



## Ep. 37: Law of the Land? Cannabis, Preemption, and SCOTUS

April 13, 2022

*Cannabis is illegal under federal law, but legal for certain uses in many states. Might the U. S. Supreme Court resolve this conflict in a Worker's Comp case?*

### Gary Hebert:

I'm **Gary Hebert**. I'm a Member (Partner) in McGlinchey Stafford New Orleans office. What in the world is McGlinchey Stafford doing recording a podcast on marijuana?

Well, today,  $\frac{2}{3}$  of the states have legalized marijuana in some fashion—leaving only 11 states without some form of legalization. Three-quarters of the nation's population live in a state that has legalized marijuana to some degree. But marijuana remains illegal under federal law—a controlled substance.

So you see, McGlinchey is still mainstream. It's just that the stream is changing courses. And if that's going to happen, we want to be where our clients need us, when they need us. So this podcast actually fits well within the firm's strategic goals, to be able to serve our clients where they need us, even if that means we get there a little before them.

Our purpose today is two-fold: (1) We're going to start with a high-level review of the laws governing different cannabis products, including a bit of nomenclature to help us through the discussion; and then (2) we're going to discuss a couple of cases that are pending, or at least pending for review, before the U.S. Supreme Court.

I joined McGlinchey during the last century. At that time, nobody was discussing marijuana, let alone legal issues relating to it. So today, joining me are a few of the firm's younger lawyers: **Ralph Confreda** is in the Fort Lauderdale office. **Remington Angelle** is in our Baton Rouge office. Both of these guys have been spending a lot of time keeping track and keeping abreast of what's going on in this space. So let's jump to them for something a little bit more substantive here.

Remington, can you give us just a high level understanding of the terms at play, so we can understand what we're talking about?

**Remington Angelle:** There are three terms that need to be clarified, whether we are speaking in the botanical or the legal context: “cannabis,” “marijuana,” and “hemp.”

Generally, “cannabis” refers to all parts of the plant: the roots, the stems, the fan leaves and the flowers, etc. However, “marijuana” typically refers to the plant’s female flowers that contain high concentrations of chemical compounds we call cannabinoids, such as THC and CBD. While “marijuana” can often refer to the whole plant as well, these two terms are often used interchangeably.

“Hemp,” on the other hand, is cannabis, but it is cannabis that has been bred to have low levels of THC. Rather than its medicinal flowers, it is mostly cultivated for its industrial uses as a commodity crop – everything from its fibrous stalks to its oils and seeds.

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**Gary Hebert:** So, Ralph, where and how has Congress distinguished “cannabis” from “hemp”?

**Ralph Confreda:** To start, we need to look back to the Nixon Administration in the 1970s, when Congress enacted the Controlled Substances Act, which we will be referring to as the CSA. This was part of Nixon's war on drugs and the CSA banned cannabis under federal law. The CSA categorizes all controlled substances into five schedules, with those listed under schedule 1 as meeting the following criteria: high potential for abuse; (2) lack of accepted medical uses of the substance; & (3) the absence of any accepted safety for its use in medically supervised treatment. Today, under the CSA, cannabis is still categorized under Schedule I with the likes of heroin, LSD, and Ecstasy.

Now in 2014, Congress passed the Rohrabacher-Farr Amendment as part of an omnibus spending bill. The amendment prohibits the Justice Department from using federal funds to interfere with state authorized cannabis programs or their participants so long as they are operating in accordance with state laws. The amendment, though, does not change the legal status of cannabis, and must be renewed by Congress each fiscal year in order to remain in effect.

Fast forward to 2018, Congress passed the Farm Bill, which accomplished three main things. First, it made a legal distinction between hemp and marijuana by defining “hemp” as cannabis with a Delta-9 THC concentration of no more than 0.3% on a dry weight basis. Second, it amended the CSA to exclude “hemp” from the definition of marijuana. And third, it reclassified “hemp” as an agricultural commodity. So now, anything above 0.3% THC is considered federally illegal “marijuana,” and anything under that 0.3% is considered legal “hemp.”

