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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH

Coalition for a Safe and Healthy Utah, d/b/a Drug Safe Utah, a Utah non-profit corporation, **Dr. Bruce H. Wooley, Walter J. Plumb III**, **Arthur Brown**, and **Bruce F. Rigby**, residents and taxpayers of Utah, and parents and grandparents of Utah residents, on behalf of those similarly situated, *Plaintiffs*, v. **Spencer J. Cox**, in his official capacity as Lieutenant Governor of Utah, *Defendant.*	**PLAINTIFFS' MOTION FOR EMERGENCY INJUNCTION** (Tier 1 discovery) Civil No. _____ Judge _____

The Plaintiffs in the above-entitled matter, pursuant to Utah R. Civ. P. 7, 65A, and 65B, respectfully submit this Motion for Emergency Injunction.

OVERVIEW

This case concerns a simple, fundamental question: May Utah's Lieutenant Governor approve an initiative for the upcoming November 2018 election that would alter Utah law so as to command violations of the Federal Constitution, Federal Law as well as Utah's Constitution? The U.S. Constitution's Supremacy Clause, the Utah Constitution, and Utah's statutes are clear: the Lieutenant Governor may not do this.

The expectation of the Utah Constitution is reflected in Utah law governing ballot initiatives. Under Utah law, to file a statewide initiative, five sponsors must file an application with the Lieutenant Governor. He must reject the application if the law is "patently unconstitutional" or "could not become law if passed." Utah Code Ann. § 20A-7-202(5)(a), (c). If the Lieutenant Governor approves the initiative for circulation, the signers must collect signatures, which are certified by the Lieutenant Governor through the county clerks. *Id.* at § 20A-7-205, *et seq.* Thus, the legislature has sought to prohibit unconstitutional laws from appearing on the ballot. It has likewise sought to protect citizens from having to vote on initiatives that could not become law if passed.

The Lieutenant Governor has already approved for signature gathering an initiative that does just that, and will soon be called upon to place that measure on the November 2018 ballot. The initiative – which would enact a proposed statute called "The Utah Medical Cannabis Act" ("UMCA") – would legalize the drug known as marijuana or cannabis, which is a Schedule I controlled substance under federal law. On its face, the initiative clashes with governing federal law, and would, therefore, place the State in violation of the U.S. Constitution's Supremacy Clause, which makes federal law the "supreme law of the land."

The initiative also commands the Utah Department of Agriculture to regulate the use of marijuana, affirmatively authorizing various individuals to manufacture and distribute it—all in violation of federal law, and, therefore, of the Supremacy Clause. The initiative would also prohibit the Utah Highway Patrol and other state agencies from carrying out their duties under state law to enforce applicable federal drug laws within their areas of responsibility.

Marijuana is a Schedule I substance for a reason. Marijuana is the most abused drug in the United States – just above opioids. While just over 2 million adults (11 and older) battle opioid addictions in the United States; approximately 4.2 million adults suffer from a marijuana use disorder in 2014 – the vast majority of them between the ages of 12 and 25.[1] Marijuana has a higher addiction frequency at all ages than opioids – 1 in 6 users who begin using in teen years as compared to 1 in 9 users who begin as adults.[2] Moreover, legalizing whole-plant marijuana in any form – even for "medicinal" purposes – would undoubtedly increase its use among Utahns, especially young Utahns. In so doing, such legalization would leave in its wake an ocean of human lives shattered by addiction, and a mountain of additional costs to be borne by Utah's taxpayers and families. Of overriding concern is the clear link between even moderate marijuana use and psychosis shown by competent studies.[3] Not only

[1] *See* https://americanaddictioncenters.org/rehab-guide/addiction-statistics/. The legalization of medical cannabis has led to a "staggering increase" in emergency room visits related to cannabis use:

"Reports have shown a staggering increase in cannabis-related emergency department (ED) visits in recent years. In 2011, the Substance Abuse and Mental Health Services Administration (SAMHSA) and Drug Abuse Warning Network (DAWN) estimated a total of 1.25 million illicit-drug–related ED visits across the US, of which 455,668 were marijuana related. A similar report published in 2015 by the Washington Poison Center Toxic Trends Report showed a dramatic increase in cannabis-related ED visits. In states with recent legalization of recreational cannabis, similar trends were seen.

States with medicinal marijuana have also shown a dramatic rise in cannabis-related ED visits. Moreover, states where marijuana is still illegal also showed increases. This widespread increase is postulated to be in part due to the easy accessibility of the drug, which contributes to over-intoxication and subsequent symptoms. Overall, from 2005 to 2011, there has been a dramatic rise in cannabis-related ED visits among all age groups and genders." http://www.psychiatrictimes.com/substance-use-disorder/cannabis-induced-psychosis-review (14 July 2017).

[2] *See* https://www.drugabuse.gov/publications/media-guide/most-commonly-used-addictive-drugs.

