02 (Jan. 16, 2013). The opinion noted that much of the legal assistance sought by clients seeking to comply with the law (e.g., patients, caregivers, physicians, pharmacists, distributers and growers), such as legal advice and assistance regarding the law's requirements and the rule-making and regulatory processes, would be consistent with lawyers' "traditional role as counselors" and "in the classic mode envisioned by professional standards." But some of that legal work might nevertheless constitute impermissible assistance in violating federal law.

18. More recently, in the context of Colorado's state law decriminalizing and regulating the sale of marijuana for recreational purposes, the state's ethics committee opined: "[U]nless and until there is a change in applicable federal law or in the Colorado Rules of Professional Conduct, a lawyer cannot advise a client regarding the full panoply of conduct permitted by the marijuana amendments to the Colorado Constitution and implementing statutes and regulations. To the extent that advice were to cross from advising or representing a client regarding the consequences of a client's past or contemplated conduct under federal and state law to counseling the client to engage, or assisting the client, in conduct the

lawyer knows is criminal under federal law, the lawyer would violate Rule 1.2(d)." Colorado Op. 125 (Oct. 21, 2013). However, the committee recommended amending the state ethics rules to authorize lawyers to advise and assist clients regarding marijuana-related conduct, notwithstanding contrary federal law.[3]

19. In 2011, Arizona's ethics committee reached a very different conclusion, however, based in significant part on the premise that "no court opinion has held that the state law is invalid or unenforceable on federal preemption grounds."

> In these circumstances, we decline to interpret and apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in "clear and unambiguous compliance" with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits. The maintenance of an independent legal profession, and of its right to advocate for the interests of clients, is a bulwark of our system of government. History is replete with examples of lawyers who, through vigorous advocacy and at great personal and professional cost to themselves, obtained the vindication of constitutional or other rights long denied or withheld and which otherwise could not have been secured.
>
> A state law now expressly permits certain conduct. Legal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law. In any potential conflict between state and federal authority, such as may be presented by the interplay between the Act and federal law, lawyers have a critical role to perform in the activities that will lead to the proper resolution of the controversy. Although the Act may be found to be preempted by federal law or otherwise invalid, as of this time there has been no such judicial determination.

Arizona Op. 11-01 (Feb. 2011). The opinion concluded:

> • If a client or potential client requests an Arizona lawyer's assistance to undertake the specific actions that the Act expressly permits; and
>
> • The lawyer advises the client with respect to the potential federal law implications and consequences thereof or, if the lawyer is not qualified to do so, advises the client to seek other legal counsel regarding those issues and limits the scope of his or her representation; and
>
> • The client, having received full disclosure of the risks of proceeding under the state law, wishes to proceed with a course of action specifically authorized by the Act; then
>
> • The lawyer ethically may perform such legal acts as are necessary or desirable to assist the client to engage in the conduct that is expressly permissible under the Act.

*Id.*

20. A recent opinion of the King County (Washington) Bar Association endorsed the Arizona committee's conclusion and much of its reasoning,[4] in the context of Washington's adoption of a state-regulated system for producing and selling marijuana for recreational purposes:

> While the KCBA does not agree with all components of the Arizona opinion, its emphasis on the client's need for legal assistance to comply with state law accurately reflects the reality that Washington clients face in navigating the new Washington law. The initial proposed implementing regulations for I-502, for example, have added 49 new sections in the Washington Administrative Code encompassing 42 pages of text. These regulations are consistent with I-502's express goal of removing the marijuana economy from the province of criminal organizations and bringing it into a "tightly regulated, state-licensed system." In building this complex system, the voters of Washington could not have envisioned it working without attorneys. As the State Bar of Arizona recognized, disciplining attorneys for working within such a system would deprive the state's citizens of legal services 'necessary and desirable to implement and bring to fruition that conduct expressly permitted under state law.

KCBA Ethics Advisory Opinion on I-502 [Initiative 502 - marijuana legalization] & Rules of Professional Conduct (Oct. 2013). Following suit, the Washington State bar ethics committee recently proposed adding a Comment to the state's ethics code and issuing an advisory opinion authorizing lawyers to assist clients in complying with the state marijuana law at least until federal enforcement policy changes.

Analysis

21. As Rule 1.2(d) makes clear, although a lawyer may not encourage a client to violate the law or assist a client in doing so, a lawyer may advise a client about the reach of the law. *See* N.Y. State 455 (1976) ("[W]here the lawyer does no more than advise his client concerning the legal character and consequences of the act, there can be no professional impropriety. That is his proper function and fully comports with the requirements of Canon 7. . . . But, where the lawyer becomes a motivating force by encouraging his client to commit illegal acts or undertakes to bring about a violation of law, he oversteps the bounds of propriety."). Thus, a lawyer may give advice about whether undertaking to manufacture, transport, sell, prescribe or use marijuana in accordance with the CCA's regulatory scheme would violate federal narcotics law. If the lawyer were to conclude competently and in good faith that the federal law was inapplicable or invalid, the lawyer could so advise the client and would not be subject to discipline even if the lawyer's advice later proved incorrect. *See, e.g.*, ABA Op. 85-352 (1985) ("[W]here a lawyer has a good faith belief . . . that a particular transaction does not result in taxable income or that certain expenditures are properly deductible as expenses, the lawyer has no duty to require [disclosure] as a condition of his or her continued representation . . . . In the role of advisor, the lawyer should counsel the client as to whether the position is likely to be sustained by a court if challenged by the IRS, as well as of the potential penalty

consequences to the client if the position is taken on the tax return without disclosure.").[5] As the Second Department recognized in dismissing a prosecution against a lawyer who allegedly gave erroneous advice about the lawfulness of the client's proposed conduct:

> We cannot conclude that an attorney who advises a client to take an action that he or she, in good faith, believes to be legal loses the protection of the First Amendment if his or her advice is later determined to be incorrect. Indeed, it would eviscerate the right to give and receive legal counsel with respect to potential criminal liability if an attorney could be charged with conspiracy and solicitation whenever a District Attorney disagreed with that advice. The potential impact of allowing an attorney to be prosecuted in circumstances such as those presented here is profoundly disturbing. A looming threat of criminal sanctions would deter attorneys from acquainting individuals with matters as vital as the breadth of their legal rights and the limits of those rights. Correspondingly, where counsel is restrained, so is the fundamental right of the citizenry, bound as it is by laws complex and unfamiliar, to receive the advice necessary for measured conduct.

*Matter of Vinluan v Doyle*, 60 AD3d 237, 243, 873 NYS2d 72 (2d Dep't 2009).

22. Further, Rule 1.2(d) forbids a lawyer from assisting a client in conduct only if the lawyer *knows* the conduct is illegal or fraudulent. If the lawyer believes that conduct is unlawful but there is some support for an argument that the conduct is legal, the lawyer may provide legal assistance under the Rules (but is not obligated to do so). *See* Rule 1.2(f) ("A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal."); s*ee also* Rule 1.16(c)(2) ("a lawyer may withdraw from representing a client when . . . the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent").

23. The difficult question arises if the lawyer *knows* that the client's proposed conduct, although consistent with state law, would violate valid and enforceable federal law.[6] Ordinarily, in that event, while the lawyer could advise the client about the reach of the federal law and how to conform to the federal law, the lawyer could not properly encourage or assist the client in conduct that violates the federal law. That would ordinarily be true even if the federal law, although applicable to the client's proposed conduct, was not rigorously enforced and the lawyer anticipated that the law would not be enforced in the client's situation. *See* Charles W. Wolfram, Modern Legal Ethics 703 (1986) ("on the whole, lawyers serve the interests of society better if they urge upon clients the desirability of complying with all valid laws, no matter how widely violated by others they may be"); *cf.*Restatement (Third) of the Law Governing Lawyers

§ 94, Cmt. f (2000) ("A lawyer's advice to a client about the degree of risk that a law violation will be detected or prosecuted [is impermissible when] the lawyer thereby intended to counsel or assist the client's crime, fraud, or violation of a court order."). But the situation is different where the state executive branch determines to implement the state legislation by authorizing and regulating medical marijuana, consistent with current, published federal executive-branch enforcement policy, and the federal government does not take effective measures to prevent the implementation of the state law. In that event, the question under Rule 1.2(d) is whether a lawyer may assist in conduct under the state medical marijuana law that the lawyer knows would violate federal narcotics law that is on the books but deliberately unenforced as a matter of federal executive discretion.