Now, various states allow use of marijuana in medical or recreational contexts, but the specifics vary from state to state. In states where marijuana remains illegal, growers use HEMP and CBD to create the various products we see on the shelves today.

**Gary Hebert:** So is it fair to say, Ralph, that hemp and CBD are legal throughout the country today?

**Ralph Confreda:** Yes. That would be an accurate statement, Gary.

**Gary Hebert:** That's an important point, I think, for our listeners to understand in this context, but let's go back to talk about marijuana. Remington, what about the other two branches of government? What are they doing in this space, if anything?

**Remington Angelle:** Well, looking at the Executive branch, we've seen a series of memoranda published by the Department of Justice across several of the most recent administrations. These memos guided federal prosecutors on how to deal with federal prosecutions in states where marijuana was legalized in some way.

One of these memos, the "Cole Memorandum," outlined eight priorities of state activities that would trigger federal enforcement of cannabis prohibition, for example, when the state activity involved distribution of cannabis to minors, criminal enterprises using violence in the cultivation and distribution of cannabis, or trafficking of cannabis across state lines.

Even though these memos were rescinded by Attorney General Jeff Sessions in 2018 under the Trump administration, the DOJ's approach to cannabis has not fundamentally changed, because the power to prosecute remains in the hands of various U.S. Attorneys and Congress' appropriations riders (which substantially limit the department's enforcement of cannabis as long as there is compliance with state law).

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But remember: just because someone is running a legal business under state law, it does not mean they are *not* violating federal law. Thus, basic banking, credit markets, bankruptcy courts, and many other features of our markets are off-limits for cannabis-related businesses. Banks, even state-chartered banks, are wary of participating in their local cannabis businesses for fear of violating money-laundering laws.

As for the Judicial Branch, we've got a mishmash of cases with conflicting results stemming from state Supreme Courts interpreting the CSA in a number of ways, whether in the context of the Commerce Clause or under the principles of Preemption. Preemption, in particular, is why we are here today.

**Gary Hebert:** Right, because that's really the issue before us, just like you described. There are various activities that are completely legal under the law of individual states, but still are in violation of federal law. And so what we're here to talk about today is a couple of cases that might be getting the consideration of the U.S. Supreme Court directly related to this issue. Did I say that about right, Ralph?

**Ralph Confreda:** That's right, Gary. So last year, the Minnesota Supreme Court decided two companion Workers' Compensation cases: [\*Musta v. Mendota Heights Dental Center\*](#) & [\*Bierbach v. Digger's Polaris\*](#).

So in both cases, they involved an individual who was injured on the job and was legally prescribed medical marijuana in accordance with Minnesota's Cannabis Act. As you can guess, the Act allows certain patients with approved diagnoses to use, possess, and purchase medical marijuana. After the injured employees purchased the medical marijuana, they sought reimbursement of the costs from their employers just as they had done with their prior prescribed medicines. The employers denied the reimbursement requests claiming the CSA preempted them from reimbursing the costs of medical marijuana. In response, the injured employees filed suit. So, the fact-scenarios are fairly straightforward.

In both cases, the trial judge concluded that federal law does NOT prohibit the employer from reimbursing the injured employees for the costs of medical marijuana and ordered the employers to reimburse the employees for costs associated with their use of medical cannabis.

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In both cases, the employers appealed. The Workers' Compensation Court of Appeals held that it lacked authority to decide whether the CSA preempts the Minn. State Workers' Comp law, but they otherwise affirmed the order of the Workers' Compensation trial court ruling.

The employers sought review from the Minnesota Supreme Court, which ultimately reversed the lower courts' rulings, holding that the Controlled Substances Act does, in fact, preempt an order requiring an employer to reimburse for the costs of medical cannabis. In other words, the MN Supreme Court sided with the employers, finding that reimbursement was not owed to the injured employees.