[3] *See* https://www.biologicalpsychiatryjournal.com/article/S0006-3223(16)00082-2/abstract.

can it reduce the IQ of teenagers who use it as much as lead poisoning would, but it is a gateway to the use of, and addiction to, other dangerous drugs.

The Coalition for a Safe and Healthy Utah, d/b/a Drug Safe Utah, is a Utah non-profit corporation dedicated to safe drug use in the State of Utah. Members of the Coalition include the Utah Medical Association, Utah Eagle Forum, Sutherland Institute, Utah Prevention Coalition Association, Behavioral Health groups, law enforcement agencies, concerned citizens, Utah Narcotics Officers Association, Utah Chiefs of Police. The individual Plaintiffs are Utah citizens, parents, and grandparents, bringing this suit to prevent the harm to Utah's safety as well as the health of their children and grandchildren from legalization of marijuana in violation of federal law and the federal and Utah Constitutions. Even more importantly, the Plaintiffs claim the constitutional protections of the United States and Utah Constitutions as well as of the rights conferred on them as taxpayers and voters who will be affected by the adverse effects of the Marijuana Initiative, which will increase abuse, dependency, and prevent the orderly administration of criminal drug laws and increase the number of car accidents and costs arising from adverse effects of using marijuana.

I. THE PLAINITFFS ARE ENTITLED TO AN INJUNCTION PREVENTING THE UMCA FROM BEING PLACED ON THE BALLOT.

The Plaintiffs are entitled to entry of an order of this Court enjoining the Lieutenant Governor from certifying the Marijuana Initiative to be placed on the November 2018 ballot. Under Utah R. Civ. P. 65, the Plaintiffs are entitled to the injunction because: (1) the Plaintiffs will be irreparably harmed if the injunction does not issue; (2) the injury to the Plaintiffs outweighs whatever damages may occur if the injunction issues; (3) the injunction is in the public interest; and (4) there is a substantial likelihood that the Plaintiffs will prevail on the

merits on their claims. *See Emerald Steel Fabricators, Inc. v. Bureau of Labor* & Indus., 230 P.3d 518 (2010).

II. THE CURRENT STATUS OF MARIJUNA LAWS AND REGULATION IN THE UNITED STATES.

The Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq.*, makes it unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance, "[e]xcept as authorized by [21 U.S.C. § 801-904]." 21 U.S.C. § 841(a)(1). The CSA similarly makes it unlawful to possess any controlled substance except as authorized by the CSA. 21 U.S.C. § 844(a). Persons who violate the CSA are subject to criminal and civil penalties, and ongoing or anticipated violations may be enjoined. 21 U.S.C. §§ 841-863, 882(a).

Since 1961, the United States has been party to the Single Convention on Narcotic Drugs ("Single Convention"), an international agreement binding, *inter alia*, all signatories to control persons and enterprises engaged in the manufacture, trade, and distribution of specified drugs. 21 U.S.C. § 801(7); Single Convention, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204. Marijuana (cannabis) is one of the drugs specified under the Single Convention on Narcotic Drugs. The Single Convention places the same restrictions on cannabis cultivation that it does on, for example, opium cultivation. Because the Single Convention is not a self-executing treaty, domestic legislation was necessary so that the U.S. could satisfy its international legal obligations under the treaty. *See United States v. Feld*, 514 F. Supp. 283, 288 (E.D.N.Y. 1981) ("The Single Convention is not self-executing, but works through the constitutional and legal systems of its signatory nations."). Enacted in 1970, § 841(a)(1) of the CSA is the method by which Congress effectuated the American obligation under that treaty. *See United States v. Noriega*, 746 F. Supp. 1506, 1515 (S.D. Fla. 1990) ("The United States

has an affirmative duty to enact and enforce legislation to curb illicit drug trafficking under the Single Convention on Narcotic Drugs.") (citations omitted).

The restrictions that the CSA places on the manufacture, distribution, and possession of a controlled substance depend upon the schedule in which the drug has been placed. 21 U.S.C. §§ 821-829. Marijuana and tetrahydrocannabinols have been classified as "Schedule I" controlled substances. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 202, 84 Stat. 1249 (Schedule I (c)(10) and (17)); 21 U.S.C. § 812(c) (Schedule I(c)(10) and (17)). A drug is listed in Schedule I, the most restrictive schedule, if it has "has a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use ... under medical supervision." 21 U.S.C. §§ 812(b)(1)(A)-(C). In addition to marijuana, other Schedule I drugs include lysergic acid diethylamide (commonly known as LSD) and Methylenedioxymethamphetamine (commonly known as MDMA or ecstasy). The CSA prohibits the distribution and possession of marijuana for nearly all uses. As a schedule I controlled substance, marijuana has no acceptable medical uses and cannot be prescribed. 21 U.S.C. § 812(c), (b)(1)(A)-(C). There is no exception for marijuana use for medical purposes, nor is there an exception for use in compliance with state law. *See Gonzales v. Raich*, 545 U.S. 1, 14, 125 S. Ct. 2195, 2204, 162 L. Ed. 2d 1 (2005) (citation omitted). The CSA states that "it shall be unlawful for any person to knowingly or intentionally to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance." 21 U.S.C. § 841(a)(1).

