State Marijuana Laws

Carl Olsen - March 6, 2022

Today, forty-eight (48) states accept the medical use of marijuana. However, marijuana's classification in the federal Controlled Substance Act (CSA) has not changed as a result. State laws are not scientific evidence. State laws are political acts. The Drug Enforcement Administration (DEA) still uses the same analysis it used prior to 1996 when California became the first state to accept it.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

21 U.S.C. § 811. Authority and criteria for classification of substances.

The difficulty we find in petitioners' argument is that neither the statute nor its legislative history precisely defines the term "currently accepted medical use"; therefore, we are obliged to defer to the Administrator's interpretation of that phrase if reasonable. See *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123, 98 L. Ed. 2d 429, 108 S. Ct. 413 (1987); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

Alliance for Cannabis Therapeutics v. DEA, 930 F.2d 936, 939 (D.C. Cir. 1991).

We noted the ambiguity of the phrase and the dearth of legislative history on point and deferred to the Administrator's interpretation as reasonable. *Id*. at 939 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-45, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) (court may not substitute its own construction of ambiguous statutory provision for reasonable interpretation by agency of statute entrusted to its administration)).

Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1134 (D.C. Cir. 1994).

only rigorous scientific proof can satisfy the CSA's "currently accepted medical use" requirement

Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1137 (D.C. Cir. 1994).

State laws authorizing the use of marijuana do not preempt federal drug laws and federal reclassification of marijuana would not resolve their inconsistency.

Thus, even if respondents are correct that marijuana does have accepted medical uses and thus should be redesignated as a lesser schedule drug, the CSA would still impose

controls beyond what is required by California law.

Respondents' submission, if accepted, would place all homegrown medical substances beyond the reach of Congress' regulatory jurisdiction.

Gonzales v. Raich, 545 U.S. 1, 27 (2005).

It is important not to read too much into the *Raich* decision. The court did not say it was impossible to resolve the inconsistency between state and federal marijuana laws. The ruling in *Raich* was that it was impossible to resolve the inconsistency by rescheduling. Legislation is currently pending in Congress to deschedule marijuana, rather than reschedule it. Any inconsistency would be resolved by entirely removing marijuana from the CSA.

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. Application of State law.

The CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its pre-emption provision.

Gonzales v. Oregon, 546 U.S. 243, 251 (2006).

There is a path to resolving the conflict which is starting to gain some traction. The DEA resolved the conflict between state and federal peyote laws by creating an exemption. Like marijuana, peyote is in schedule I of the CSA. Marijuana and peyote are even in the same subcategory, hallucinogens.

The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

21 C.F.R. § 1307.31. Native American Church.

It is not difficult to imagine a new regulation, which might be codified as 21 C.F.R. § 1307.32: "The listing of marijuana as a controlled substance in Schedule I does not apply to the nondrug use of marijuana in state programs authorizing it, etc. …"

The Federal Aviation Administration has an exemption for state laws, and specifically for marijuana.

(a) Except as provided in paragraph (b) of this section, no person may operate a civil aircraft within the United States with knowledge that narcotic drugs, marihuana, and depressant or stimulant drugs or substances as defined in Federal or State statutes are carried in the aircraft.

(b) Paragraph (a) of this section does not apply to any carriage of narcotic drugs, marihuana, and depressant or stimulant drugs or substances authorized by or under any Federal or State statute or by any Federal or State agency.

14 C.F.R. § 91.19. Carriage of narcotic drugs, marihuana, and depressant or stimulant drugs or substances.

The authority to make exemptions comes from the CSA.

The Attorney General may, by regulation, waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety.

21 U.S.C. § 822(d). Waiver.

The Act contains a provision authorizing the Attorney General to "waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety." 21 U.S.C. § 822(d). The fact that the Act itself contemplates that exempting certain people from its requirements would be "consistent with the public health and safety" indicates that congressional findings with respect to Schedule I substances should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them.

Gonzales v. O Centro Espirita Beneficente União do Vegetal, 546 U.S. 418, 432-33 (2006).

Exemption, like scheduling, is an administrative remedy. Courts generally require exhaustion of administrative remedies before considering any challenge to scheduling if the government raises the issue. However, unless the government or the plaintiff brings it up (as in the cases cited above), a court has no authority to make arguments neither of the parties are making.

For the sake of argument, let's apply the *Chevron* deference standard to a state application for an exemption like the one for peyote. First off, the factors the DEA must evaluate in considering an exemption (public health and safety) are different from the factors the DEA must evaluate in considering scheduling (science). The fact a state has authorized the activity would seem to create a presumption of health and safety. A set of federal guidelines existed at one time and some states actually relied on them in

creating their programs, but the guidelines fail to mention federal exemption and create no legal rights.

• 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.

Cole Memorandum 2013. United States Department of Justice, August 29, 2013.
The DEA was resistant to acknowledging it could make exceptions in 1989.

The DEA's contention that Congress directed the Administrator automatically to turn away all churches save one opens a grave constitutional question. A statutory exemption authorized for one church alone, and for which no other church may qualify, presents a "denominational preference" not easily reconciled with the establishment clause. *See* *Larson v. Valente*, 456 U.S. 228, 245, 72 L. Ed. 2d 33, 102 S. Ct. 1673 (1982); *cf. infra* pp. 1463-1464. We resist an interpretation dissonant with the "cardinal principle" that legislation should be construed, if "fairly possible," to avoid a constitutional confrontation. *See* *Ashwander v. TVA*, 297 U.S. 288, 348, 80 L. Ed. 688, 56 S. Ct. 466 (1936) (Brandeis, J., concurring).

Olsen v. DEA, 878 F.2d 1458, 1461 (D.C. Cir., 1989).

But in 2018 the DEA published guidelines for religious exemptions. The DEA is in the process of codifying the guidlines. See DEA Registration for Religious Organizations, updated March 2022. See 21 U.S.C. § 871(b) and 21 U.S.C. § 958.

It would defy logic for the DEA to argue states are not entitled to as much (or more) respect. States created the federal government in return for their mutual protection. This should not be a heavy lift for the DEA. The DEA would need some strong evidence that states cannot be trusted to survive *Chevron* analysis.

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