24. This situation raises political and philosophical questions that this Committee cannot and need not resolve regarding how best to make and implement law in a federal system. Some may think it anomalous, where Congress has recognized no relevant exception to its narcotics prohibitions, for states to adopt medical marijuana laws that appear to contravene federal law and for the federal executive branch, through the exercise of prosecutorial discretion, effectively to carve out an exception for the implementation of these state laws. Others may think that DOJ's forbearance is consistent with its tradition, known to Congress, of exercising prosecutorial discretion to mitigate the criminal law's excesses, including where the criminal law reaches farther than its underlying purposes. We do not believe that by adopting Rule 1.2(d), our state judiciary meant to declare a position on this debate or meant to preclude lawyers from counseling or assisting conduct that is legal under state law. Rule 1.2(d) was based on an ABA model and there is no indication that anyone – not the ABA, not the state bar, and not the state court itself -- specifically considered whether lawyers may serve in their traditional role in this sort of unusual legal situation. We assume for purposes of this Opinion that state courts will themselves serve in their traditional role: As issues of interpretation arise in litigation under the CCA, state courts will be available to issue interpretive rulings and take other judicial action that has the practical effect of assisting in the implementation of the CCA.[7] Serving this role will not undermine state judicial integrity. Similarly, we do not believe that it derogates from public respect for the law and lawyers, or otherwise undermines the objectives of the professional conduct rules, for lawyers as "officers of the court" to serve in their traditional role as well, if they so choose. Obviously, lawyers may decline to give legal assistance regarding the CCA.

25. We conclude that the New York Rules of Professional Conduct permit lawyers to give legal assistance regarding the CCA that goes beyond a mere discussion of the legality of the client's proposed conduct. In general, state professional conduct rules should be interpreted to promote state law, not to impede its effective implementation. As the Arizona and King County opinions recognized, a state medical-marijuana law establishing a complex regulatory scheme depends on lawyers for its success. Implicitly, the state law authorizes lawyers to provide traditional legal services to clients seeking to act in accordance with the state law. Further, and crucially, in this situation the federal enforcement policy also depends on the availability of lawyers to establish and promote compliance with the "strong and effective regulatory and enforcement systems" that are said to justify federal forbearance from enforcement of narcotics laws that are technically applicable. The contemplated legal work is not designed to escape law enforcement by avoiding detection. *Cf.* Rule 1.2 cmt. [9] ("There is a critical distinction between presenting an analysis of the legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."); N.Y. State 529 (1981) ("[T]he Code distinguishes between giving legal advice and giving advice which would aid the client in escaping

punishment for past crimes. EC 7-5 warns that 'a lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment'"). Lawyers would assist clients who participate openly and subject to a state regulatory structure that the federal government allows to function as a matter of discretion. Nothing in the history and tradition of the profession, in court opinions, or elsewhere, suggests that Rule 1.2(d) was intended to prevent lawyers in a situation like this from providing assistance that is necessary to implement state law and to effectuate current federal policy.[8] If federal enforcement were to change materially, this Opinion might need to be reconsidered.

CONCLUSION

26. In light of current federal enforcement policy, the New York Rules of Professional Conduct permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana.

(34-14)

[1]Laws of 2014, Chap. 90 (signed by the Governor and effective on July 5, 2014).

[2]*See, e.g.*, 18 U.S.C. §2(a)("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."); 18 U.S.C. § 2(b)("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."); 21 U.S.C. § 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

[3]Colorado added a new comments [14] to Rule 1.2 of the Colorado Rules of Professional Conduct, permitting a lawyer to counsel a client regarding the validity, scope and meaning of the Colorado marijuana law and to assist a client in conduct that the lawyer reasonably believes is permitted by that law, but the lawyer must also advise the client regarding related federal law and policy. Nevada adopted a new Comment [1] to Rule 1.2 that is substantively identical to Colorado Comment [14]. In Washington State, the King County Bar Association has urged the Washington Supreme Court to amend the Washington Rules of Professional Conduct to add a comment to Rule 8.4 and a new Rule 8.6, to make clear that conduct permitted by the state marijuana law does not reflect adversely on the lawyer's honesty, trustworthiness or fitness in other respects, and that a lawyer is not subject to discipline for counseling or assisting a client in conduct permitted by the state marijuana law, even though the conduct may violate federal law. Those proposals were still pending when we issued this opinion.

[4]The King County opinion rejected the implication of the Arizona opinion that the propriety of the lawyer's assistance turned on the fact that the state medical marijuana law had not yet been invalidated or preempted.

[5]Inasmuch as this Committee limits itself to interpreting the ethics rules, we take no view on whether a colorable argument can be made that the federal narcotics law is invalid or unenforceable in situations where individuals or entities transport, distribute, possess or use marijuana pursuant to state medical marijuana law. We note, however, that as a constitutional matter, duly enacted federal laws ordinarily preempt inconsistent state laws under the federal Supremacy Clause. We also note, in particular, that in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court rejected a claim that Congress exceeded its authority under the Commerce Clause insofar as the marijuana prohibition applied to personal use of marijuana for medical purposes.

[6]Rule 1.2(d) allows lawyers to assist clients in good faith challenges to a law's validity, but that is not the situation posed here.

[7]If the state courts were to nullify the CCA based on inconsistent federal narcotics law, the question addressed in this opinion would, of course, become moot.

[8]For essentially the same reason, we regard Rule 8.4(b) as inapplicable. Assuming that a lawyer's legal assistance in implementing the state medical-marijuana law technically violates the unenforced federal criminal law, we do not believe that the lawyer's assistance under the circumstances described here would amount to "illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

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Amendment to 2013-2014 Federal Budget

The "Rohrabacher-Farr Amendment"

has been, and, again, will be passed unanimously by the House.

I yield back the balance of my time.

Mr. WOLF. Mr. Chairman, I move to strike the requisite number of words.

The Acting CHAIR. The gentleman from Virginia is recognized for 5 minutes.

Mr. WOLF. I accept the amendment, and I yield back the balance of my time.

The Acting CHAIR. The question is on the amendment offered by the gentleman from Florida (Mr. Grayson).

The amendment was agreed to.

Amendment No. 25 Offered by Mr. Rohrabacher

Mr. ROHRABACHER. Mr. Chairman, I have an amendment at the desk preprinted in the Congressional Record.

The Acting CHAIR. The Clerk will designate the amendment.

The text of the amendment is as follows:

> At the end of the bill (before the short title), insert the following:
>
> Sec. __. None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

The Acting CHAIR. Pursuant to the order of the House of today, the gentleman from California (Mr. Rohrabacher) and a Member opposed each will control 5 minutes.

The Chair recognizes the gentleman from California.

Mr. ROHRABACHER. Mr. Chairman, I rise to speak in favor of my amendment, which would prohibit the Department of Justice from using any of

[[Page H4983]]

the funds appropriated in this bill to prevent States from implementing their own medical marijuana laws. Twenty-nine States have enacted laws that allow patients access to medical marijuana and its derivatives, such as CBD oils.

It is no surprise then that public opinion is shifting, too. A recent Pew Research Center survey found that 61 percent of Republicans and a whooping 76 percent of Independents favor making medical marijuana legal and available to their patients who need it.

*United States v McIntosh*, 833 F.3d 1163 (9th Cir. 2016)

# *United States v. McIntosh*

United States Court of Appeals for the Ninth Circuit

December 7, 2015, Argued and Submitted, San Francisco, California; August 16, 2016, Filed

No. 15-10117, No. 15-10122, No. 15-10127, No. 15-10132, No. 15-10137, No. 15-30098, No. 15-71158, No. 15-71174, No. 15-71179, No. 15-71225

**Reporter**
833 F.3d 1163 *; 2016 U.S. App. LEXIS 15029 **

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEVE MCINTOSH, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. IANE LOVAN, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SOMPHANE MALATHONG, Defendant-Appellant.UNITED STATES OF AMERICA, Plaintiff-Appellee, v. VONG SOUTHY, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KHAMPHOU KHOUTHONG, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JERAD JOHN KYNASTON, AKA Jared J. Kynaston, AKA Jerad J. Kynaston; SAMUEL MICHAEL DOYLE, AKA Samuel M. Doyle; BRICE CHRISTIAN DAVIS, AKA Brice C. Davis; JAYDE DILLON EVANS, AKA Jayde D. Evans; TYLER SCOTT MCKINLEY, AKA Tyler S. McKinley, Defendants-Appellants. IN RE IANE LOVAN, IANE LOVAN, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FRESNO, Respondent, UNITED STATES OF AMERICA, Real Party in Interest. IN RE SOMPHANE MALATHONG, SOMPHANE MALATHONG, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FRESNO, Respondent, UNITED STATES OF AMERICA, Real Party in Interest. IN RE VONG SOUTHY, VONG SOUTHY, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FRESNO, Respondent, UNITED STATES OF AMERICA, Real Party in Interest. IN RE KHAMPHOU KHOUTHONG, KHAMPHOU KHOUTHONG, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FRESNO, Respondent, UNITED STATES OF AMERICA, Real Party in Interest.

