

2012 AG Opinions

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October 3, 2012	No. I12-003 (R12-014) Re: A School District's Ability to Provide a Preschool Program to Children Without Disabilities
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STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL October 3, 2012	No. I12-003 (R12-014) Re: A School District's Ability to Provide a Preschool Program to Children Without Disabilities
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To: Anthony W. Contente-Cuomo
Mangum, Wall, Stoops & Warden P.L.L.C.

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), this Opinion addresses a question from the Chinle Unified School District ("District") regarding the District's ability to provide a preschool program to children without disabilities without engaging a separate public, federally funded, or private child care provider. We issue this Opinion to provide guidance concerning this matter to all Arizona school districts.

Questions Presented

Does an Arizona school district have statutory authority to provide an educational preschool program to preschool children without disabilities without engaging a separate public, federally funded, or private child care provider?

Summary Answer

School districts are authorized to provide educational programs to preschool children without disabilities pursuant to federal or other grants or as part of a community school program that A.R.S. §§ 15-1141 and 15-1142 authorize. In providing such preschool programs, school districts are not required to engage a separate public, federally funded, or private child care provider unless a condition of a federal or other grant requires them to do so.

Background

The District has proposed participating as a subgrantee of the Arizona Department of Education in an Arizona Early Childhood Health and Development Board grant program, commonly known as “First Things First” (“ECHD”). The grant would give the District funding to directly provide educational services for all District preschool children meeting the grant program requirements. The grant program currently funds seventy school district preschools throughout Arizona. *See Arizona Early Childhood Health and Development Board, 2011 Annual Report, Pre-Kindergarten Expansion, at 15.*

You have questioned whether school districts lack statutory authority to participate in such a program, other than a program for disabled students that A.R.S. § 15-771(A) authorizes or a program that A.R.S. § 15-1251 authorizes. Section 1251, which established the Early Childhood Block Grant (“ECBG”) program, restricts the provision of preschool services funded under that program to services that a public, federally funded, or private child care provider other than the district itself provides. A.R.S. § 15-1251(C)(2). This Opinion revises your analysis and conclusion.

Many Arizona school districts currently maintain long-established educational preschool programs for children without disabilities without engaging a separate public, federally funded,

or private child care provider. The districts operate these programs primarily using funds from the following sources: (1) federal grants, such as those that the Head Start program provides; (2) grants and donations that ECDH and other programs provide; and (3) tuition payments made on behalf of the participating children.

Arizona Revised Statutes §§ 15-1141 through 15-1143 authorize school districts to provide educational programs to children as part of a community school program. In addition, A.R.S. § 15-207(B) provides that school districts may expend the federal grants that they receive in accordance with the grant's purposes. Further, A.R.S. § 15-341(A)(14) allows school district governing boards to accept gifts, grants, and devises and to spend the money for the donor's intended purpose.

We note that a distinction exists between educational services provided to preschool children and services that provide mere custodial care of children. The ECDH grant program that the District is considering involves providing educational services rather than custodial "day-care" services to preschool children.¹ This Opinion does not address any issues related to a school district providing custodial "day-care" services.

Analysis

A school district governing board's powers are limited to those that the Legislature has expressly or impliedly conferred upon it. *Tucson Unified Sch. Dist. No. 1 v. Tucson Educ. Ass'n*, 155 Ariz. 441, 442-43, 747 P.2d 602, 603-04 (App. 1987); Ariz. Att'y Gen. Op. I00-022. The statutes concerning the authority of school district governing boards focus on the districts' responsibility to educate children. Ariz. Att'y Gen. Op. I00-022; *see also Prescott Cmty. Hosp. Comm'n v. Prescott Sch. Dist. No. 1*, 57 Ariz. 492, 494, 1115 P.2d 160, 161 (1941) (stating that a

¹ See Ariz. Att'y Gen. Op. I81-014 (stating that the educational services school districts are authorized to provide include educational preschool programs but do not include the operation of custodial day-care facilities).

school district's purpose is to promote the education of the State's youth and that its granted powers are intended to meet that purpose).

I. School Districts Are Authorized to Directly Provide Educational Preschool Services to Children Without Disabilities

The statutes setting forth the general powers and duties of school district governing boards specifically state that school districts may provide educational preschool programs for children with disabilities. A.R.S. §§ 15-771(A), 15-821(B). The statutes do not expressly refer to providing educational preschool programs for children without disabilities. However, there are several statutes that impliedly confer authority to public schools to provide such preschool programs.