Both Plaintiffs filed a petition for review with the U.S. Supreme Court.

**Gary Hebert:** And so my understanding is that's where we are now. These plaintiffs have both filed for review by the Supreme Court, but the Supreme Court has not yet acted on those requests. Is that correct, Remy?

**Remington Angelle:** That's correct.

**Gary Hebert:** So then, we have two writs from the similar cases. What's really the precise, legal issue that may or may not be of interest to the Supreme Court?

**Remington Angelle:** Gary, the real issue here is preemption. Based on the Supremacy Clause of the U.S. Constitution, preemption concerns whether a federal law supersedes conflicting state law.

Without getting more wonkish than the situation requires, there are essentially two types of preemption: Express Preemption and Implied Preemption. Express Preemption is when a federal law *expressly* states that it is intended to preempt state law. Examples include: the Federal Arbitration Act, the Truth-in-Lending Act, and the Fair Credit Reporting Act.

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However, Implied Preemption occurs when a court decides that, even though the federal law doesn't explicitly state that it preempts state law, it nevertheless *does* preempt state law. We break implied preemption into two types: Field Preemption, and Conflict Preemption. When we're talking about Field Preemption, this is when the federal law is interpreted to have left no room for the states to supplement the law and the government has occupied the field.

Conflict Preemption, on the other hand, is also kind of broken out into two types. It is either when it is impossible to comply with both the federal and the state law, or if the state law poses an obstacle to the purposes and objectives of the federal law. But under the context of the Controlled Substances Act, the Act expressly rejects field preemption, and it preempts a state law when there is a "positive conflict" between the Act and the state law.

So based on how the Act is written and what many have argued in the past, we are dealing with Conflict Preemption, specifically when it is impossible to comply with both the federal and state laws at the same time.

**Gary Hebert:** So, Ralph, can you give us just sort of a quick rundown of the Minnesota Supreme court's rationale for holding that the CSA does preempt the state workers' comp laws?

**Ralph Confreda:** Absolutely, but doing so really requires that we look back at the 3 State Supreme Court decisions the Court referenced in its opinion.

This all started with the Maine Supreme Court's 2018 decision in *Bourgoin v. Twin Rivers Paper Co., LLC*. With the same issue before the Maine Supreme Court, it held that there was a "positive conflict" between the CSA and Maine's Workers' Compensation statute, which also required an employer to reimburse an injured employee for the costs of medical cannabis.

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*The [Maine Supreme] Court observed that an employer who reimbursed for legal medical marijuana use could be liable under federal law on an "aiding and abetting" theory, because the employer would be acting with knowledge that it was subsidizing the employee's purchase of marijuana.*

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In holding that the CSA preempted state law, the Court observed that an employer who reimbursed for legal medical marijuana use could be liable under federal law on an "aiding and abetting" theory, because the employer would be acting with knowledge that it was subsidizing the employee's purchase of marijuana, which as we discussed earlier, remains illegal under federal law. On the other hand, the employer would violate state law if it refused to reimburse the employee. Thus, the court found a positive conflict.

**Gary Hebert:** A positive conflict because the employer was in a situation where it either was going to violate federal law, or it was going to violate state law. Is that fair?

**Ralph Confreda:** That's correct, Gary.

**Gary Hebert:** Okay, so, we have a Minnesota and a Maine finding that the CSA preempts state law, but what about the other two state Supreme Court cases, Remington?

**Remington Angelle:** Well, on the other side of the split, unlike Minnesota and Maine, the Supreme Courts of New Hampshire and New Jersey held the opposite – they say CSA did not preempt an employer from reimbursing an injured employee for the cost of medical cannabis.

In Appeal of *Panaggio*, the New Hampshire Supreme Court cited the dissents of the Maine Supreme Court, and it found no direct conflict between the CSA and the state law. Thus, no preemption. According to the New Hampshire Court, the employer lacked the required mens rea (or the intent) for committing an "aiding and abetting" offense under federal law, because the employer's reimbursement is compelled by state law rather than a voluntary participation in the offense.

