

STATE OF MICHIGAN

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MICHIGAN MEDICAL MARIHUANA ACT: Return of marihuana to patient or caregiver
upon release from custody

PREEMPTION:

Section 4(h) of the Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26424(h), which prohibits the forfeiture of marihuana possessed for medical use, directly conflicts with and is thus preempted by, the federal Controlled Substances Act, 21 USC 801 *et seq.*, to the extent section 4(h) requires a law enforcement officer to return marihuana to a registered patient or primary caregiver upon release from custody.

Opinion No. 7262

November 10, 2011

Honorable Kevin Cotter
State Representative
The Capitol
Lansing, Michigan

You have asked whether a law enforcement officer¹ who arrests a patient or primary caregiver registered under the Michigan Medical Marihuana Act (MMMA or Act), Initiated Law 1 of 2008, MCL 333.26241 *et seq.*, must return marihuana² found in the possession of the patient or primary caregiver upon his or her release from custody.

Under the MMMA, the medical use of marihuana is permitted by "state law to the extent that it is carried out in accordance with the provisions of [the] act." MCL 333.26427(a), 333.26424(d)(1) and (2). Pursuant to section 7(e), "[a]ll other acts and parts of acts inconsistent with [the MMMA] do not apply to the medical use of marihuana as provided for by this act." MCL 333.26427(e). The Act "constitutes a determination by the people of this state that there should exist a very limited, highly restricted exception to the statutory proscription against the manufacture and use of marihuana in Michigan." *People v King*, ___ Mich App ___; ___ NW2d ___ (Docket No. 294682, issued February 3, 2011), lv gtd 489 Mich 957 (2011). "All the MMMA does is give some people limited protection from prosecution by the state, or from other adverse state action in carefully limited medical marijuana situations." *Casias v Wal-Mart Stores, Inc*, 764 F Supp 2d 914, 922 (WD Mich, 2011). Thus, by enacting the MMMA, the people did not repeal any statutory prohibitions regarding marihuana. The possession, sale, delivery, or manufacture of marihuana remain crimes in Michigan. *Id.*, citing *People v Redden*, 290 Mich App 65, 92; 799 NW2d 184 (2010) (O'Connell, J., concurring).³ The same is true under federal law. The Controlled Substances Act (CSA), 21 USC 801 *et seq.*, makes all marihuana-related activity illegal, including the possession, manufacture, and distribution of marihuana. See 21 USC 812(c), 823(f), and 844(a).⁴

The MMMA protects from state prosecution or other penalty registered qualifying patients, MCL 333.26424(a), and registered primary caregivers, MCL 333.26424(b), who engage in the "medical use" of marihuana in accordance with all conditions of the Act. MCL 333.26427(a), 333.26424(d)(1) and (2). The term "medical use" is broadly defined and includes the "acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana." MCL 333.26423(e). In order to qualify for full protection under the Act, patients and caregivers must apply for and receive a registry identification card from the Michigan Department of Licensing and Regulatory Affairs. MCL 333.26424(a) and (b).⁵

A qualifying patient with a valid registry identification card may possess up to 2.5 ounces of usable marihuana, and cultivate up to 12 marihuana plants, unless the patient has designated a primary caregiver and specified that the caregiver will cultivate marihuana for the patient. MCL 333.26424(a). A primary caregiver who has a valid registration card may possess up to 2.5 ounces of usable marihuana per patient, and may also cultivate 12 marihuana plants per patient if the patients have so specified. MCL 333.26424(b), 333.26426(d).⁶ Thus, registered patients and primary caregivers are not subject to arrest, prosecution, or other penalty as long as they are in possession of the statutorily permitted amounts of marihuana, and are in compliance with the remaining provisions of the Act.

Relevant to your question, the MMMA specifically prohibits the forfeiture of marihuana possessed in connection with the medical use of marihuana. Section 4(h) of the Act provides:

Any marihuana, marihuana paraphernalia, or licit property that is possessed, owned, or used in connection with the medical use of marihuana, as allowed under this act, or acts incidental to such use, *shall not be* seized or *forfeited*. [MCL 333.26424(h); emphasis added.]