Arizona Revised Statutes § 15-207(B) provides that school districts may expend federal monies that the State Board of Education apportions to them for the purposes and in the manner that the federal grants set forth. Further, A.R.S. § 15-341(A)(14) allows school district governing boards to accept other gifts, grants, and devises and to expend the funds for the donor's intended purpose. We conclude that it is permissible for a school district to provide educational services to preschool children as part of the conditions of a federal grant or of a grant provided under Section 15-341(A)(14).

In addition, A.R.S. §§ 15-1141 through 15-1143 permit school districts to operate community school programs, which A.R.S. § 15-1141(3) defines as follows:

[T]he involvement of people in the development of an educationally oriented community. The community school serves the purposes of academic and skill development for all citizens, furnishes supervised recreational and avocational instruction, supplies remedial and supplemental education, furnishes meeting places for community groups and provides facilities for the dissemination of a variety of community related services

This definition encompasses a school district's provision of an educational preschool program. An educational preschool program encourages the "development of an educationally oriented community" and serves the purpose of "academic and skill development" for children. Further, such a program "supplies . . . supplemental education" for children. A.R.S. § 15-1141(3).

This Office previously reached the same conclusion in Ariz. Att'y Gen. Op. I81-014. The second of three questions that the Opinion addressed was whether a school district has authority to operate an educational preschool facility itself. We concluded that these sources of authority, including the predecessor statutes to A.R.S. §§ 15-1141 through 15-1143, authorize school districts to provide educational services to preschool children pursuant to grants or as a part of a community school program.²

Further recognition that a school district may provide educational preschool services itself is found in an administrative rule of the State Board of Education. The rule provides a licensing methodology for issuing early childhood teaching certificates to persons engaged in programs for children birth through age eight provided both by "local education agencies" as well as by their "subgrantees and contracted providers . . ." A.A.C. R7-2-608.

II. Early Childhood Block Grant Funds Can Be Used to Provide Educational Services to Preschool Children

In the past, school districts used the ECBG program pursuant to A.R.S. § 15-1251 to provide educational services to preschool children. The statutory authorization for this program restricts a school district's use of ECBG funding to preschool services provided "only from a public, federally funded, or private child care provider." A.R.S. § 15-1251(C)(2).

² The conclusion in Ariz. Att'y Gen. Op. I81-014 that school districts are authorized to provide educational services to preschool children has been cited in several opinions addressing school district authority. See Ariz. Att'y Gen. Op. I98-007, I99-021 and I02-003.

As a consequence, if a school district decides to conduct a preschool program with ECBG funds, a condition of the funding is that the district cannot directly conduct the program. The use of the funds is specifically restricted to a school district that retains a public, federally funded, or private child care provider to provide services on its behalf.

We note, however, that in fiscal year 2010, the Legislature froze ECBG funding due to budget constraints and subsequently deappropriated it. *See* 2010 Ariz. Sess. Laws, 7th Spec. Sess. ch. 1 § 135. Arizona's budget for fiscal year 2011 provided no funding for the ECBG program, which terminated the program for the 2010-2011 school year. The program did not receive any funding for the 2011-2012 or 2012-2013 school years either. As a consequence, while the ECBG enabling statute remains in effect, the grant program has been suspended since fiscal year 2010 due to lack of appropriated funds and it therefore is not currently a potential source of educational preschool funding.³

III. Arizona Early Childhood Development and Health Board (“First Things First”) Funds

The ECDH issues grants that are a significant source of funding for educational preschool programs for school districts as well as the private sector. The grants are funded by a dedicated tax levied on tobacco products. A.R.S. §§ 42-3371, 42-3372. Revenues from that tax are deposited directly into the Early Childhood Development and Health Fund established by the voter initiative that created the agency. A.R.S. §§ 8-1181, 42-3371, 42-3372.

The statutory requirements for ECDH's grant program are set forth in A.R.S. § 8-1171. There are no requirements in the ECDH statute limiting the use of its funds for educational preschool programs for disabled children, nor are there restrictions prohibiting a school district from directly providing preschool services. Because A.R.S. § 15-341(A)(14) allows school

³ Your opinion to the District assumes that the unfunded ECBG grant program is “the primary source of funding for the First Things First Program.”

district governing boards to accept gifts, grants, and devises and to expend the money for the donor's intended purpose, we see no statutory restriction on a school district spending ECDH grant funds on district-conducted educational preschool programs in accordance with the terms the grant sets forth.