**Subsequent History:** Motion denied by *United States v. McIntosh, 2017 U.S. Dist. LEXIS 39920 (N.D. Cal., Mar. 20, 2017)*

**Prior History: [**1]** Appeal from the United States District Court for the Northern District of California. D.C. No. 3:14-cr-00016-MMC-3. Maxine M. Chesney, Senior District Judge, Presiding.

Appeals from the United States District Court for the Eastern District of California. D.C. No. 1:13-cr-00294-LJO-SKO-1, D.C. No. 1:13-cr-00294-LJO-SKO-2, D.C. No. 1:13-cr-00294-LJO-SKO-3, D.C. No. 1:13-cr-00294-LJO-SKO-4. Lawrence J. O'Neill, District Judge, Presiding.

Appeal from the United States District Court for the Eastern District of Washington. D.C. No. 2:12-cr-00016-WFN-1 Wm. Fremming Nielsen, Senior District Judge, Presiding.

Petitions for Writ of Mandamus. D.C. No. 1:13-cr-00294-LJO-SKO-1, D.C. No. 1:13-cr-00294-LJO-SKO-3, D.C. No. 1:13-cr-00294-LJO-SKO-2, D.C. No. 1:13-cr-00294-LJO-SKO-4.

*United States v. Kynaston, 534 Fed. Appx. 624, 2013 U.S. App. LEXIS 15035 (9th Cir. Wash., 2013)*

**Disposition:** VACATED AND REMANDED WITH INSTRUCTIONS.

## Core Terms

medical ***marijuana***, appropriations, prosecutions, funds, state law, district court, cultivation, authorize, ***marijuana***, rider, individuals, prohibits, injunction, cases, injunctive relief, spending, implementing, manufacture, appeals, enjoin, practical effect, ***marijuana*** plant, orders, Dictionary, direct denial, federal court, spend money, separation-of-powers, requirements, principles

## Case Summary

**Overview**

ISSUE: Whether criminal defendants may avoid prosecution for various federal ***marijuana*** offenses on the basis of a congressional appropriations rider that prohibits the U.S. Department of Justice (DOJ) from spending funds to prevent states' implementation of their own medical ***marijuana*** laws. HOLDINGS: [1]-Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015), prohibits the DOJ from spending money on actions that prevent the Medical ***Marijuana*** States giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical ***marijuana***; [2]-At a minimum, § 542 prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical ***Marijuana*** Laws and who fully complied with such laws.

**Outcome**

The court vacated the orders of the district courts and remanded with instructions to conduct an evidentiary hearing to determine whether defendants had complied with state law.

## LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Authority of Appellate Court

*HN1*[] **Appellate Jurisdiction, Authority of Appellate Court**

Federal courts are courts of limited subject-matter jurisdiction, possessing only that power authorized both by the Constitution and by Congress. Before proceeding to the merits of a dispute, the court must assure itself that it has jurisdiction.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

*HN2*[] **Appellate Jurisdiction, Final Judgment Rule**

The court of appeals' jurisdiction is typically limited to final decisions of the district court. In criminal cases, this prohibits appellate review until after conviction and imposition of sentence.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Interlocutory Appeals

*HN3*[] **Appellate Jurisdiction, Interlocutory Appeals**

Under *28 U.S.C.S. § 1292(a)*, the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States granting, continuing, modifying, refusing or dissolving injunctions, except where a direct review may be had in the Supreme Court. By its terms, *§ 1292(a)(1)* requires only an interlocutory order refusing an injunction.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Interlocutory Appeals

*HN4*[] **Appellate Jurisdiction, Interlocutory Appeals**

While *28 U.S.C.S. § 1292(a)(1)* must be narrowly construed in order to avoid piecemeal litigation, it does permit appeals from orders that have the "practical effect" of denying an injunction, provided that the would-be appellant shows that the order "might have a serious, perhaps irreparable, consequence." The U.S. Court of Appeals for the Ninth Circuit finds nothing in Carson to suggest that the requirement of irreparable injury applies to appeals from orders specifically denying injunctions. Carson merely expanded the scope of appeals that do not fall within the meaning of the statute. Thus, Carson's requirements do not apply to appeals from the "direct denial of a request for an injunction."

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Interlocutory Appeals

*HN5*[] **Appellate Jurisdiction, Interlocutory Appeals**

In almost all federal criminal prosecutions, injunctive relief and interlocutory appeals will not be appropriate. Federal courts traditionally have refused, except in rare instances, to enjoin federal criminal prosecutions. An order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not

considered an injunction and therefore is not appealable under *28 U.S.C.S. § 1292(a)(1)*. Thus, in almost all circumstances, federal criminal defendants cannot obtain injunctions of their ongoing prosecutions, and orders by district courts relating solely to requests to stay ongoing federal prosecutions will not constitute appealable orders under *§ 1292(a)(1)*.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

Criminal Law & Procedure > Commencement of Criminal Proceedings

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Interlocutory Appeals

**HN6[] Congressional Duties & Powers, Spending & Taxation**

It is emphatically the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the courts to enforce them when enforcement is sought. A court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation. When Congress has enacted a legislative restriction like the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015), that expressly prohibits the Department of Justice from spending funds on certain actions, federal criminal defendants may seek to enjoin the expenditure of those funds, and the court of appeals may exercise jurisdiction over a district court's direct denial of a request for such injunctive relief.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

**HN7[] Jurisdiction & Venue, Jurisdiction**

District courts in criminal cases have ancillary jurisdiction, which is the power of a court to adjudicate and determine matters incidental to the exercise of its primary jurisdiction over a cause under review.

Constitutional Law > The Judiciary > Case or Controversy > Standing

**HN8[] Case or Controversy, Standing**

The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. A court has an independent obligation to examine its own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines.

Constitutional Law > The Judiciary > Case or Controversy > Standing

Criminal Law & Procedure > Appeals > Appellate Jurisdiction

**HN9[] Case or Controversy, Standing**

Constitutional limits on the court's jurisdiction are established by U.S. Const. art. III, which limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. It demands that an "actual controversy" persist throughout all stages of litigation. That means that standing must be met by persons seeking appellate review. To have U.S. Const. art. III standing, a litigant must have suffered or be imminently threatened with a concrete and particularized "injury in fact" that is fairly traceable to the challenged action and likely to be redressed by a favorable judicial decision.

Constitutional Law > The Judiciary > Case or Controversy > Standing

**HN10[] Case or Controversy, Standing**

One who seeks to initiate or continue proceedings in federal court must demonstrate, among other requirements, both standing to obtain the relief requested, and, in addition, an ongoing interest in the dispute on the part of the opposing party that is sufficient to establish concrete adverseness. When those conditions are met, U.S. Const. art. III does not restrict the opposing party's ability to object to relief being sought at its expense.

Constitutional Law > The Judiciary > Case or Controversy > Standing

**HN11** **Case or Controversy, Standing**

Threatened prosecution may give rise to standing.

Constitutional Law > Separation of Powers

Constitutional Law > The Judiciary > Case or Controversy > Standing

**HN12** **Constitutional Law, Separation of Powers**

The Bond decision concluded that, "if the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." The U.S. Supreme Court explained that both federalism and separation-of-powers constraints in the Constitution serve to protect individual liberty, and a litigant in a proper case can invoke such constraints "when government acts in excess of its lawful powers." The Court gave numerous examples of cases in which private parties, rather than government departments, were able to rely on separation-of-powers principles in otherwise jusiticiable cases or controversies. In another decision, the Court recognized, of course, that the separation of powers can serve to safeguard individual liberty and that it is the duty of the judicial department--in a separation-of-powers case as in any other--to say what the law is.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

**HN13** **Congressional Duties & Powers, Spending & Taxation**

The Appropriations Clause of the Constitution, refer to U.S. Const. art. I, § 9, cl. 7, provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). This straightforward and explicit command means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress. Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute.