The DEA rejected attempts to reschedule marijuana from a Schedule I to a Schedule II drug in 2016 after a massive review of relevant studies.[4] As recently as January 2013, an

[4] *See* https://www.dea.gov/divisions/hq/2016/hq081116.shtml.

attempt to reclassify marijuana to a less restrictive schedule was rejected by the United States Court of Appeals for the D.C. Circuit. *See Americans for Safe Access v. Drug Enforcement Admin.*, No. 11-1265, 2013 U.S. App. LEXIS 1407 (D.C. Cir. Jan. 22, 2013). The court upheld a decision by the Drug Enforcement Administration ("DEA") that marijuana has no "currently accepted medical use" based on the lack of "adequate and well-controlled studies proving efficacy." *Id.* at 5. The DEA's decision was based on a binding scientific and medical evaluation conducted by the U.S. Department of Health and Human Services. That agency concluded that the "research on the medical use of marijuana ha[d] not progressed to the point that marijuana [could] be considered to have a 'currently accepted medical use' or a 'currently accepted medical use with severe restrictions."' *Id.* at 33-34 (citing 76 Fed. Reg. 40,560).

The *Americans for Safe Access* decision affirms the unambiguous federal policy that no usage of marijuana – medical or otherwise – is permitted anywhere in the United States. As set forth in the CSA and the DEA's decision, marijuana remains a Schedule I drug proscribed under federal law. *See also Alliance for Cannabis Therapeutics v. DEA,* 15 F.3d 1131, 1133 (D.C. Cir. 1994) (tracing back unsuccessful efforts to reschedule marijuana since 1972).

Furthermore, under the CSA, it is unlawful to manufacture, distribute, dispense, or possess a Schedule I drug, except as part of a strictly controlled research project that has been registered with the DEA and approved by the Food and Drug Administration ("FDA"). 21 U.S.C. 841(a)(1), 823, 844(a); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 489-490, 492 (2001). The Agricultural Act of 2104 provided for states to initiate marijuana research programs at universities. Only universities that are part of this program are permitted to cultivate marijuana in the United States. Utah has enacted the "Hemp Cannabidiol Act" to provide for such research. *See* UCA 4-41-101 *et. seq.*

In summary, nowhere within this comprehensive statutory and regulatory scheme is there an exception for a state, such as Utah, to set out on its own course in regard to marijuana. Federal law makes no provision for a separate state-created licensing and regulatory regime for marijuana, whether intended for medical use or otherwise.

III. THE PROVISIONS OF UTAH'S MEDICAL CANNIBIS ACT.

A. What the Proponents of the Marijuana Initiative Say It Does. The voter information description of the Utah Medical Cannabis Act claims that it does the following:

> The measure would require an individual or a parent or legal guardian of a minor who wants to use marijuana for medical purposes to receive a medical card from the Utah Department of Health. To receive a medical card, a recommendation from a physician would be needed. Physicians would be allowed to recommend marijuana if the patient has a qualifying illness and may benefit from using marijuana. The state Department of Health would start issuing medical cards no later than March 1, 2020.
>
> The initiative would allow for the licensing of marijuana cultivation facilities, processing facilities, testing laboratories, and dispensaries. The measure would restrict the number of dispensaries by the number of residents in a county divided by 150,000 and rounded up to the greatest whole number. In 2016, Salt Lake County, the state's largest county by population, would have been allowed eight dispensaries under the initiative.
>
> Dispensaries would be allowed to sell marijuana to individuals with medical cards. During any one 14-day period, an individual would be allowed to buy either 2 ounces of unprocessed marijuana or an amount of marijuana product with no more than 10 grams of tetrahydrocannabinol (THC) or cannabidiol.
>
> After January 1, 2021, individuals with medical cards would be allowed to grow six marijuana plants for personal use within their homes if there are no dispensaries within 100 miles.
>
> The initiative would enact or keep bans on smoking marijuana, driving under the influence of marijuana, or using marijuana in public view except in a medical emergency.
>
> The measure would exempt the sale of medical marijuana from the sales tax.
>
> Local governments would be prohibited from enacting zoning ordinances to ban cultivation facilities, processing facilities, testing laboratories, and

> dispensaries on the basis that these businesses possess, grow, manufacture, or sell marijuana or that these types of businesses violate federal law. Local governments would be allowed to pass laws governing the time, place, and manner of dispensary operations. Other local zoning ordinances would also apply to marijuana businesses. The initiative would prohibit businesses from being within 600 feet of a school, public park, playground, church, or library and 300 feet of lots zoned for residential use.[5]