The term "forfeited" is not defined in the Act. An undefined statutory term must be accorded its plain and ordinary meaning. MCL 8.3a; *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). Resort to lay or legal dictionaries is appropriate in interpreting statutes. *Oakland County Bd of County Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998). The word "forfeit" has a well-understood meaning in the law. It means "[t]o lose, or lose the right to, by some error, fault, offense, or crime." Black's Law Dictionary (6th ed), p 650. Thus, as used in section 4(h), "forfeited" means the permanent loss of marihuana or related property as a consequence of having done something improper.

According section 4(h) its plain meaning, and reading it in conjunction with section 7(e), MCL 333.26427(e), which renders conflicting state statutes subject to the MMMA, section 4(h) prohibits the forced or involuntary surrender of marihuana if the person in possession is a registered patient or caregiver in complete compliance with all other provisions of the MMMA. Therefore, if a registered patient or caregiver's marihuana is confiscated by law enforcement during the course of an arrest, if the person's registration card is valid and the possession complies with the MMMA, the officer must return the marihuana to the patient or caregiver upon release from custody.

But this does not conclude the analysis because, as stated above, federal law prohibits the manufacture, distribution, or possession of marihuana. The CSA provides that "[e]xcept as

authorized by this title, it shall be unlawful for any person knowingly or intentionally -- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance" 21 USC 841(a)(1). The CSA categorizes marihuana as a Schedule I controlled substance. 21 USC 812(c) (Schedule I) (c)(10). And its use remains a federal crime. See 21 USC 812(c)(10).⁷ Simple possession of marihuana is also a crime, 21 USC 844(a), and possession for "personal use" renders the offender "liable to the United States for a civil penalty in an amount not to exceed \$10,000." 21 USC 844a(a).⁸

"As a state law authorizing the use of medical marihuana, the MMMA cannot negate, nullify or supersede the federal Controlled Substances Act, which criminalized the possession and distribution of marihuana throughout the entire country long before Michigan passed its law." *United States v Michigan Dep't of Community Health*, ___ F Supp 2d ___ (WD Mich, amended opinion, June 9, 2011), (2011 US Dist LEXIS 59445; 2011 WL 2412602). "Thus, the MMMA has no effect on federal law, and the possession of marijuana remains illegal under federal law, even if it is possessed for medicinal purposes in accordance with state law." *United States v Hicks*, 722 F Supp 2d 829, 833 (ED Mich, 2010).

The question thus centers on the relationship between section 4(h) of the MMMA, which prohibits the forfeiture of marihuana, and the provisions of the CSA.

"The doctrine of federal preemption has its origin in the Supremacy Clause of article VI, cl 2, of the United States Constitution, which declares that the laws of the United States 'shall be the supreme Law of the Land" *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), abrogated in part on other grounds by *Sprietsma v Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002). Whether a federal statute preempts state law is a question of federal law. *Allis-Chalmers Corp v Lueck*, 471 US 202, 214; 105 S Ct 1904; 85 L Ed 2d 206 (1985). There is a strong presumption against preemption of state law, and preemption may be found only where it is the clear and unequivocal intent of Congress. *Cipollone v Liggett Group, Inc*, 505 US 504, 516; 112 S Ct 2608; 120 L Ed 2d 407 (1992). This is especially true in the area of health and safety, which has historically been left to state regulation. *Ryan*, 454 Mich at 27, citing *Hillsborough County v Automated Medical Labs, Inc*, 471 US 707, 715; 105 S Ct 2371; 85 L Ed 2d 714 (1985). Nevertheless, "[w]here state and federal law 'directly conflict,' state law must give way." *PLIVA, Inc v Mensing*, ___ US ___; 131 S Ct 2567, 2577; 180 L Ed 2d 580 (2011) (citation omitted); *Gonzales*, 545 US at 29.⁹

In any preemption case, the ultimate test is the intent of Congress in passing the federal law. *Wyeth v Levine*, 555 US 555, 565; 129 S Ct 1187; 173 L Ed 2d 51 (2009); *Medtronic, Inc v Lohr*, 518 US 470, 494; 116 S Ct 2240; 135 L Ed 2d 700 (1996). Congress's intent may be express or implied; either through express language in the federal statute or through the federal statute's structure and purpose. *Altria Group v Good*, 555 US 70, 76; 129 S Ct 538; 172 L Ed 2d 398 (2008).