Constitutional Law > Separation of Powers

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

**HN14** **Constitutional Law, Separation of Powers**

The Appropriations Clause plays a critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them. Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury. The Clause has a fundamental and comprehensive purpose to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents. Without it, Justice Story explained, the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure.

Criminal Law & Procedure > Commencement of Criminal Proceedings

Governments > Legislation > Effect & Operation

**HN15** **Criminal Law & Procedure, Commencement of Criminal Proceedings**

None of the funds made available in this Act to the Department of Justice may be used, with respect to Medical ***Marijuana*** States to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical ***marijuana***: Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015).

Governments > Legislation > Effect & Operation

Governments > Legislation > Interpretation

**HN16** **Legislation, Effect & Operation**

It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Regarding the plain meaning of "prevent any of the Medical ***Marijuana*** States from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical ***marijuana***"--the pronoun "them" refers back to the Medical ***Marijuana*** States, and "their

own laws" refers to the state laws of the Medical ***Marijuana*** States. And "implement" means: To "carry out, accomplish; esp.: to give practical effect to and ensure of actual fulfillment by concrete measure." Implement, Merriam-Webster's Collegiate Dictionary (11th ed. 2003); "To put into practical effect; carry out." Implement, American Heritage Dictionary of the English Language (5th ed. 2011); and "To complete, perform, carry into effect (a contract, agreement, etc.); to fulfil (an engagement or promise)." Implement, Oxford English Dictionary, www.oed.com. The court may follow the common practice of consulting dictionaries to determine ordinary meaning.

Criminal Law & Procedure > Commencement of Criminal Proceedings

Governments > Legislation > Effect & Operation

*HN17*[] **Criminal Law & Procedure, Commencement of Criminal Proceedings**

In sum, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015), prohibits the Department of Justice from spending money on actions that prevent the Medical ***Marijuana*** States giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical ***marijuana***.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale

Governments > Legislation > Interpretation

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession

*HN18*[] **Controlled Substances, Delivery, Distribution & Sale**

Statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. The court must read the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015), with a view to its place in the overall statutory scheme for ***marijuana*** regulation, namely the Controlled Substances Act (CSA) and the State Medical ***Marijuana*** Laws. The CSA prohibits the use, distribution, possession, or cultivation of any ***marijuana***. *21 U.S.C.S. §§ 841(a), 844(a)*. The State Medical ***Marijuana*** Laws are those state laws that authorize the use, distribution, possession, or cultivation of medical ***marijuana***. Thus, the CSA prohibits what the State Medical ***Marijuana*** Laws permit.

Criminal Law & Procedure > Commencement of Criminal Proceedings

Governments > Legislation > Effect & Operation

*HN19*[] **Criminal Law & Procedure, Commencement of Criminal Proceedings**

In light of the ordinary meaning of the terms of Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015), and the relationship between the relevant federal and state laws, the court considers whether a superior authority, which prohibits certain conduct, can prevent a subordinate authority from implementing a rule that officially permits such conduct by punishing individuals who are engaged in the conduct officially permitted by the lower authority. The court concludes that it can.

Criminal Law & Procedure > Commencement of Criminal Proceedings

Governments > Legislation > Effect & Operation

*HN20*[] **Criminal Law & Procedure, Commencement of Criminal Proceedings**

At a minimum, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015), prohibits the Department of Justice from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical ***Marijuana*** Laws and who fully complied with such laws.

Criminal Law & Procedure > Commencement of Criminal Proceedings

Governments > Legislation > Effect & Operation

HN21[] **Criminal Law & Procedure, Commencement of Criminal Proceedings**

"Law" has many different meanings, including the following definitions that appear most relevant to Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015): "The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them." "The set of rules or principles dealing with a specific area of a legal system." Law, Black's Law Dictionary (10th ed. 2014); and: "1. a. The body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects. (In this sense usually the law.)." "One of the individual rules which constitute the 'law' (sense 1) of a state or polity. The plural has often a collective sense. approaching sense 1." Law, Oxford English Dictionary, www.oed.com. The relative pronoun "that" restricts "laws" to those laws authorizing the use, distribution, possession, or cultivation of medical ***marijuana***.

Criminal Law & Procedure > Commencement of Criminal Proceedings

Governments > Legislation > Effect & Operation

HN22[] **Criminal Law & Procedure, Commencement of Criminal Proceedings**

In sum, the ordinary meaning of Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015), prohibits the Department of Justice from preventing the implementation of the Medical ***Marijuana*** States' laws or sets of rules and only those rules that authorize medical ***marijuana*** use.

Criminal Law & Procedure > Commencement of Criminal Proceedings

Governments > Legislation > Effect & Operation

HN23[] **Criminal Law & Procedure, Commencement of Criminal Proceedings**

Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015), prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical ***marijuana***. DOJ does not prevent the implementation of rules authorizing conduct when it prosecutes individuals who engage in conduct unauthorized under state medical ***marijuana*** laws. Individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical ***marijuana*** have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate § 542. Congress could easily have drafted § 542 to prohibit interference with laws that address medical ***marijuana*** or those that regulate medical ***marijuana***, but it did not. Instead, it chose to proscribe preventing states from implementing laws that authorize the use, distribution, possession, and cultivation of medical ***marijuana***.

Governments > Legislation > Effect & Operation

Governments > Legislation > Interpretation

HN24[] **Legislation, Effect & Operation**

It is a fundamental principle of appropriations law that the court may only consider the text of an appropriations rider, not expressions of intent in legislative history. An agency's discretion to spend appropriated funds is cabined only by the text of the appropriation, not by Congress' expectations of how the funds will be spent, as might be reflected by legislative history. As the U.S. Supreme Court has said (in a case involving precisely the issue of Executive compliance with appropriation laws, although the principle is one of general applicability): "legislative intention, without more, is not legislation."

Criminal Law & Procedure > Commencement of Criminal Proceedings

Governments > Legislation > Effect & Operation

Criminal Law & Procedure > Criminal Offenses > Controlled Substances

HN25[] **Criminal Law & Procedure, Commencement of Criminal Proceedings**

To be clear, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015), does not provide immunity from prosecution for federal ***marijuana*** offenses.

Civil Procedure > Remedies > Writs > All Writs Act

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN26 **Writs, All Writs Act**

The court has jurisdiction under the All Writs Act, 28 U.S.C.S. § 1651, to "issue all writs necessary or appropriate in aid of our jurisdiction and agreeable to the usages and principles of law." 28 U.S.C.S. § 1651. The writ of mandamus is a drastic and extraordinary remedy reserved for really extraordinary causes.

**Summary:**

**SUMMARY***

**Criminal Law**

In ten consolidated interlocutory appeals and petitions for writs of mandamus arising from three district courts in two states, the panel vacated the district court's orders denying relief to the appellants, who have been indicted for violating **[**2]** the Controlled Substances Act, and who sought dismissal of their indictments or to enjoin their prosecutions on the basis of a congressional appropriations rider, *Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015)*, that prohibits the Department of Justice from spending funds to prevent states' implementation of their medical ***marijuana*** laws.

The panel held that it has jurisdiction under *28 U.S.C. § 1292(a)(1)* to consider the interlocutory appeals from these direct denials of requests for injunctions, and that the appellants have standing to invoke separation-of-powers provisions of the Constitution to challenge their criminal prosecutions.

The panel held that § 542 prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by state medical ***marijuana*** laws and who fully complied with such laws. The panel wrote that individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical ***marijuana*** have engaged in conduct that is unauthorized, and that prosecuting such individuals does not violate § 542.

Remanding to the district courts, the panel instructed that if DOJ wishes to continue **[**3]** these prosecutions, the appellants are entitled to evidentiary hearings to determine whether their conduct was completely authorized by state law. The panel wrote that in determining the appropriate remedy for any violation of § 542, the district courts should consider the temporal nature of the lack of funds along with the appellants' rights to a speedy trial.