B. What the Marijuana Initiative Actually Does. The statement of the effect of the UMCA given to voters is misleading *in extremis* because it does not inform voters of the real legal effects of adopting the marijuana initiative. Here is what it really does:

1. The Cannabis Initiative Creates a Massive Bureaucracy at Great Cost to Taxpayers While Exempting Marijuana Sales from Taxes so that Purveyors of Pot Reap Huge Profits. The UMCA establishes a broad new industry overseen by the Utah Department of Health (the "Department") to establish in Utah private "cannabis cultivation facilities" to grow and cultivate marijuana and to license private interests called "cannabis production establishments" and "cannabis processing facilities" that manufacture, process and test marijuana. *See* UMCA 4-41b-102(2), (6), and (9). These cannabis dispensing agents are private interests that stand to make billions of dollars as they have in other states that have legalized marijuana. The cannabis industry is predicted to make $24.5 billion in profit by 2021.[6] Notwithstanding the fact that the Department will have to hire numerous new employees at great cost to taxpayers to handle the massive new duties imposed by the UMCA, the UMCA exempts all marijuana sales from Utah taxes. *See* UCMA 59-1-307. Even worse, the UMCA grants a deduction for costs of production and "salaries or other compensation for personal services" so that marijuana establishments can maximize their profits. *See* UMCA 59-12-104.7. Thus, Utah taxpayers get no benefit from cannabis sales and all of the massive

[5] *See* https://ballotpedia.org/Utah_Medical_Marijuana_Initiative_(2018).
[6] *See* http://www.businessinsider.com/legal-weed-market-to-hit-10-billion-in-sales-report-says-2017-12.

profits go into the pockets of those pushing this Initiative so that they can set up cannabis establishments.

2. The Cannabis Initiative Creates Marijuana Dispensaries and Prevents Municipalities From Determining Appropriate Locations. The Department licenses Cannabis dispensed through "cannabis dispensaries" that allow a machine to dispense marijuana to a card holder without personal ID other than a cannabis card. *See* UMCA 4-41b-4(4). Utah Municipalities cannot control where such marijuana dispensaries are located. *See* UMCA 4-41b-405.

3. The Cannabis Initiative Permits Marijuana to be Dispensed without any Photo Identification at the Point of Sale, and, Thus, Makes it Easier to Obtain than Cigarettes. The UMCA provides that users may obtain marijuana from a dispensary by using a "medical cannabis card." *See* UMCA 26-60b-201. However, there is no requirement that a photo Identification be provided in addition to the card in order to obtain cannabis – unlike cigarettes. Further, the UMCA provides that purchasing cannabis without a card results in a mere slap on the wrist – an infraction and a $100 penalty. Because the street value of the marijuana is more than that, there is an economic incentive to possess marijuana regardless of the legal penalty. Further, anyone can give a card to another person – including any child—and that person can obtain marijuana from a dispensary.

4. The Cannabis Initiative Permits Users to Grow Their Own Marijuana at Home. The UMCA provides that a person who has a cannabis card and lives more than 100 miles from a cannabis dispensary can grow up to six (6) cannabis sativa plants at home. *See* UMCA 26-60b-201((6)(d). The Initiative should be called "the Delta, Hanksville and Circleville Marijuana Personal Home Cultivation Act."

5. The Cannabis Initiative Renders it Pragmatically Impossible to Enforce Any Federal or Utah Marijuana Cultivation, Use, or Possession Laws, and, Thus, In Effect Decriminalizes Marijuana. It is false that a cannabis card is required to purchase marijuana under the UMCA. The UMCA states that it is an affirmative defense against any charge of use, possession, or manufacture of marijuana "that the individual would be eligible for a medical cannabis card . . . after July 1, 2020." This provision requires that enforcing officers must be able to prognosticate the future of an individual before arresting an individual for manufacture, use, or possession. To make matters worse, the UMCA requires that all records that could be used as evidence "be destroyed after 60 days," thus severely hampering any effort to enforce drug laws. *See* UMCA 26-60b-103. Further, no individual actually needs to have a cannabis card because merely being diagnosed with "a qualifying illness" is a defense *even where no cannabis card has been prescribed*. *See* UMCA 26-60b-2(b). However, officers do possess such information and could not possibly obtain the needed information about a medical diagnosis under the Health Insurance Portability and Accountability Act of 1996 ("HIPPA") that prevents such disclosure. Thus, if the Marijuana Initiative passes it will be impossible for any law enforcement officer anywhere in Utah to enforce any Utah laws regarding manufacture, possession, and use of marijuana whether obtained legally under the UMCA or not.

6. The Marijuana Initiative Requires Utah to Become a Marijuana User Sanctuary State. The UMCA provides that Utah law enforcement officers cannot cooperate with federal authorities to enforce federal marijuana laws. Thus, it impedes the orderly administration of Federal-State cooperative efforts to curb illegal marijuana use. *See* UMCA

58-37-3.8. Indeed, the UMCA purports to control the way in which the law is executed and is executive in nature rather than legislative.

