STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 20-11

Potential Legal Consequences for Pharmacists under the Proposed Cannabis Act

Question

Considering marijuana is federally classified as a Schedule I controlled substance, would state-licensed pharmacists face any adverse legal consequences if they provided counsel and guidance to patients regarding the medical use of cannabis as contemplated by the proposed Tennessee Clinical Cannabis Authorization and Research Act?

Opinion

The Cannabis Act would immunize pharmacists acting in good faith from adverse administrative actions and civil liability under state law. And, although the Cannabis Act does not immunize pharmacists from state criminal liability and does not—and could not—immunize pharmacists from adverse administrative and criminal consequences under federal law, pharmacists acting in good faith pursuant to the state medical cannabis program are highly unlikely to face criminal prosecution or adverse administrative action by federal officials.

ANALYSIS

Proposed Amendment No. 1 to Senate Bill 2334, 111th Tenn. Gen. Assem. (2020), would enact the Tennessee Clinical Cannabis Authorization and Research Act ("Cannabis Act"), which provides a framework within which to authorize access to medical cannabis for patients with qualifying medical conditions. Qualifying individuals may obtain a registry identification card under the proposed legislation that would allow them to purchase medical cannabis from a licensed dispensary. Before purchasing medical cannabis, however, every registered cardholder must have a medical therapy management consultation with a state-licensed qualified pharmacist.[1] Proposed § 68-7-119(c)(1). During these consultations, the pharmacist may provide dosing recommendations, and a pharmacist recommending higher concentrations and higher dosages of medical cannabis must document that recommendation in writing. Proposed § 68-7-119(c)(3).

Under proposed § 68-7-119(c)(4) and (5)—the "immunity clauses"—of the Cannabis Act, qualified pharmacists "acting in good faith and with reasonable care in the provision of consultation services . . . [are] immune from disciplinary or adverse administrative actions for acts or omissions during the provision of consultation services." Additionally, "any qualified pharmacist involved in the provision of consultation services pursuant to this section is immune

[1] The Cannabis Act defines a "qualified pharmacist" as "a pharmacist licensed pursuant to title 63, chapter 10 [of the Tennessee Code], who is registered with the commission and completes at least two (2) hours of continuing education on clinical cannabis biennially."

from civil liability for actions authorized by this section in the absence of gross negligence or willful misconduct."

The immunity clauses of the Act would protect pharmacists from adverse civil consequences under state law. Because pharmacists are generally licensed and regulated by the State, not the federal government, the immunity clauses would protect them from adverse administrative action related to the practice of their profession, so long as they act in good faith. Similarly, because civil liability is almost exclusively a matter of state tort law, the immunity clauses protect pharmacists from civil judgments based on their participation in the provision of medical cannabis so long as they do not act with gross negligence or engage in willful misconduct.

However, the immunity clauses do not immunize pharmacists from any potential consequences under federal law or any criminal liability under state or federal law.[2] Nor could a state law immunize pharmacists from prosecution or administrative consequences under federal criminal law. Under the Constitution's Supremacy Clause, federal law is supreme—and thus preempts—any contrary state law. *See generally Kansas v. Garcia*, 140 S.Ct. 791, 801 (2020).

Nevertheless, the criminal prosecution or civil punishment of a pharmacist for actions taken pursuant to the Cannabis Act appears to be highly improbable. The actions contemplated by the Cannabis Act likely do not constitute a crime under the plain text of federal and state law. Under the Controlled Substances Act ("CSA"), it is illegal, among other things, "for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance" such as cannabis. 21 U.S.C. § 841(a)(1).[3] Pharmacists may be prosecuted under the CSA when they have filled prescriptions that were not issued for a legitimate purpose and did so "knowing that the prescription was invalid." *United States v. Veal*, 23 F.3d 985, 988 (6th Cir. 1994); *see also United States v. Limberopoulous*, 26 F.3d 245, 249-50 (1st Cir. 1994). And federal regulations implementing the CSA impose on pharmacists a "corresponding responsibility" to ensure prescriptions for controlled substances are issued for legitimate purposes. 21 C.F.R. § 1306.04(a).