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David Matthew Miller, Spokane, Washington, for Defendant-Appellant Brice Christian Davis.

Nicholas V. Vieth, Spokane, Washington, for Defendant-Appellant Jayde Dillion Evans.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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**Judges:** Before: Diarmuid F. O'Scannlain, Barry G. Silverman, and Carlos T. Bea, Circuit Judges. Opinion by Judge O'Scannlain.

**Opinion by:** Diarmuid F. O'Scannlain

## Opinion

**[*1168]** O'SCANNLAIN, Circuit Judge:

We are asked to decide whether criminal defendants may avoid prosecution for various **[**5]** federal ***marijuana*** offenses on the basis of a congressional appropriations rider that prohibits the United States Department of Justice from spending funds to prevent states' implementation of their own medical ***marijuana*** laws.

I

A

These ten cases are consolidated interlocutory appeals and petitions for writs of mandamus arising out of orders entered by three district courts in two states within our circuit.[1] All Appellants have been **[*1169]** indicted for various infractions of the Controlled Substances Act (CSA). They have moved to dismiss their indictments or to enjoin their prosecutions on the grounds that the Department of Justice (DOJ) is prohibited from spending funds to prosecute them.

In *McIntosh*, five codefendants allegedly **[**6]** ran four ***marijuana*** stores in the Los Angeles area known as Hollywood Compassionate Care (HCC) and Happy Days, and nine indoor ***marijuana*** grow sites in the San Francisco and Los Angeles areas. These codefendants were indicted for conspiracy to manufacture, to possess with intent to distribute, and to distribute more than 1000 ***marijuana*** plants in violation of *21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A)*. The government sought forfeiture derived from such violations under *21 U.S.C. § 853*.

In *Lovan*, the U.S. Drug Enforcement Agency and Fresno County Sheriff's Office executed a federal search warrant on 60 acres of land located on North Zedicker Road in Sanger, California. Officials allegedly located more than 30,000 ***marijuana*** plants on this property. Four codefendants were indicted for manufacturing 1000 or more ***marijuana*** plants and for conspiracy to manufacture 1000 or more ***marijuana*** plants in violation of *21 U.S.C. §§ 841(a)(1), 846*.

In *Kynaston*, five codefendants face charges that arose out of the execution of a Washington State search warrant related to an investigation into violations of Washington's Controlled Substances Act. Allegedly, a total of 562 "growing ***marijuana*** plants," along with another 677 pots, some of which appeared to have the root structures of **[**7]** suspected harvested ***marijuana*** plants, were found. The codefendants were indicted for conspiring to manufacture 1000 or more ***marijuana*** plants, manufacturing 1000 or more ***marijuana*** plants, possessing with intent to distribute 100 or more ***marijuana*** plants, possessing a firearm in furtherance of a Title 21 offense, maintaining a drug-involved premise, and being felons in possession of a firearm in violation of *18 U.S.C. §§ 922(g)(1), 924(c)(1)(A)(i)* and *21 U.S.C. §§ 841, 856(a)(1)*.

B

In December 2014, Congress enacted the following rider in an omnibus appropriations bill funding the government through September 30, 2015:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina,

[1] Appellants filed one appeal in ***United States v. McIntosh***, No. 15-10117, arising out of the Northern District of California; one appeal in *United States v. Kynaston*, No. 15-30098, arising out of the Eastern District of Washington; and four appeals with four corresponding petitions for mandamus—Nos. 15-10122, 15-10127, 15-10132, 15-10137, 15-71158, 15-71174, 15-71179, 15-71225, which we shall address as *United States v. Lovan*—arising out of the Eastern District of California.

> Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical ***marijuana***.

Consolidated and **[**8]** Further *Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014)*. Various short-term measures extended the appropriations and the rider through December 22, 2015. On December 18, 2015, Congress enacted a new appropriations act, which appropriates funds through the fiscal year ending September 30, 2016, and includes essentially the same rider in § 542. *Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015)* **[*1170]** (adding Guam and Puerto Rico and changing "prevent such States from implementing their own State laws" to "prevent any of them from implementing their own laws").

Appellants in *McIntosh*, *Lovan*, and *Kynaston* filed motions to dismiss or to enjoin on the basis of the rider. The motions were denied from the bench in hearings in *McIntosh* and *Lovan*, while the court in *Kynaston* filed a short written order denying the motion after a hearing. In *McIntosh* and *Kynaston*, the court concluded that defendants had failed to carry their burden to demonstrate their compliance with state medical ***marijuana*** laws. In *Lovan*, the court concluded that the determination of compliance with state law would depend on facts found by the jury in a federal prosecution, and thus it would revisit the defendants' motion after the trial.

Appellants in all **[**9]** three cases filed interlocutory appeals, and Appellants in *McIntosh* and *Lovan* ask us to consider issuing writs of mandamus if we do not assume jurisdiction over the appeals.

II

***HN1***[] Federal courts are courts of limited subject-matter jurisdiction, possessing only that power authorized both by the Constitution and by Congress. *See Gunn v. Minton, 133 S. Ct. 1059, 1064, 185 L. Ed. 2d 72 (2013)*. Before proceeding to the merits of this dispute, we must assure ourselves that we have jurisdiction. *See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)*.

A

The parties dispute whether Congress has authorized us to exercise jurisdiction over these interlocutory appeals. ***HN2***[] "Our jurisdiction is typically limited to final decisions of the district court." *United States v. Romero-Ochoa, 554 F.3d 833, 835 (9th Cir. 2009)*. "In criminal cases, this prohibits appellate review until after conviction and imposition of sentence." *Midland Asphalt Corp. v. United States, 489 U.S. 794, 798, 109 S. Ct. 1494, 103 L. Ed. 2d 879 (1989)*. In the cases before us, no Appellants have been convicted or sentenced. Therefore, unless some exception to the general rule applies, we should not reach the merits of this dispute. Appellants invoke three possible avenues for reaching the merits: jurisdiction over an order refusing an injunction, jurisdiction under the collateral order doctrine, and the writ of mandamus. We address the first of these three avenues.

1

***HN3***[] Under *28 U.S.C. § 1292(a)*, "the courts of appeals shall have **[**10]** jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, *refusing* or dissolving *injunctions*, . . . except where a direct review may be had in the Supreme Court." (emphasis added). By its terms, *§ 1292(a)(1)* requires only an interlocutory order refusing an injunction. Nonetheless, relying on *Carson v. American Brands, Inc., 450 U.S. 79, 84, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981)*, the government argues that *§ 1292(a)(1)* requires Appellants to show that the interlocutory order (1) has the effect of refusing an injunction; (2) has a serious, perhaps irreparable, consequence; and (3) can be effectually challenged only by immediate appeal.

The government's reliance on *Carson* is misplaced in light of our precedent interpreting that case. In *Shee Atika v. Sealaska Corp.*, we explained:

> In *Carson*, the Supreme Court considered whether *section 1292(a)(1)* permitted appeal from an order denying the parties' joint motion for approval of a **[*1171]** consent decree that contained an injunction as one of its provisions. Because the order did not, on its face, deny an injunction, an appeal from the order did not fall precisely within the language of *section 1292(a)(1)*. The Court nevertheless permitted the appeal. The Court stated that, ***HN4***[] while *section 1292(a)(1)* must be narrowly construed in order **[**11]** to avoid piecemeal litigation, it does permit appeals from orders that have the "practical effect" of denying an injunction, provided that the would-be appellant

> shows that the order "might have a serious, perhaps irreparable, consequence."
>
> We find nothing in *Carson* to suggest that the requirement of irreparable injury applies to appeals from orders specifically denying injunctions. *Carson* merely expanded the scope of appeals that do not fall within the meaning of the statute. Sealaska appeals from the direct denial of a request for an injunction. *Carson*, therefore, is simply irrelevant.

*39 F.3d 247, 249 (9th Cir. 1994)* (citations omitted); *accord Paige v. California, 102 F.3d 1035, 1038 (9th Cir. 1996)*; *see also Shee Atika, 39 F.3d at 249 n.2* (noting that its conclusion was consistent with "the overwhelming majority of courts of appeals that have considered the issue" and collecting cases). Thus, *Carson's* requirements do not apply to appeals from the "direct denial of a request for an injunction." *Shee Atika, 39 F.3d at 249*.