7. The Marijuana Initiative Provides that Reckless Physicians Who Know Nothing About Marijuana Effects Can Commit Malpractice and Still Get Off Scot Free. Marijuana is a Schedule I drug that has a higher frequency of addiction than opioids and can lead to severe consequences such a permanent brain damage and psychosis. The Drug Enforcement Agency has determined that there are no reliable studies showing that marijuana has any accepted medical uses. Any physician who prescribed marijuana to treat a medical condition would, therefore, be professionally irresponsible and reckless. Nevertheless, the UMCA provides that physicians who prescribe marijuana cannot "be subject to civil liability, criminal liability or licensure sanctions…." *See* UMCA 26-60b-108. To make matters worse, the Marijuana Initiative would permit a marijuana card to be given to a patient after just one visit. *See* UMCA 26-60b-107(4). Even worse still, the Marijuana Initiative does not require the "physician" to have any training regarding or be knowledgeable about marijuana effects at all. Further, "physician" (one who can prescribe Schedule II substances, *see* UMCA 26-60b-107(1)) is defined so broadly that it includes practitioners who know nothing of pharmacology, neurophysiology, or drug interactions. "Physician" includes optometrists, podiatrists, physicians' assistants, and certified nurse midwives. *See* Utah Admin. Code § R156-37-301.

8. The Marijuana Initiative Is Essentially a Recreational Marijuana Initiative Because Anyone Who Complains of Pain Can Obtain a Marijuana Card. The UMCA provides that any person who suffers from "chronic or debilitating pain" and who could possibly be "at risk of becoming chemically dependent" can qualify for a marijuana card. In

jurisdictions where marijuana use for medical purposes has been legalized, only "a small portion of users identified specific serious illnesses and conditions" in contrast to the cause of "chronic or debilitating pain", which can be diagnosed based solely on the subjective report by a patient of pain that cannot be verified in any way "is far and away the most common condition identified by medical marijuana applicants." Gerald Caplan, *Medical Marijuana: A Study of Unintended Consequences*, 43 McGeorge L. Rev. 127, 137 (2012). It can be confidently concluded that the "statistical dominance of "chronic" or "severe" pain, as well as abundant anecdotal evidence, suggests that applicants offer, and physicians accept, chronic pain as a qualifying condition when in fact it is not…." *Id.*

9. The Marijuana Initiative Permits Giving Marijuana to Children Without Any Medical Guidelines Whatsoever as to Dosages, Appropriate Uses, Side Effects, Monitoring, or Warnings to be Given to Patients Regarding Dangers. The UMCA allows a parent or guardian to obtain a medical cannabis card for use by a child of any age if the child has a "qualifying illness". *See* UMCA 26-60b-201(2)(b). However, there are no guidelines for appropriate uses, dosages, side effects, medicinal interactions with other medicines, warnings regarding dangers of use, and/or regarding monitoring usage. The studies uniformly show that dangers of marijuana are particularly acute for minors – and the UMCA does not have any provision for protecting Utah children from unscrupulous physicians who can prescribe use of marijuana with legal impunity.

IV. THE PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.

A. Federal Law Preempts the Marijuana Initiative. Section 903 of the Controlled Substances Act (the "CSA") defines Congressional intent with respect to preemption:

> 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 penalties to the exclusion of any State law or the same subject 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. When faced with a preemption analysis courts usually engage in an implied preemption analysis to determine whether a federal law preempts a State law. *See generally Wyeth v. Levine*, 555 U.S. 555 (2009). An actual conflict exists between federal and state law if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 281 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). This type of preemption is called "obstacle preemption."

Under the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, all State laws that interfere with, or are contrary to, the laws of the United States passed by Congress are preempted. Thus, the Court has found pre-emption "where it is impossible for a private party to comply with both state and federal requirements, (citation omitted) or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Electric Co.*, 496 U.S. 72, 79 (1990).

The proposed Initiative to adopt the Utah Medical Cannabis Initiative ("UMCA") would make it impossible for private individuals to comply with both state and federal requirements and would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The Utah Supreme Court analyzed when an actual conflict exists between Federal and State law in *Houghton v. Dept. of Health*, 2002 UT 101, 57 P. 3d 1067. In *Houghton*, Justice Durrant observed in his concurring opinion:

> ¶24 Congressional intent to preempt state law can manifest itself in a variety of ways, all of which require preemption of the offending state statutory provisions. While a federal law may explicitly state that it preempts state law in the field, more

often the determination of congressional intent requires an inquiry into the purposes underlying the federal law.

Sometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's "structure and purpose" or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent. A federal statute, for example, may create a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Alternatively, federal law may be in "irreconcilable conflict" with state law. Compliance with both statutes, for example, may be a "physical impossibility" or, the state law "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of congress." *Id.* at 31, 116 S.Ct. 1103 (citations omitted).