Under conflict preemption principles,¹⁰ where state and federal law "directly conflict," state law must give way. *Wyeth*, 555 US at 583 (Thomas, J., concurring in judgment); see also *Crosby v Nat'l Foreign Trade Council*, 530 US 363, 372; 120 S Ct 2288; 147 L Ed 2d 352 (2000) ("state law is naturally preempted to the extent of any conflict with a federal statute"). State and federal

law conflict where it is "impossible" to "comply with both state and federal requirements." *PLIVA, Inc.*, 131 S Ct at 2577, quoting *Freightliner Corp v Myrick*, 514 US 280, 287; 115 S Ct 1483; 131 L Ed 2d 385 (1995) (internal quotation marks omitted).

Section 4(h) of the MMMA, forbidding forfeiture of marihuana, directly conflicts with the CSA's prohibition against possession or distribution of marihuana because it is impossible for a law enforcement officer to comply with both federal and state law.

As discussed above, under section 4(h) a law enforcement officer must return marihuana to a registered patient or caregiver if the individual's possession complies with the MMMA. But the CSA prohibits the possession or distribution of marihuana under any circumstance. If a law enforcement officer returns marihuana to a patient or caregiver as required by section 4(h), the officer is distributing or aiding and abetting the distribution or possession of marihuana by the patient or caregiver in violation of the CSA. Thus, a Michigan law enforcement officer cannot simultaneously comply with the federal prohibition against distribution or aiding and abetting the distribution or possession of marihuana and the state prohibition against forfeiture of marihuana.¹¹ In other words, it is "impossible" for state law enforcement officers to comply with their state-law duty not to forfeit medical marihuana, and their federal-law duty not to distribute or aid in the distribution of marihuana. See *PLIVA*, 131 S Ct at 2577-2578 (holding state statutes preempted where it was impossible for drug manufacturers to comply with state law and applicable federal law).¹² Under these circumstances, the unavoidable conclusion is that section 4(h) of the MMMA is preempted by the CSA to the extent it requires law enforcement officers to return marihuana to registered patients or caregivers.¹³ As a result, law enforcement officers are not required to return marihuana to a patient or caregiver.

By returning marihuana to a registered patient or caregiver, a law enforcement officer is exposing himself or herself to potential criminal and civil penalties under the CSA for the distribution of marihuana or for aiding or abetting¹⁴ the possession or distribution of marihuana. Section 841(a) of the CSA applies to "any person," which, courts have presumed, covers government employees as well as private citizens.¹⁵ While section 885(d) of the CSA, 21 USC 885(d), confers immunity on state law enforcement officers who violate its provisions while "lawfully engaged in the enforcement of any law . . . relating to controlled substances," returning marihuana to a registered patient or caregiver under the MMMA could not be considered lawful "enforcement" of a law related to controlled substances. "Enforcement" in this context means the prosecution of unlawful possession or distribution of controlled substances. See *United States v Rosenthal*, 266 F Supp 2d 1068, 1078-1079 (ND Cal, 2003), *aff'd in part, reversed in part* 445 F3d 1239, opinion amended and superseded on denial of rehearing 454 F3d 943 (2006). Otherwise, a state could contradict the fundamental purpose of the CSA and immunize any state officials who participate in the competing state regime. *Id.*¹⁶ Moreover, the state officers' conduct would remain "unlawful" in any event because immunity does not decriminalize the underlying conduct, it only provides protection from prosecution or other penalty.