2

In the cases before us, the district courts issued direct denials of requests for injunctions. Lovan, for instance, requested injunctive relief in the conclusion of his opening brief: "Therefore, the Court should dismiss all counts against Mr. Lovan based upon alleged violations of *21 U.S.C. § 841* and/or enjoin the Department **[**12]** of Justice from taking any further action against the defendants in this case unless and until the Department can show such action does not involve the expenditure of any funds in violation of the Appropriations Act." At the hearing, Lovan's counsel made exceptionally clear that his motion sought injunctive relief in the alternative:

> THE COURT: But remember, your remedy is not because you are upset that the Department of Justice is spending taxpayer money. Your remedy is a dismissal, which is what you are seeking now, is it not?
>
> MR. FARKAS: And your Honor, as an alternative in our motion, we ask for a stay of these proceedings, asked this Court to enjoin the Department of Justice from spending any funds to prosecute Mr. Lovan if this Court finds he is in conformity with the California Compassionate Use Act. So it is a motion to dismiss or, alternatively, a motion to enjoin until Congress designates funds for that purpose.

Shortly thereafter, Lovan's counsel reiterated: "[W]e would ask either for a dismissal or to enjoin the government from spending any funds that were not appropriated under the Appropriations Act." At the close of the hearing, Lovan's counsel even explicitly argued that the **[**13]** district court's denial of injunctive relief would be appealable immediately: "I believe this might be the type of collateral order that is appealable to the Ninth Circuit immediately. As I said, we are asking for an injunction." The district court denied Lovan's motion, which clearly requested injunctive relief.

Similarly, in *Kynaston*, the opening brief in support of the motion began and ended with explicit requests for injunctive relief. Subsequent filings by other defendants in that case referenced the injunctive relief sought, and one discussed at length how courts of equity should exercise their jurisdiction. The district court denied the motion, which clearly sought injunctive relief.

**[*1172]** In *McIntosh*, the defendant requested injunctive relief in his moving papers, and he mentioned his request for injunctive relief three times in his reply brief. At the hearing, the question of injunctive relief did not arise, and the district court said simply that it was denying the motion. Although McIntosh could have emphasized the equitable component of his request more, we conclude that he raised the issue sufficiently for the denial of his motion to constitute a direct denial of a request for **[**14]** an injunction.

Therefore, we have jurisdiction under *28 U.S.C. § 1292(a)(1)* to consider the interlocutory appeals from these direct denials of requests for injunctions.

3

We note the unusual circumstances presented by these cases. *HN5*[] In almost all federal criminal prosecutions, injunctive relief and interlocutory appeals will not be appropriate. Federal courts traditionally have refused, except in rare instances, to enjoin federal criminal prosecutions. *See Ackerman v. Int'l Longshoremen's Union, 187 F.2d 860, 868 (9th Cir. 1951)*; *Argonaut Mining Co. v. McPike, 78 F.2d 584, 586 (9th Cir. 1935)*; *Stolt-Nielsen, S.A. v. United States, 442 F.3d 177, 185 (3d Cir. 2006)*; *Deaver v. Seymour, 822 F.2d 66, 69, 261 U.S. App. D.C. 334 (D.C. Cir. 1987)*. "An order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under *§ 1292(a)(1)*." *Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 279, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988)*. Thus, in almost all circumstances, federal criminal defendants cannot obtain injunctions of their ongoing prosecutions, and orders by district courts relating solely to requests to stay ongoing federal prosecutions will not constitute appealable orders under *§ 1292(a)(1)*.

Here, however, Congress has enacted an appropriations rider that specifically restricts DOJ from spending money to pursue certain activities. HN6[] It is "emphatically . . . the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish **[**15]** their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for . . . the courts to enforce them when enforcement is sought." *Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978)*; *accord United States v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 497, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001)*. A "court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" *Oakland Cannabis, 532 U.S. at 497* (quoting *Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 551, 57 S. Ct. 592, 81 L. Ed. 789 (1937)*). Even if Appellants cannot obtain injunctions of their prosecutions themselves, they can seek—and have sought—to enjoin DOJ from *spending funds* from the relevant appropriations acts on such prosecutions.[2] When Congress has enacted a legislative **[*1173]** restriction like § 542 that expressly prohibits DOJ from spending funds on certain actions, federal criminal defendants may seek to enjoin the expenditure of those funds, and we may exercise jurisdiction over a district court's direct denial of a request for such injunctive relief.

B

1

As part of our jurisdictional inquiry, we must consider whether Appellants have standing to complain that DOJ is spending money that has not been appropriated by Congress. HN8[] "The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance." *Kowalski v. Tesmer, 543 U.S. 125, 128, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004)*. Although the government concedes that Appellants have standing, we have an "independent obligation to examine [our] own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." *United States v. Hays, 515 U.S. 737, 742, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995)* (internal quotation marks and alterations omitted).

HN9[] Constitutional limits on our jurisdiction are established by Article III, which limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. It "demands that an 'actual controversy' persist throughout all stages of litigation. That means that standing 'must be met by persons seeking appellate review . . . .'" *Hollingsworth v. Perry, 133 S. Ct. 2652, 2661, 186 L. Ed. 2d 768 (2013)* (citations omitted). To have Article III standing, a litigant "must have suffered or be imminently threatened with a concrete **[**17]** and particularized 'injury in fact' that is fairly traceable to the challenged action . . . and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386, 188 L. Ed. 2d 392 (2014)*.

In *Bond v. United States*, the Supreme Court addressed a situation similar to the cases before us. *564 U.S. 211, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011)*. There, the Third Circuit had concluded that the criminal defendant lacked "standing to challenge a federal statute on grounds that the measure interferes with the powers reserved to States," and the Supreme Court reversed. *Id. at 216, 226*.

The Court explained that HN10[] "[o]ne who seeks to initiate or continue proceedings in federal court must demonstrate, among other requirements, both standing to obtain the relief requested, and, in addition, an 'ongoing interest in the dispute' on the part of the opposing party that is sufficient to establish 'concrete adverseness.'" *Id. at 217* (citations omitted). "When those conditions are met, Article III does not restrict the opposing party's ability to object to relief being sought at its expense." *Id.* "The requirement of Article III standing thus had no bearing upon [the defendant's] capacity to assert defenses in the District Court." *Id.*

Applying those principles to the defendant's standing to appeal, the Court concluded that **[**18]** it was "clear Article III's prerequisites are met. Bond's challenge to her conviction and sentence 'satisfies the case-or-controversy requirement, because the incarceration . . . constitutes a concrete injury, caused by the conviction

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[2] We need not decide in the first instance exactly how the district courts should resolve claims that DOJ is spending money to prosecute a defendant in violation of an appropriations rider. We therefore take no view on the precise relief required and leave that issue to the district courts in the first instance. We note that HN7[] district courts **[**16]** in criminal cases have ancillary jurisdiction, which "is the power of a court to adjudicate and determine matters incidental to the exercise of its primary jurisdiction over a cause under review." *United States v. Sumner, 226 F.3d 1005, 1013-15 (9th Cir. 2000)*; *see Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 378-80, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)*; *Garcia v. Teitler, 443 F.3d 202, 206-10 (2d Cir. 2006)*.

and redressable by invalidation of the conviction.'" *Id.* Here, Appellants have not yet been deprived of liberty via a conviction, but their indictments imminently threaten such a deprivation. *Cf.* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2342-47, 189 L. Ed. 2d 246 (2014) **HN11**[↑] (threatened prosecution may give rise to standing). They clearly had Article III standing to pursue their challenges below because **[*1174]** they were merely objecting to relief sought at their expense. And they have standing on appeal because their potential convictions constitute concrete, particularized, and imminent injuries, which are caused by their prosecutions and redressable by injunction or dismissal of such prosecutions. *See* Bond, 564 U.S. at 217.

After addressing Article III standing, **HN12**[↑] the *Bond* Court concluded that, "[i]f the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." Id. at 223. The Court explained that both federalism and separation-of-powers constraints in the Constitution serve **[**19]** to protect individual liberty, and a litigant in a proper case can invoke such constraints "[w]hen government acts in excess of its lawful powers." Id. at 220-24. The Court gave numerous examples of cases in which private parties, rather than government departments, were able to rely on separation-of-powers principles in otherwise jusiticiable cases or controversies. *See* id. at 223 (citing Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010); Clinton v. City of New York, 524 U.S. 417, 433-36, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995); Bowsher v. Synar, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986); INS v. Chadha, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935)).