¶25 Barnett suggests that there are three categories of statutory schemes that can reflect congressional intent to preempt state law: (1) statutes containing explicit language to that effect; (2) statutory structure or purpose revealing a clear preemptive intent; or (3) statutes that result in a conflict between state and federal law. (Conflict preemption is further subdivided into (a) situations in which simultaneous compliance with state and federal law is impossible and (b) circumstances in which state laws undermine congressional purposes.) This court, quoting in *Price* the foregoing language from *Barnett*, structured preemption analysis differently. For the three categories of congressional intent described above, this court substituted four equally weighted categories. The impossibility of simultaneous compliance and the undermining of federal purposes become, in the version of preemption analysis articulated in *Price*, separate categories, not aspects of conflict analysis.

¶26 The category under which a court chooses to analyze the preemption issue can have significant effects on the result. When treated as one aspect of conflict between state and federal law, analysis of whether state law tends to undermine federal purposes (category 3(b) under Barnett) is susceptible to being conflated with overt conflict between federal and state law (category 3(a)), and therefore overlooked . In S.S., this court applied the test for preemption in a manner that tended to elide questions of whether the relevant state provisions undermined federal purposes: "a federal statute will preempt a state statute has been shown to preemptively occupy the field. We find no irreconcilable conflict here." *S.S.*, 972 P.2d at 443 (emphasis added). We have recognized that actual conflict may include conflict with the "provisions or goals" of a statute of superior authority, *Smith v. Batchelor*, 832 P.2d 467, 472 (Utah 1992) (emphasis added), but the court's analysis of conflicts in *S.S.* and *Wallace* focused primarily on the impossibility of dual compliance. The court explicitly addressed the need to harmonize federal provisions requiring states to seek reimbursement and the federal anti-lien provision, but did not fully examine the purposes the anti-lien

> provision is intended to serve, or whether the court's resolution is likely to undermine that purpose. The federal jurisprudence on which Utah preemption analysis relies makes it clear that while there is no "infallible constitutional test or . exclusive constitutional yardstick" for determining congressional, *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed 581 (1941) the court's primary function is to determine whether, under the circumstances of this particular case. [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress. *Id*; *see also Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 141, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963); 517 U.S. 25 at 31, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996). An inquiry into the goals underlying a federal statute is a necessary element in a court's preemption and analysis, an element this court adopted, and even highlighted, in its statement of the preemption model in Price.

Houghton v. Dept. of Health, 2002 UT 101, 57 P. 3d 1067. Justice Durrant was correct that "the category under which a court chooses to analyze the preemption issue can have significant effects as well." *Id*. For example, in *Emerald Steel Fabricators, Inc. v. Bureau of Labor* & Indus., 230 P.3d 518 (2010), the Oregon Supreme Court found that the Federal Controlled Substances Act ("CSA") preempted the State's medical marijuana law. The Oregon Supreme Court observed that to interpret the CSA's "positive conflict" provision to mean that it was "physically impossible" to comply with both State and Federal marijuana laws leads to an analysis that is "vanishingly narrow." However, it found that "positive conflict" may also exist where the State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 69, 61 S. Ct. 399, 405, 85 L. Ed. 581 (1941), *Barnett Bank v. Nelson*, 517 U.S. 25, 35-37, 116 S. Ct. 1103, 134 L. Ed 2d 237 (1996); and *Michigan Canners & Freezers Ass. v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 104 S. Ct. 2518, 81 L. Ed 2d 399 (1984)).

The *Emerald City* court went on to enumerate the numerous conflicts between the Oregon medical marijuana law and the CSA that demonstrated that the State law stood as an obstacle to accomplishing the purposes of the CSA. E.g., the Oregon law ("ORS") authorized

use of medical marijuana where the State prohibits such use. The ORS exempted physicians who prescribe marijuana from State criminal liability, and permitted medical doctors to prescribe Schedule I drugs. The *Emerald City* court held: "In sum, whatever the wisdom of Congress's policy to categorize marijuana as a Schedule I drug, the Supremacy Clause required that we respect that choice when, as in this case, state law stands as an obstacle to the accomplishment of the full purposes of the federal. Doing so means that ORS 475.306(1) is not enforceable." *Id.* at 528.