The people of this State, even in the exercise of their constitutional right to initiate legislation, cannot require law enforcement officers to violate federal law by mandating the return of marihuana to registered patients or caregivers. This conclusion is consistent with the federal

district court's opinion in *United States v Michigan Dep't of Community Health*, ___ F Supp 2d ___, *supra*, which held that the MMMA's confidentiality provision, MCL 333.26426(h), was preempted by 21 USC 876 to the extent it precluded compliance with a federal subpoena sought in conjunction with an investigation under the CSA. It also accords with the Oregon Supreme Court's decision in *Emerald Steel Fabricators, Inc v Bureau of Labor and Industries*, 348 Or 159; 230 P3d 518, 529 (2010), which held that Oregon's medical marihuana law authorizing the use of marihuana and exempting its use from prosecution, was preempted by the CSA to the extent it "affirmatively authorizes the use of medical marijuana, . . . leaving it without effect."

It is my opinion, therefore, that section 4(h) of the Michigan Medical Marihuana Act, MCL 333.26424(h), which prohibits the forfeiture of marihuana possessed for medical use, directly conflicts with and is thus preempted by, the federal Controlled Substances Act, 21 USC 801 *et seq.*, to the extent section 4(h) requires a law enforcement officer to return marihuana to a registered patient or primary caregiver upon release from custody.

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[Atts.1](#)
[Atts.2](#)

¹ Although this opinion uses the term "officer," the discussion applies to any employee or agent of a state or local law enforcement agency responsible for returning confiscated or seized items.

² "Marijuana" and "marihuana" are both acceptable spellings for the name of this drug. The spelling "marihuana" is used in the MMMA and the Public Health Code, MCL 333.1101 *et seq.*, but "marijuana" is the more commonly used spelling. The statutory spelling is used here except in quotes that use the more common spelling.

³ Marihuana remains a Schedule 1 controlled substance under the Michigan Public Health Code, MCL 333.7212(1)(c), meaning that "the substance has a high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision," MCL 333.7211. Similarly, the manufacture, delivery, or possession with intent to deliver marihuana remains a felony, MCL 333.7401(1) and (2)(d), and possession of marihuana remains a misdemeanor offense, MCL 333.7403(2)(d).

⁴ The MMMA acknowledges that it does not supersede or alter federal law. MCL 333.26422(c) provides, "[a]lthough federal law currently prohibits any use of marihuana except under very limited circumstances, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law."

⁵ The MMMA expressly refers to the Department of Community Health. However, the authority, powers, duties, functions, and responsibilities under the Act were transferred from the Department of Community Health to the Department of Licensing and Regulatory Affairs under Executive Order 2011-4.

⁶ A qualifying patient may designate one primary caregiver "to assist with [the] patient's medical use of marihuana." MCL 333.26423(g), 333.26424(b). A primary caregiver may only assist up to five registered patients, to whom he or she is connected through the registration process. MCL 333.26424(b) and 333.26426(d).

⁷ "For marijuana (and other drugs that have been classified as 'schedule I' controlled substances), there is but one express exception, and it is available only for Government-approved research projects, § 823(f)." *United States v Oakland Cannabis Buyers' Coop*, 532 US 483, 490; 121 S Ct 1711; 149 L Ed 2d 722 (2001).

⁸ A registered patient or caregiver has no right to the return of marihuana under federal law. First, 21 USC 881(a)(1) provides that "[a]ll controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title" "shall be subject to forfeiture to the United States and no property right shall exist in them." Second, the Supreme Court has held that no person can have a legally protected interest in contraband *per se*. See *United States v Jeffers*, 342 US 48, 53; 72 S Ct 93; 96 L Ed 59 (1951). And in *Cooper v City of Greenwood, MS*, 904 F2d 302, 305 (CA 5, 1990), the court held, "[c]ourts will not entertain a claim contesting the confiscation of contraband *per se* because one cannot have a property right in that which is not subject to legal possession." As explained in *United States v Harrell*, 530 F3d 1051, 1057 (CA 9, 2008), "[a]n object is contraband *per se* if its possession, without more, constitutes a crime; or in other words, if there is no legal purpose to which the object could be put." Given that it is illegal under federal law for any private person to possess marihuana, 21 USC 812(c), 841(a)(1), 844(a), marihuana is contraband *per se* as a matter of federal law, which means no person can have a cognizable legal interest in it. See *Gonzales v Raich*, 545 US 1, 27; 125 S Ct 2195; 162 L Ed 2d 1 (2005) ("[t]he CSA designates marihuana as contraband for *any* purpose") (emphasis in original).