Conclusion

School districts are authorized to provide educational programs to preschool children without disabilities pursuant to federal or other grants or as part of a community school program that A.R.S. §§ 15-1141 and 15-1142 authorize. In providing such preschool programs, school districts are not required to engage a separate public, federally funded, or private child care provider unless a condition of a federal or other grant requires them to do so.

Thomas C. Horne
Attorney General



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL September 7, 2012	No. I12-002 (R12-011) Re: Powers of the Board of Technical Registration
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To: Ronald Dalrymple,
Executive Director, Arizona Board of Technical Registration

Question Presented

You have asked whether the Board of Technical Registration (“the Board”) is authorized to conduct investigations and file criminal complaints with prosecutors to determine whether crimes specified in A.R.S. § 12-1000 have occurred.

Summary Answer

No. Section 12-1000(G) provides the Board with limited authority to investigate and levy civil penalties against real property owners who permit the unauthorized removal of notices relating to former drug laboratories that have been posted on the owners’ real property. The statute does not grant the Board broad authority to criminally enforce any other provisions of section 12-1000.

Background

The Board is a multimember administrative body charged with administering chapter 1 of title 32. *See* A.R.S. §§ 32-101(A); -102(A), -106. The statutory scheme, which covers professions such as architects and assayers, “provide[s] for the safety, health and welfare of the public through the promulgation and enforcement of standards of qualification” of registered or certified professionals. A.R.S. § 32-101(A). Relevant to your inquiry, the Legislature has charged the Board with regulating drug laboratory site remediation firms, which are defined as firms that “perform[] remediation of contamination from the manufacture of” illegal drugs such as methamphetamine. A.R.S. § 32-101(15).

The Board has certain responsibilities concerning remediation sites. For example, it is authorized to establish requirements and best practices for the remediation of contaminated sites. A.R.S. § 12-1000(E). It is also authorized to maintain public documents that are received from the remediating firm. A.R.S. § 12-1000(F). It also has responsibilities related to notices that are posted at remediation sites. A.R.S. § 12-1000(G).

Certain notices must be posted on sites that require remediation. A.R.S. § 12-1000(A)(4). The “notice of removal” states that a “clandestine drug laboratory was seized or a person was arrested on the real property for having chemicals or equipment used in the manufacturing of methamphetamine, ecstasy or LSD on the real property.” A.R.S. § 12-1000(B)(2). The notice also includes the date of seizure or arrest, details of the property address and seizing agency, and other information. A.R.S. § 12-1000(B). The notice informs the reader that entry into the contaminated area is illegal until the site is remediated. *Id.* The notice also details the penalties for its unauthorized removal. *Id.* The Board is authorized to repost a notice that has been

removed, and if the real property owner “knowingly allows” the notice to be removed, the board may fine him not more than \$2,000 per violation. A.R.S. § 12-1000(G).

The legislature recently made several changes to the regulatory scheme relating to site remediation. Among other things, that legislation, chapter 327 of Arizona Session Laws 2012, creates several new criminal penalties. For example, A.R.S. § 12-1000(L) makes it is a Class 5 felony to, among other things, (1) occupy real property that is not remediated except to perform necessary managerial duties or lawfully conduct remediation; (2) sell any items from residually contaminated real property, mobile homes, recreational vehicles, or dwelling units prior to remediation; or (3) disturb or remove posted notices of removal unless one is the real property’s owner. Real property owners face Class 5 felony sanctions for allowing a posted notice of removal to be disturbed after the Board has already assessed a civil penalty against the person or for other listed acts. *Id.*

Finally, the Board administrates a technical registration fund. A.R.S. § 32-109. That fund includes revenue from court assessments on those convicted of drug charges. *See* A.R.S. § 13-3423. This money is available “[t]o pay the board’s expenses associated with investigations and enforcement actions pursuant to Section 12-1000” and to pay “a county, city or town for remediation” of drug lab sites. A.R.S. § 32-109(C)(1)-(2). Monies in the fund “are not subject to legislative appropriation.” A.R.S. § 32-109(C).