But the proposed Cannabis Act does not contemplate pharmacists filling prescriptions or dispensing medical cannabis. Instead, it requires only that registered cardholders "consult" with a qualified pharmacist and that pharmacists record certain higher dosing recommendations in writing. By analogy, the Ninth Circuit concluded that a physician's recommendation that a patient use medical cannabis "does not itself constitute illegal conduct" under the CSA and did not

[2] Elsewhere, the Cannabis Act does include a general provision that provides immunity from both administrative and civil consequences *and* criminal prosecution. Proposed § 68-7-305 would provide that "A person is not subject to arrest, prosecution, or penalty in any manner, and must not be denied any right or privilege, including any civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau, for: (1) Being in the presence or vicinity of the clinical use of clinical cannabis products; or (2) Allowing the person's property to be used for activities authorized by this chapter." But that section does not appear to cover pharmacists' counseling registered cardholders about appropriate dosage amounts.

[3] The CSA organizes controlled substances into five different schedules. *See* 21 U.S.C. § 812(b). Schedule I drugs (1) have high potential for abuse; (2) have no currently accepted medical use in treatment in the United States; and (3) lack accepted safety uses under medical supervision. *See id.* § 812(b)(1). Under the CSA, marijuana is considered a Schedule I drug. *Id.* § 812(c). As for medical marijuana, the potential for this particular use does not negate the drug's illegality as a Schedule I drug. *See Gonzales v. Raich*, 545 U.S. 1, 28 (2005).

constitute "aiding or abetting" or furthering a conspiracy to violate the CSA. *Conant v. Walters*, 309 F.3d 629, 635-36 (9th Cir. 2002).

For similar reasons, prosecution of pharmacists under state criminal laws governing controlled substances also does not appear possible. Under the Tennessee Drug Control Act ("TDCA"), it is illegal "for a defendant to knowingly . . . manufacture a controlled substance; deliver a controlled substance; sell a controlled substance; or possess a controlled substance with intent to manufacture, deliver, or sell the controlled substance."[4] Tenn. Code Ann. § 39-17-417(a). The text of the TDCA thus largely mirrors the CSA and does not appear to encompass a pharmacist providing consultation about the use of medical cannabis to an individual with a qualifying medical condition.

Moreover, even if actions taken by pharmacists pursuant to the proposed Cannabis Act came within the scope of federal or state criminal laws governing controlled substances, prosecution remains highly unlikely. Although the CSA classifies marijuana as a Schedule I drug, at least thirty-three States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have implemented medical marijuana programs as of March 10, 2020. *See* National Conference of State Legislatures, *State Medical Marijuana Laws* (Mar. 10, 2020), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx. More specifically, at least five States—Arkansas, Connecticut, Minnesota, New York, and Pennsylvania—have passed medical marijuana laws that establish roles for pharmacists in the dispensing process. *See* Ark. Const. amend. 98, § 8 (requiring each marijuana dispensary to appoint a pharmacist as a consultant); Conn. Gen. Stat. § 21a-246(a) (allowing only pharmacists to apply for marijuana dispensary licenses); Minn. Stat. § 152.29(3)(a) (allowing only pharmacists to give final approval of the distribution of medical marijuana to patients); 10 N.Y. Comp. Codes R. & Regs. tit. 10, § 1004.12(a) (requiring a pharmacist who has completed a four-hour course on marijuana to be on the premises of a marijuana dispensing facility and to supervise the activity within the facility); 35 Pa. Stat. Ann. § 10231.801(b) (requiring a physician or a pharmacist who has completed a four-hour training course on medical marijuana to be onsite at primary marijuana dispensing facilities when the facility is open).[5]

The Department of Justice has advised United States Attorneys 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

[4] The TDCA organizes controlled substances into seven different schedules based on eight characteristics: (1) the actual or relative potential for abuse; (2) the scientific evidence of its pharmacological effect, if known; (3) the state of current scientific knowledge regarding the substance; (4) the history and current pattern of abuse; (5) the scope, duration, and significance of abuse; (6) the risk to the public health; (7) the potential of the substance to produce psychic or physiological dependence liability; and (8) whether the substance is an immediate precursor of a substance already controlled under this section. Tenn. Code Ann. § 39-17-403(a). Based on these considerations, the TDCA classifies marijuana as a Schedule VI drug. *Id.* § 39-17-415(a)(1).