The New Hampshire Court further found that the CSA does not contemplate insurance regulations and practices, and that the order to reimburse would not interfere with the federal government's ability to enforce the CSA.

A month later, after the *Panaggio* decision in NH, the New Jersey Supreme Court threw its hat into the ring and agreed with the *Panaggio* Court, but for a different reason. Instead of finding a conflict within criminal violations like aiding and abetting, the Court reasoned that Congress' spending bill riders, namely the Rohrabacher-Farr Amendment discussed earlier, represented Congress' "clear [and] volitional act," to take precedence over the CSA. Thus, the NJ Court found no conflict between state and federal law, and the state law on this issue, so that NJ law was not "an obstacle" to Congress' objectives.

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**Gary Hebert:**

And then Ralph, what did the Minnesota Supreme court do with these issues?

**Ralph Confreda:**

So, bringing us full circle, the Minnesota Supreme Court analyzed these three decisions and agreed with the reasoning of the Maine Supreme Court, holding that requiring an employer to pay for medical marijuana equates to engaging in conduct that would violate the CSA.

To distinguish the NJ Court, the MN Court conceded that the federal government's position on criminal prosecution of cannabis offenses has been in a state of flux for over a decade. The back-and-forth between the Cole Memos and the Sessions Memo make that evident.

And while Congress' appropriation riders do suspend the federal government's interference with state medical marijuana laws, the Court countered that the appropriation riders do not provide immunity from prosecution for marijuana offenses. In theory, the federal government could prosecute individuals who committed offenses while the government lacked funding.

**Gary Hebert:**

Guys, I'm old enough to remember that big changes in the law—and frankly, in society writ large—sometimes come along from oddball rulings from the Supreme Court. What are the possible outcomes here, Ralph?

**Ralph Confreda:**

So Gary, I think there is a high likelihood that the U.S. Supreme Court will grant *Musta's* petition and take the case for two main reasons. First and as we discussed, there is a now 2-2 split between four state supreme courts on this very issue.

Second, the U.S. Supreme Court has recently invited the Solicitor General to file a brief in *Musta* to express the views of the United States. While that it is not atypical, it does show the Court has significant interest in the case and wants the DOJ to take a position on this issue.

With this in mind, the most likely outcomes include :

The Supreme Court could answer the question presented narrowly, finding that the CSA either preempts or does not preempt the Minnesota Workers' Compensation Statute requiring an employer to reimburse an injured employee for the cost of medical marijuana. If the court finds preemption, I expect the Supreme Court will include a call to the legislative and executive branches of government regarding marijuana and the CSA just as the Minnesota Supreme court did at the end of its opinion in *Musta*.

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If the court finds there is no preemption, this decision would green-light reimbursement claims for medical cannabis in the workers' compensation space. More importantly, and on a broader spectrum, it would seemingly blow the door open in the cannabis space and lead to more challenges to the CSA beyond the workers' compensation arena.

Finally, the least likely outcome is for the court to decline to take this case. If this happens, this will certainly result in future challenges in other states, and unfortunately it will leave us right back to where we started.

**Gary Hebert:**

This is such a fluid and interesting area with potentially significant consequences to the cannabis industry, and maybe even to preemption beyond that. For now, let's agree to come back with an update on the Supreme Court issues after the Solicitor General takes a position on all of this. We don't really know when that's going to happen, but when it does, we will be ready. Thanks again for joining us. I'm Gary Hebert.

**Remington Angelle:**

I'm Remington Angelle.

**Ralph Confreda:**

And I'm Ralph Confreda.

*Thanks for tuning into this episode of "More with McGlinchey." If you have a question or would like to propose a topic, we'd love to hear from you at [podcast@mcglinchey.com](mailto:podcast@mcglinchey.com). For additional resources on this topic, please visit [mcglinchey.com](http://mcglinchey.com). On behalf of the law firm that brings you more, we hope you'll join us next time.*



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