Analysis

As a general rule, an administrative agency requires statutory authorization to carry out enforcement actions. *Peeples, Inc. v. Ariz. State Land Dep’t*, 204 Ariz. 66, 71, ¶ 18, 59 P.3d 830, 835 (App. 2002). The Board’s authority, which chapter 327 did not alter, permits it to “[h]ear and pass upon complaints or charges or [to] direct an administrative law judge to hear and pass

upon complaints and charges” related to its enforcement authority. A.R.S. § 32-106(A)(5). The board may also “employ an executive director to conduct investigations and carry out the purposes of [chapter 1 of title 32].” A.R.S. § 32-107. Additionally, when taking enforcement actions, the Board may undertake investigations and employ investigators “to determine whether a disciplinary action should be taken against the holder of a certificate or registration under” chapter 1 of title 32. A.R.S. § 32-128(D).

Two provisions confirm that the board has authority to investigate violations of A.R.S. § 12-1000 regarding the unlawful removal of site remediation notices. Specifically, section 12-1000(G) provides that “[i]f the state board of technical registration conducts an investigation and determines that the posted notice of removal is missing,” the Board may take steps that include reposting the notice and imposing a civil penalty of up to \$2,000 on a real property owner who “knowingly” permits the notice to be disturbed. Second, A.R.S. § 32-109(C)(1) provides that monies from the assessment on criminal drug convictions “shall be used . . . [t]o pay the board’s expenses associated with investigations and enforcement actions pursuant to section 12-1000.” Taken together, these provisions grant the Board authority, in addition to its other duties involving regulating service providers, to investigate the removal of notices and to take civil enforcement actions against violators.

This authorization, however, does not extend to investigations and enforcement actions based on section 12-1000’s provisions in general. *See Peeples*, 204 Ariz. at 71 ¶ 18, 59 P.3d at 835. Thus, the Board does not have criminal enforcement authority and cannot file criminal complaints with prosecutors to determine whether the crimes codified in section 12-1000 have been committed. It does not have authority to determine whether criminal conduct has occurred either. Rather, consistent with the Board’s authority, it should forward evidence of criminal

conduct that it encounters in the course of conducting its statutory duties to the appropriate law enforcement agency.

Chapter 327's history confirms this conclusion. As introduced, Senate Bill 1438 provided for the creation of a criminal investigations unit of the Board to "investigate any criminal act prohibited by this chapter [chapter 1 of title 32] or any other criminal act in violation of Title 12 or 13 that is reasonably related to the practice of the professions or occupations regulated by the board." See Senate Bill 1438, 50th Leg., 2d Reg. Sess., § 5 (as introduced January 31, 2012). However, a conference committee of the Legislature removed this language before the bill's final passage. See *Ariz. State Senate Staff*, 50th Leg., 2d Reg. Sess., *Final Amended Fact Sheet for S.B. 1438* (May 24, 2012). The removal of this language confirms that the legislature did not intend to grant the Board further enforcement power.¹

Conclusion

For the forgoing reasons, I conclude that the Board is authorized to investigate violations of section 12-1000 for disturbing posted notices of removal, but that the Board does not have broader authority to enforce the criminal penalties included in that section.

Thomas C. Horne
Attorney General

¹ A summary prepared by the staff of the House of Representatives states that S.B.1438, after the conference committee amendment "[a]llows the Board to investigate a missing notice of removal and take actions such as reposting the notice, imposing a civil penalty, and pursuing criminal prosecution for disturbing the notice of removal," *Ariz. House of Representatives Staff* 50th Leg., 2d Reg. Sess., *House Summary for S.B. 1438*, (May 1, 2012)(post-conference committee). However, in light of the conference committee's action, this language does not support the conclusion that the Legislature intended the Board to become a criminal law-enforcement agency for purposes of enforcing A.R.S. § 12-1000.

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION

by

THOMAS C. HORNE
ATTORNEY GENERAL

August 6, 2012

No. I12-001
(R12-008)

Re: Preemption of the Arizona Medical
Marijuana Act (Proposition 203)

To: The Honorable John Kavanaugh,
State Representative
Sheila Polk,
Yavapai County Attorney
Ken Angle,
Graham County Attorney
Brad Carlyon,
Navajo County Attorney
Daisy Flores,
Gila County Attorney
Barbara LaWall,
Pima County Attorney
Bill Montgomery,
Maricopa County Attorney
Ed Rheinheimer,
Cochise County Attorney
George Silva,
Santa Cruz County Attorney
Jon R. Smith,
Yuma County Attorney
Matt Smith,
Mohave County Attorney
James P. Walsh,
Pinal County Attorney
Michael Whiting,
Apache County Attorney
Derek Rapier,
Greenlee County Attorney

Question Presented

The following question has been presented to this Office by a member of the Legislature and thirteen of Arizona's fifteen county attorneys: Is the Arizona Medical Marijuana Act ("the AMMA") preempted by the federal Controlled Substances Act ("the CSA")?