⁹ The Supreme Court, however, has clarified that Congress does not have the authority to commandeer the processes of states "by directly compelling them to enact and enforce a federal regulatory program." *New York v United States*, 505 US 144, 161; 112 S Ct 2408; 120 L Ed 2d 120 (1992) (citation omitted). Thus, the preemption power is constrained by the Supreme Court's anti-commandeering rule. The CSA, however, contains no language compelling state action or attempting to commandeer state law enforcement employees.

¹⁰ In answering your question, it is not necessary for this opinion to address other forms of preemption, such as express, field, or obstacle preemption.

¹¹ While appellate courts in California and Oregon have upheld the return of medical marihuana, *City of Garden Grove v Superior Court of Orange County*, 157 Cal App 4th 355; 68 Cal Rptr 3d 656 (2007), *State v Kama*, 178 Or App 561; 39 P3d 866 (2002), these decisions are of questionable value in light of recent decisions. See *Pack v Superior Court of Los Angeles County*, 199 Cal App 4th 1070 (2011), and *Emerald Steel Fabricators, Inc v Bureau of Labor and Industries*, 348 Or 159; 230 P3d 518, 529 (2010).

¹² Section 903 of the CSA contemplates that conflicting state laws will be preempted where "there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together." 21 USC 903.

¹³ This office has previously found other state statutes preempted by federal law. See, e.g., OAG 2001-2002, No 7074, p 9 (January 24, 2001) (finding section 1905(3) of the Insurance Code preempted by the federal Liability Risk Retention Act of 1986); OAG 1991-1992, No 6679, p 28 (April 29, 1991) (finding section 23 of the Michigan Mortgage Brokers, Lenders and Services Licensing Act dealing with loan processing fees preempted by the federal Depository Institutions Deregulation and Monetary Control Act of 1980.); and OAG 1989-1990, No 6649, p 351 (July 11, 1990) (concluding that section 301(a) of the federal Labor Management Relations Act of 1947 preempted the Michigan Department of Labor from determining state law claims for wages and fringe benefits brought by employees under 1978 PA 390).

¹⁴ 18 USC 2(a) states: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

¹⁵ The CSA defines "distribute" as "to deliver . . . a controlled substance," and it further defines the terms "deliver" or "delivery" as "the actual, constructive, or attempted transfer of a controlled substance." 21 USC 802(11), 802(8). In *United States v Vincent*, 20 F3d 229, 233 (CA 6, 1994), the United States Court of Appeals for the Sixth Circuit held that in order to establish the knowing or intentional distribution of a controlled substance, "the government needed only to show that defendant knowingly or intentionally delivered a controlled substance. 21 USC § 802(11). It was irrelevant for the government to also show that defendant was paid for the delivery." Distributing a small amount of marijuana for no remuneration is treated as simple possession, and is a misdemeanor offense. See 21 USC 841(b)(4).

¹⁶ This analysis is consistent with the views expressed by the United States Department of Justice. An April 14, 2011, letter from the two federal prosecutors in the State of Washington, advised the Governor of Washington that if a medical marijuana proposal became law that "state employees who conduct[] activities mandated by the Washington legislative proposals would not be immune from liability under CSA." Similarly, a June 29, 2011, memorandum issued by United States Deputy Attorney General James Cole provides that "[s]tate laws or local ordinances are not a defense to civil or criminal enforcement of federal law . . . including enforcement of the CSA." The letter and memorandum are attached to this opinion.