The Court reiterated this principle in NLRB v. Noel Canning, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014). There, the Court granted relief to a private party challenging an order against it on the basis that certain members of the National Labor Relations Board had been appointed in excess of presidential authority under the Recess Appointments Clause, another separation-of-powers constraint. Id. at 2557. The Court "recognize[d], of course, that the separation of powers can serve to safeguard individual liberty and that it is the 'duty of the judicial department'—in a separation-of-powers case as in any other—'to say what the law is.'" Id. at 2559-60 (citing Clinton, 524 U.S. at 449-50 (Kennedy, J., concurring), and quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)); *see also* id. at 2592-94 (Scalia, J., concurring in the judgment) (discussing at great length how the separation of powers protects individual liberty).

Thus, Appellants have standing to invoke separation-of-powers provisions of the Constitution to challenge **[**20]** their criminal prosecutions.

2

Here, Appellants complain that DOJ is spending funds that have not been appropriated by Congress in violation of **HN13**[↑] the Appropriations Clause of the Constitution. *See* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). This "straightforward and explicit command . . . means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990) (citation omitted). "Money may be paid out only through an appropriation made by law; in **[*1175]** other words, the payment of money from the Treasury must be authorized by a statute." *Id.*

**HN14**[↑] The Appropriations Clause plays a critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them. "Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." Id. at 425. The Clause has a "fundamental and comprehensive purpose . . . to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." Id. at 427-28. Without it, Justice **[**21]** Story explained, "the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure." Id. at 427 (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1348 (3d ed. 1858)).

Thus, if DOJ were spending money in violation of § 542,

it would be drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause. That Clause constitutes a separation-of-powers limitation that Appellants can invoke to challenge their prosecutions.

III

The parties dispute whether the government's spending money on their prosecutions violates § 542.

A

We focus, as we must, on the statutory text. Section 542 provides that HN15[] "[n]one of the funds made available in this Act to the Department of Justice may be used, with respect to [Medical ***Marijuana*** States[3]] to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical ***marijuana***." *Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015)*. Unfortunately, the rider is not a model of clarity.

1

HN16[] "It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Sandifer v. U.S. Steel Corp., 134 S. Ct. 870, 876, 187 L. Ed. 2d 729 (2014)* (quoting *Perrin v. United States, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979)*). Thus, in order to decide whether the prosecutions of Appellants violate § 542, we must determine the plain meaning of "prevent any of [the Medical ***Marijuana*** States] from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical ***marijuana***." The pronoun **[*1176]** "them" refers **[**23]** back to the Medical ***Marijuana*** States, and "their own laws" refers to the state laws of the Medical ***Marijuana*** States. And "implement" means:

> To "carry out, accomplish; *esp.*: to give practical effect to and ensure of actual fulfillment by concrete measure." *Implement, Merriam-Webster's Collegiate Dictionary* (11th ed. 2003);
>
> "To put into practical effect; carry out." *Implement, American Heritage Dictionary of the English Language* (5th ed. 2011); and
>
> "To complete, perform, carry into effect (a contract, agreement, etc.); to fulfil (an engagement or promise)." *Implement, Oxford English Dictionary*, www.oed.com.

*See Sanford v. MemberWorks, Inc., 625 F.3d 550, 559 (9th Cir. 2010)* (We "may follow the common practice of consulting dictionaries to determine" ordinary meaning.); *Sandifer, 134 S. Ct. at 876*. HN17[] In sum, § 542 prohibits DOJ from spending money on actions that prevent the Medical ***Marijuana*** States' giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical ***marijuana***.

2

DOJ argues that it does not prevent the Medical ***Marijuana*** States from giving practical effect to their medical ***marijuana*** laws by prosecuting private individuals, rather than taking legal action against the state. We are not persuaded.

Importantly, the HN18[] "[s]tatutory language **[**24]** cannot be construed in a vacuum. It is [another] fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost, 136 S. Ct. 1061, 1070, 194 L. Ed. 2d 108 (2016)* (internal quotation marks omitted). Here, we must read § 542 with a view to its place in the overall statutory scheme for ***marijuana*** regulation, namely the CSA and the State Medical ***Marijuana*** Laws. The CSA prohibits the use, distribution, possession, or cultivation of any ***marijuana***. *See 21 U.S.C. §§ 841(a), 844(a)*.[4]

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[3] To avoid repeating the names of all 43 jurisdictions listed, we refer to Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, **[**22]** Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming, the District of Columbia, Guam, and Puerto Rico as the "Medical ***Marijuana*** States" and their laws authorizing "the use, distribution, possession, or cultivation of medical ***marijuana***" as the "State Medical ***Marijuana*** Laws." While recognizing that the list includes three non-states, we will refer to the listed jurisdictions as states and their laws as state laws without further qualification.

[4] This requires a slight caveat. Under the CSA, "the manufacture, distribution, or possession of ***marijuana*** [is] a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study." *Gonzales v. Raich, 545 U.S. 1, 14, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005)*; *see 21 U.S.C. §§ 812(c), 823(f),*

The State Medical ***Marijuana*** Laws are those state laws that authorize the use, distribution, possession, or cultivation of medical ***marijuana***. Thus, the CSA prohibits what the State Medical ***Marijuana*** Laws permit.

*HN19*[] In light of the ordinary meaning of the terms of § 542 and the relationship between the relevant federal **[**25]** and state laws, we consider whether a superior authority, which prohibits certain conduct, can prevent a subordinate authority from implementing a rule that officially permits such conduct by punishing individuals who are engaged in the conduct officially permitted by the lower authority. We conclude that it can.

DOJ, without taking any legal action against the Medical ***Marijuana*** States, prevents them from implementing their laws that authorize the use, distribution, possession, or cultivation of medical ***marijuana*** by prosecuting individuals for use, distribution, possession, or cultivation of medical ***marijuana*** that is authorized by such laws. By officially permitting certain conduct, state law provides for non-prosecution of individuals who engage in such conduct. If **[*1177]** the federal government prosecutes such individuals, it has prevented the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct.

We therefore conclude that, *HN20*[] at a minimum, § 542 prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical ***Marijuana*** Laws and who fully **[**26]** complied with such laws.

3

Appellants in *McIntosh* and *Kynaston* argue for a more expansive interpretation of § 542. They contend that the rider prohibits DOJ from bringing federal ***marijuana*** charges against anyone licensed or authorized under a state medical ***marijuana*** law for activity occurring within that state, including licensees who had failed to comply fully with state law.

For instance, Appellants in *Kynaston* argue that "implementation of laws necessarily involves all aspects of putting the law into practical effect, including interpretation of the law, means of application and enforcement, and procedures and processes for determining the outcome of individual cases." Under this view, if the federal government prosecutes individuals who are not strictly compliant with state law, it will prevent the states from implementing the *entirety* of their laws that authorize medical ***marijuana*** by preventing them from giving practical effect to the penalties and enforcement mechanisms for engaging in unauthorized conduct. Thus, argue the *Kynaston* Appellants, the Department of Justice must refrain from prosecuting "unless a person's activities are so clearly outside the scope of a state's medical ***marijuana*** **[**27]** laws that reasonable debate is not possible."

To determine whether such construction is correct, we must decide whether the phrase "laws that authorize" includes not only the rules authorizing certain conduct but also the rules delineating penalties and enforcement mechanisms for engaging in unauthorized conduct. In answering that question, we consider the ordinary meaning of "laws that authorize the use, distribution, possession, or cultivation of medical ***marijuana***." "*HN21*[] Law" has many different meanings, including the following definitions that appear most relevant to § 542:

> "The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them."
>
> "The set of rules or principles dealing with a specific area of a legal system <copyright law>."

*Law, Black's Law Dictionary* (10th ed. 2014); and:

> "1. a. The body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects. (In this **[**28]** sense usually *the law.)*."
>
> "One of the individual rules which constitute the 'law' (sense 1) of a state or polity. . . . The plural has often a collective sense . . . approaching sense 1."

*Law, Oxford English Dictionary*, www.oed.com . The relative pronoun "that" restricts "laws" to those laws authorizing the use, distribution, possession, or cultivation of medical ***marijuana***. *See* Bryan A. Garner, *Garner's Dictionary of Legal Usage* 887-89 (3d ed.