Summary Answer

Yes, in part. The Supremacy Clause of the United States Constitution provides that federal law "shall be the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. Because of federal prohibitions, those AMMA provisions and related rules that authorize any cultivating, selling, and dispensing of marijuana are preempted. However, the AMMA provisions and related rules that pertain to the issuance of registry identification cards for patients and caregivers are not preempted because they merely serve to identify those individuals for whom the possession or use of marijuana has been decriminalized under state law and, therefore, are not authorizations to violate federal law.

Background

The AMMA was passed narrowly by voters in 2010 as Proposition 203. The purpose of the proposition, as explained by the Arizona Legislative Council's ballot measure analysis provided to all voters, was to "allow a 'qualifying patient' who has a 'debilitating medical condition' to obtain an 'allowable amount of marijuana' from a 'nonprofit medical marijuana dispensary' and to possess and use the marijuana to treat or alleviate the debilitating medical condition or symptoms associated with the condition." Ariz. Sec'y of State, Ariz. Ballot Prop. Guide, Gen. Election—Nov. 2, 2010, at 83 (quoting Ariz. Rev. Stat. ("A.R.S.") § 36-2801), *available at* <http://azsos.gov/election/2010/info/PubPamphlet/english/prop203.pdf>. In order to

facilitate its implementation, the AMMA requires that “[t]he Arizona Department of Health Services [“DHS”] . . . adopt and enforce a regulatory system for the distribution of marijuana for medical use, including a system for approving, renewing and revoking the registration of qualifying patients, designated caregivers, nonprofit dispensaries and dispensary agents.” *Id.*; *see also* A.R.S. § 36-2803. After the Act took effect, DHS promulgated rules related to its implementation. *See* Ariz. Admin. Code §§ R9-17-101 to R9-17-323 (2011).

Following the AMMA’s passage, the State brought questions relating to preemption to two different courts. In *Arizona v. United States*, No. 2:11-cv-01072-SRB (D. Ariz. 2011), the State expressed concern that while the “employees and officers of the State of Arizona have a mandatory duty to implement” the AMMA (subject to a legal action in mandamus), state officials “risk prosecution and penalties under federal criminal statutes if they faithfully comply with Arizona law.” *See* Compl. at 15, ¶ 81. The Complaint sought declaratory relief and asked the federal court to determine whether the AMMA was preempted by federal law or whether implementation of the AMMA was subject to a “safe harbor” by virtue of certain actions of the federal government. *See generally id.* The district court judge, however, concluded that the State had not met “the constitutional or prudential components of ripeness” and dismissed its complaint. Order, *Arizona v. United States*, No. 2:11-cv-01072-SRB at 10 (D. Ariz. January 4, 2012). Similar issues were raised in a mandamus action against DHS in Superior Court for Maricopa County. *See* Minute Entry, *Compassion First LLC v. State*, No CV 2011-011290 at 5 (January 17, 2012). In that case the superior court judge recognized “the State’s dilemma” explaining that “it is caught between the proverbial rock and hard place, between the AMMA and the CSA.” *Id.* Nevertheless, the court declined to “determine issues of preemption and federal criminal liability,” instead concluding that the “sole issue before [it was] whether the

State has discretion to put the implementation of the AMMA on hold while it” sought relief on those issues in federal court.¹ *Id.*

Analysis

The Supremacy Clause of the United States Constitution declares that the “Constitution, and the Laws of the United States . . . shall be the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding.” U.S. Const. art. VI, cl. 2. “Under this principle, Congress has the power to preempt state law.” *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012). In passing the CSA, Congress recognized that “[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.” 21 U.S.C. § 801(2). Furthermore, Congress found that “[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate” and concluded that “it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.” *Id.* § 801(5). “The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug [under the Act], Congress expressly found that the drug has no acceptable medical uses.” *Gonzales v. Raich*, 545 U.S. 1, 27 (2005). Consequently, although the CSA “expressly contemplates that many drugs ‘have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people’ . . . it includes no exception at all for any medical use of marijuana.” *United States v. Oakland Cannabis Buyers’*