[5] In other States that have adopted similar legislation, representatives of state pharmacists have concluded that pharmacists may safely participate in the state program without fear of adverse legal consequences, while also recognizing that, as long as marijuana remains a Schedule I controlled substances, the federal government has the authority to impose penalties. *See* Steven E. Grubb, *Pharmacists' Role Under Pennsylvania's New Medical Marijuana Law*, https://cdn.ymaws.com/www.papharmacists.com/resource/resmgr/Legislative/Pharmacists'_Role_Under_Penn.pdf.

of particular crimes in the community." Memorandum for All United States Attorneys, Re: Marijuana Enforcement (Jan. 4, 2018), available at https://www.justice.gov/opa/press-release/file/1022196/download. And the federal law enforcement priorities set by the Department do not include prosecution of those growing or distributing medical marijuana in accordance with state law, let alone pharmacists advising qualifying individuals about proper use of medical cannabis. *Id.*[6] In addition, in a 2015 appropriations act, Congress prohibited the Department from taking away taxpayer funds "to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. 113-235, 128 Stat. 2130, § 538. In doing so, Congress expressed support for state medical cannabis programs and support for the Department's policy of not prosecuting individuals involved in these state programs. Similarly, state-law prosecutions of pharmacists who are acting pursuant to the Cannabis Act appear highly unlikely and might raise concerns about fair notice of what constitutes criminal activity under the due process clause. *See Johnson v. United States*, 135 S.Ct. 2551, 2556-57 (2015).

The U.S. Drug Enforcement Administration (DEA), which is part of the Department of Justice, has also not made it a policy to suspend or revoke the authority of physicians and pharmacists to prescribe and dispense controlled substances under federal law as a result of medical professionals' participation in state medical cannabis programs. The DEA did revoke the prescribing authority of a Colorado physician who had prescribed medical marijuana to an excess number of patients, but it justified that revocation as a result of Colorado's suspension of the physician's license, not on the fact that the physician was prescribing medical marijuana. *See* Janet Carol Dean, M.D. Decision and Order, 82 Fed. Reg. 9224, 9224-26 (Feb. 3, 2017).

In sum, state-licensed pharmacists are highly unlikely to face legal consequences for providing consultation about the use of medical cannabis pursuant to the proposed legislation. The proposed legislation immunizes pharmacists from civil liability or adverse administrative action under state law. And federal and state criminal provisions governing controlled substances do not, by their plain text, apply to the type of consultation contemplated by the proposed legislation. Moreover, federal prosecution of or administrative action against pharmacists providing consultation about medical cannabis does not align with the U.S. Department of Justice's current marijuana enforcement priorities. Nor have pharmacists involved in medical cannabis consultation in other States faced criminal prosecution or federal administrative action. Similarly, prosecution under state criminal laws governing controlled substances appears unlikely and would conflict with the intent of the legislature expressed in the proposed legislation.

[6] The Department previously recognized eight objectives regarding enforcement of the illegality of marijuana as follows: (1) preventing the distribution of marijuana to minors; (2) preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; (3) preventing the diversion of marijuana from States where it is legal under state law in some form to other States; (4) preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; (5) preventing violence and the use of firearms in the cultivation and distribution of marijuana; (6) preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; (7) preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and (8) preventing marijuana possession or use on federal property. *See* Memorandum for All United States Attorneys, Re: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), available at https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

Thus, the Cannabis Act would immunize pharmacists acting in good faith from adverse administrative actions and civil liability under state law. And, although the Cannabis Act does not immunize pharmacists from state criminal liability and does not—and could not—immunize pharmacists from adverse administrative and criminal consequences under federal law, pharmacists acting in good faith pursuant to the state medical cannabis program are highly unlikely to face criminal prosecution or adverse administrative action by federal officials.

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