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***841(a)(1)***, *844(a)*. Thus, except as part of "a strictly controlled research project," federal law "designates ***marijuana*** as contraband for *any* purpose." *Raich, 545 U.S. at 24, 27*.

2011). HN22[↑] In sum, the ordinary meaning of § 542 prohibits the Department of Justice from preventing the implementation of the Medical ***Marijuana*** States' laws or sets of rules and only those **[*1178]** rules that authorize medical ***marijuana*** use.

We also consider the context of § 542. The rider prohibits DOJ from preventing forty states, the District of Columbia, and two territories from implementing their medical ***marijuana*** laws. Not only are such laws varied in composition but they also are changing as new statutes are enacted, new regulations are promulgated, and new administrative and judicial decisions interpret such statutes and regulations. Thus, § 542 applies to a wide variety of laws that are in flux.

Given this context and the restriction of the relevant laws to those **[**29]** that authorize conduct, we conclude that HN23[↑] § 542 prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical ***marijuana***. DOJ does not prevent the implementation of rules authorizing conduct when it prosecutes individuals who engage in conduct unauthorized under state medical ***marijuana*** laws. Individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical ***marijuana*** have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate § 542. Congress could easily have drafted § 542 to prohibit interference with laws that address medical ***marijuana*** or those that regulate medical ***marijuana***, but it did not. Instead, it chose to proscribe preventing states from implementing laws that authorize the use, distribution, possession, and cultivation of medical ***marijuana***.

B

The parties cite various pieces of legislative history to support their arguments regarding the meaning of § 542.

We cannot consider such sources. HN24[↑] It is a fundamental principle of appropriations law that we may only consider the **[**30]** text of an appropriations rider, not expressions of intent in legislative history. "An agency's discretion to spend appropriated funds is cabined only by the 'text of the appropriation,' not by Congress' expectations of how the funds will be spent, as might be reflected by legislative history." *Salazar v. Ramah Navajo Chapter, 132 S. Ct. 2181, 2194-95, 183 L. Ed. 2d 186 (2012)* (quoting *Int'l Union, UAW v. Donovan, 746 F.2d 855, 860-61, 241 U.S. App. D.C. 122 (D.C. Cir. 1984)* (Scalia, J.)). In *International Union*, then-Judge Scalia explained:

> As the Supreme Court has said (in a case involving precisely the issue of Executive compliance with appropriation laws, although the principle is one of general applicability): "legislative intention, without more, is not legislation." The issue here is not how Congress expected or intended the Secretary to behave, but how it *required* him to behave, through the only means by which it can (as far as the courts are concerned, at least) require anything—the enactment of legislation. Our focus, in other words, must be upon the text of the appropriation.

*746 F.2d at 860-61* (quoting *Train v. City of New York, 420 U.S. 35, 45, 95 S. Ct. 839, 43 L. Ed. 2d 1 (1975)*); *see also Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 646, 125 S. Ct. 1172, 161 L. Ed. 2d 66 (2005)* ("The relevant case law makes clear that restrictive language contained in Committee Reports is not legally binding."); *Lincoln v. Vigil, 508 U.S. 182, 192, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993)* ("'[I]ndicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any **[**31]** legal requirements on' the agency." (citation omitted)).

We recognize that some members of Congress may have desired a more expansive **[*1179]** construction of the rider, while others may have preferred a more limited interpretation. However, we must consider only the text of the rider. If Congress intends to prohibit a wider or narrower range of DOJ actions, it certainly may express such intention, hopefully with greater clarity, in the text of any future rider.

IV

We therefore must remand to the district courts. If DOJ wishes to continue these prosecutions, Appellants are entitled to evidentiary hearings to determine whether their conduct was completely authorized by state law, by which we mean that they strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical ***marijuana***. We leave to the district courts to determine, in the first instance and in each case, the precise remedy that would be appropriate.

We note the temporal nature of the problem with these prosecutions. The government had authority to initiate criminal proceedings, and it merely lost funds to

continue them. DOJ is currently prohibited from spending funds **[**32]** from specific appropriations acts for prosecutions of those who complied with state law. But Congress could appropriate funds for such prosecutions tomorrow. Conversely, this temporary lack of funds could become a more permanent lack of funds if Congress continues to include the same rider in future appropriations bills. In determining the appropriate remedy for any violation of § 542, the district courts should consider the temporal nature of the lack of funds along with Appellants' rights to a speedy trial under the *Sixth Amendment* and the Speedy Trial Act, 18 U.S.C. § 3161.[5]

V

For the foregoing reasons, we vacate the orders of the district courts and remand with instructions to conduct an evidentiary hearing to determine whether Appellants have complied with state law.[6]

**VACATED AND REMANDED WITH INSTRUCTIONS.**

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[5] The prior observation should also serve as a warning. *HN25*[] To be clear, ***§ 542*** does not provide immunity from prosecution for federal ***marijuana*** offenses. The CSA prohibits the manufacture, distribution, and possession of ***marijuana***. Anyone in any state who possesses, distributes, or manufactures ***marijuana*** for medical or recreational purposes (or attempts or conspires to do so) is committing a federal crime. The federal government can prosecute such offenses for up to five years after they occur. *See* 18 U.S.C. § 3282. Congress currently restricts the government from spending certain funds to prosecute certain individuals. But Congress could restore funding tomorrow, a year **[**33]** from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding. Moreover, a new president will be elected soon, and a new administration could shift enforcement priorities to place greater emphasis on prosecuting ***marijuana*** offenses.

Nor does any state law "legalize" possession, distribution, or manufacture of ***marijuana***. Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. U.S. Const. art VI, cl. 2. Thus, while the CSA remains in effect, states cannot actually authorize the manufacture, distribution, or possession of ***marijuana***. Such activity remains prohibited by federal law.

[6] ***HN26***[] We have jurisdiction under the All Writs Act to "issue all writs necessary or appropriate in aid of [our] jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The writ of mandamus "is a drastic and extraordinary remedy reserved for really extraordinary causes." United States v. Guerrero, 693 F.3d 990, 999 (9th Cir. 2012) (quoting Cheney v. U.S. Dist. Court, 542 U.S. 367, 380, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)). We **DENY** the petitions for the writ of mandamus because the petitioners **[**34]** have other means to obtain their desired relief and because the district courts' orders were not clearly erroneous as a matter of law. *See id.* (citing Bauman v. U.S. Dist. Ct., 557 F.2d 650, 654-55 (9th Cir. 2010)). In addition, we **GRANT** the motion for leave to file an oversize reply brief, ECF No. 47-2; **DENY** the motion to strike, ECF No. 52; and **DENY** the motion for judicial notice, ECF No. 53.

# United States Justice Department Memorandum – January 4, 2018

## Marijuana Enforcement

## Rescission of the "Cole Memo"

# Office of the Attorney General
## Washington, D. C. 20530

January 4, 2018

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: Jefferson B. Sessions, III
Attorney General

SUBJECT: Marijuana Enforcement

In the Controlled Substances Act, Congress has generally prohibited the cultivation, distribution, and possession of marijuana. 21 U.S.C. § 801 *et seq*. It has established significant penalties for these crimes. 21 U.S.C. § 841 *et seq*. These activities also may serve as the basis for the prosecution of other crimes, such as those prohibited by the money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act. 18 U.S.C. §§ 1956-57, 1960; 31 U.S.C. § 5318. These statutes reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime.

In deciding which marijuana activities to prosecute under these laws with the Department's finite resources, prosecutors should follow the well-established principles that govern all federal prosecutions. Attorney General Benjamin Civiletti originally set forth these principles in 1980, and they have been refined over time, as reflected in chapter 9-27.000 of the U.S. Attorneys' Manual. These principles require federal prosecutors deciding which cases to prosecute to weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.

Given the Department's well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately.[1] This memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion in accordance with all applicable laws, regulations, and appropriations. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

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[1] Previous guidance includes: David W. Ogden, Deputy Att'y Gen., Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009); James M. Cole, Deputy Att'y Gen., Memorandum for United States Attorneys: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011); James M. Cole, Deputy Att'y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013); James M. Cole, Deputy Att'y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014); and Monty Wilkinson, Director of the Executive Office for U.S. Att'ys, Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014).