Similarly, the Colorado Supreme Court found in *People v. Crouse*, 2017 CO 5, ¶ 2, 388 P.3d 39, that the statute requiring the return of medical marijuana to a patient was preempted by the CSA. The court reasoned as follows: "The return provision requires law enforcement officers to return, or distribute, marijuana. Distribution of marijuana, however, remains unlawful under federal law. Thus, compliance with the return provision necessarily requires law enforcement officers to violate federal law. This constitutes a "positive conflict" between the return provision and the CSA's distribution prohibition such that "the two cannot consistently stand together." *Id.*

However, Connecticut, Michigan, California and Arizona have applied a much narrower preemption analysis than suggested by Justice Durrant to their respective state marijuana acts.[7] They have found a "positive conflict" only when it is physically impossible

[77] *See Reed-Kaliher v. Hoggatt*, 235 Ariz. 361, 365, 332 P.3d 587, 591 (Ct. App. 2014), *aff'd*, 237 Ariz. 119, 347 P.3d 136 (2015) (holding that CSA does not preempt Arizona's Medical Marijuana Act ("AMMA") where status under probation based on conviction of crime of possession was governed by state law and not addressed by CSA); *White Mountain Health Center Inc. v. County of Maricopa*, 2012 WL 6656902 (Ariz. Super., Dec. 3, 2012) (holding that zoning authority regarding placement of marijuana dispensaries under the AMMA belongs to states and is not preempted by CSA); *Nofsinger v. SSC Niantic Operating Co.*, 273 F.Supp.3d 326 (D. Conn. 2017) (holding that CSA does not preempt Connecticut's medical marijuana laws for purposes of prohibiting employers from firing employees due to marijuana use); *Joe Hemp's First Hemp Bank v. City of Oakland*, No. C 15-05053 WHA, 2016 WL 375082, at *3 (N.D. Cal. Feb. 1, 2016), *appeal dismissed*, No. 16-15332, 2017 WL 7833762 (9th Cir. Oct. 11, 2017) (holding that CSA did not preempt California's recreational marijuana law

even if the State law would in effect undermine the objectives and purposes of congress as long as the Federal Government could still enforce the CSA.

For example, in *Ter Beek v. City of Wyoming*, 495 Mich. 1, 7, 846 N.W.2d 531, 535 (2014), a land owner challenged a zoning ordinance that allowed him to grow, possess, and use medical marijuana in his home. Note that no argument was raised in *Ter Beek* under the Agricultural Act of 2014 that defines permissible growth of industrial marijuana because it predated that Act. The *Ter Beek* court found that zoning ordinances are among the areas of "public health, safety, and welfare" that are traditionally left to the states." *Id*. at 10 (citing *Gonzales v. Oregon*, 546 U.S. 243, 270, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006)). The court acknowledged that "impossibility" of coexistence of both the CSA and the Michigan medical marijuana act would be presented "when the state law requires what federal law prohibits or vice versa." *Id.* at 12.

Nevertheless, the *Ter Beek* court found that its medical marijuana law did not "stand as an obstacle to the accomplishment and execution of the full purposes of the CSA." *Id.* at 14. The *Ter Beek* court reasoned that while the Michigan act and the CSA "differ with respect to medical uses of marijuana, § 4(a)'s limited state law immunity for such uses does not frustrate the CSA's operation nor refuse its provisions their natural effect, such that its purpose cannot be otherwise accomplished." *Id*. at 15. The *Ter Beek* court rationalized that the Michigan's immunity "does not purport to alter the CSA's federal criminalization of marijuana or to interfere with or undermine federal enforcement of that prohibition." *Id.*

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because state laws did not create an obstacle to enforcement of the CSA by the Federal Government); *see also generally Cty. of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 822, 81 Cal. Rptr. 3d 461, 478 (2008) (applying impossibility preemption standard but observing in dicta that California medical marijuana law did not pose an obstacle to objectives under the CSA).

Ter Beek is of course distinguishable from the present case because the issue is not whether Congress left zoning authority to the states, but whether the UMCA stands as an obstacle to the purposes of CSA. Although *Ter Beek* purported to address that issue, it fell back into the "impossibility" analysis that is much narrower than obstacle preemption.

Further, such reasoning is simple nonsense. The U.S. Supreme Court held that "the main objectives of the CSA were to conquer drug abuse and to control legitimate and illegitimate traffic in controlled substances." *Gonzales v. Raich*, 545 U.S. 1, 12, 125 S. Ct. 2195, 2203, 162 L. Ed. 2d 1 (2005) (citation omitted). "To effectuate the statutory goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Id*. at 13 (citation omitted). Congress thus categorized marijuana as a Category I controlled substance, therefore designating it "as contraband for any purpose" and finding that it "has no acceptable medical uses." *Id*. at 27.

Moreover, since all of these state courts rendered their decisions, the DEA has determined in its regulatory capacity that allowing marijuana use would lead to drug abuse, has no legitimate medical uses, and present a health hazard to users that has not been shown by competent studies to be safe for medical use. *See* Denial of Petition To Initiate Proceedings To Reschedule Marijuana, 81 FR 53688-01 (August 12, 2016). The DEA findings demonstrate that the purposes of the CSA are in fact undermined and both "cannot consistently stand together."