¹ Subsequent litigation in other matters has raised similar issues. *See, e.g., State v. Okun*, No. 1 CA-CV 12-0094 (App. Feb. 9, 2012), docket *available at* <http://apps.supremecourt.az.gov/aacc/appella/1CA%5CCV%5CCV120094.PDF>; Answer of County Defendants, *White Mountain Health Cntr., Inc. v. Cnty. of Maricopa*, CV2012-053585 (Ariz. Sup. Ct. June 19, 2012).

Coop., 532 U.S. 483, 493 (2001) (internal citation omitted) (rejecting medical necessity argument as defense to criminal prosecution).

This issue has been ruled on in two (2010, 2011) appellate court cases, one in California and one in Oregon. The legal analysis in these cases controls this opinion. *See* Mich. Op. Att’y Gen. No. 7262, 2011 WL 5848600, at *4 n.11 (2011) (concluding that the recent Oregon and California decisions render prior decisions related to medical marijuana “of questionable value”).

First, the Oregon Supreme Court concluded, in analyzing Oregon’s similar medical marijuana program, that those provisions of the Oregon law that authorized “a use that federal law prohibits stand[] as an obstacle to the implementation and execution of the full purposes and objectives of the [CSA].” *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 529 (Or. 2010). That court explained that under U.S. Supreme Court precedent, where a state law authorizes “conduct that the federal Act forbids, ‘it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.* (quoting *Mich. Canners & Freezers Ass’n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 478 (1984)).

Similarly, the California Court of Appeals has held that where an ordinance creates an application process that permits it to operate a medical marijuana collective, the ordinance’s authorization “stands as an obstacle to the accomplishment of [the] purpose [of the CSA].” *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633, 651 (App. 2011), *rev. granted*, 268 P.3d 1063 (2012).²

In contrast, a state’s decision concerning the decriminalization of certain conduct stands on a different footing because “[w]hen an act is prohibited by federal law, but neither prohibited

² In addition, “Congress continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration.” Act of Oct. 21, 1998, Pub. L. No. 105-277, Div. F., 112 Stat. 2681-2761.

nor authorized by state law, there is no obstacle preemption.” *Id.*; accord *Emerald Steel*, 230 P.3d at 530 (“Congress lacks authority to require states to criminalize conduct that the states choose to leave unregulated, no matter how explicitly Congress directs the states to do so.”). Here, the AMMA decriminalizes the possession and use of marijuana of up to 2.5 ounces for those individuals (patients and caregivers) who have been issued certain identification cards. A.R.S. § 36-2811. But the language of the statute does not authorize anything. This provision, by the terms of the statute, is not preempted because it is beyond Congress’s power to dictate the parameters of state criminal conduct. However, to the extent that an identification card *purports to authorize* an individual to cultivate marijuana or otherwise violate federal law, such language is preempted.³

³ You have also asked whether state and other government employees face federal criminal sanctions for administering, implementing, or complying with the AMMA. I am unable to answer this question as it lies in the discretion of the U.S. Department of Justice. Under federal law it appears that state and other government employees could be subject to prosecution for actions required by the AMMA. For example, the most recent statement of the then-Acting U.S. Attorney for Arizona stated that “[c]ompliance with the AMMA and Arizona regulations will not provide a safe harbor or immunity from federal prosecution for anyone involved in the cultivation and distribution of marijuana . . . [a]s such, state employees who conduct activities authorized by the AMMA are not immune from liability under the CSA.” Letter of Acting U.S. Attorney Ann Birmingham Scheel to Governor Janice K. Brewer (Feb. 16, 2012).

Conclusion

In light of the legal principles outlined above, and the continuing concerns raised by the chief law enforcement officers of thirteen of Arizona's fifteen counties throughout the state, I must issue this opinion concluding that those provisions of the AMMA and related rules authorizing any cultivating, selling, and dispensing of marijuana are preempted. However, the AMMA provisions and related rules that pertain to the issuance of registry identification cards for patients and caregivers are not preempted because they merely serve to identify those individuals for whom the possession or use of marijuana has been decriminalized under state law and, therefore, are not authorizations to violate federal law.

Thomas C. Horne

Thomas C. Horne
Attorney General