Under the Michigan court's reasoning in *Ter Beek*, the State of South Carolina, for example, would not present an obstacle to the purpose of federal laws when it seceded from the Union because the United States could still send its army to enforce federal laws. Such

reasoning is absurd and fails to consider whether the federal purposes are undermined by the state's actions in promoting marijuana use (even as a Schedule I drug) that stands as an obstacle to the accomplishment of the federal purpose to curb drug abuse.

B. Utah Medical Marijuana Initiative Presents an Obstacle to the Full Purposes of the CSA and Other Federal Laws. The UMCA mandates non-permissively that officials of the Utah Department of Health aid, abet, and conspire to do what the CSA forbids as a criminal act – to manufacture, distribute, and dispense a Schedule I controlled substance. Aiding and abetting manufacturing of controlled substances is a federal crime. *See* 18 U.S.C. § 2.[8] The UMCA states that the Department of Health "shall issue a license to operate a cannabis establishment." *See* UMCA 4-41b-201(1). The UMCA also requires the Department to "renew a person's license", UMCA 4-41b-202(1), and to "issue a medical cannabis card to an individual", UMCA 26-60b-201(1). Thus, the UMCA requires employees of the Utah Department of Health to aid, abet, and conspire with those who violate federal law under the CSA.

In addition, a doctor can prescribe, and a pharmacist can dispense, a controlled substance only "for a legitimate medical purpose [and while] acting in the usual course of his professional practice." 21 C.F.R. § 1306.04. Under the CSA, Schedule I substances like marijuana have no legitimate medical purpose and, therefore, they cannot be prescribed or dispensed. Thus, the provisions of the UMCA and the CSA "cannot consistently stand together."

[8] 18 U.S.C. § 2(a) states: "whosoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

The Colorado Supreme Court in *People v. Crouse*, 2017 CO 5, ¶ 14, 388 P.3d 39, 42, found that the CSA preempted a provision that required state law enforcement officers to return marijuana to medical users. The court provided in relevant part:

> Section 14(2)(e) requires law enforcement officers to return seized marijuana and marijuana products to medical marijuana patients after an acquittal. Colo. Const. art. XVIII, § 14(2)(e). The CSA, however, prohibits the distribution of marijuana without regard to whether state law permits its use for medical purposes. 21 U.S.C. § 841. The CSA defines "distribute" to mean "to deliver a controlled substance or a listed chemical." 21 U.S.C. § 802(11) (2012). The CSA further defines "deliver" to mean "the actual, constructive, or attempted transfer of a controlled substance." 21 U.S.C. § 802(8) (2012). An officer returning marijuana to an acquitted medical marijuana patient will be delivering and transferring a controlled substance. Therefore, based on the CSA definition, when law enforcement officers return marijuana in compliance with section 14(2)(e), they distribute marijuana in violation of the CSA. Because compliance with one law necessarily requires noncompliance with the other, there is a "positive conflict" between section 14(2)(e) and the CSA such that the two cannot consistently stand together.

Id. Since the decisions by the courts in Michigan, Arizona, California, and Connecticut, the DEA has made findings regarding marijuana and its effects that demonstrate a "positive conflict" between the UMCA and CSA such that the two cannot stand together. Under the UMCA, physicians may prescribe marijuana, a Schedule I drug, disregarding the CSA. *See* UMCA § 26-60b-107. Indeed, the UMCA also provides: "A physician who recommends treatment with cannabis or a cannabis product to an individual in accordance with this chapter may not, based on the recommendation, be subject to civil liability, criminal liability, or licensure sanctions under Title 58, chapter 67, Utah Medical Practice Act or Title 58, chapter 68, Utah Osteopathic Medical Malpractice Act." *See* UMCA § 26-60b-108. Thus, the UMCA forecloses access to courts for malpractice or even criminal acts such as over-dosing because there are no dose limitations or even proper guidelines for proper doses. The UMCA limits the amount of marijuana a cardholder may possess; not what a physician may prescribe.

These provisions are in direct conflict with the CSA. Schedule I drugs cannot be prescribed because they have no acceptable medical use under DEA determinations. As the United States Supreme Court found in *Gonzales v. Raich*, a Schedule I drug has a "high potential for abuse, no currently accepted medical use, and no accepted safety for use in medically supervised treatment…." *Gonzales*, 545 U.S. at 2, 125 S. Ct. at 2197, 162 L. Ed. 2d 1.

Advocates have repeatedly challenged the Schedule I designation for marijuana and sought to have it designated as a Schedule II drug that would allow cannabis to be prescribed. However, the Schedule I designation has been upheld by every court that has considered it. *Hemp Indus. Ass'n v. U.S. Drug Enf't Admin.*, No. 17-70162, 2018 WL 2000087, at *2 (9th Cir. Apr. 30, 2018); *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 499, 121 S. Ct. 1711, 1722, 149 L. Ed. 2d 722 (2001) (declining to find a "medical necessity" exception for use of cannabis in Schedule I); *see also* Denial of Petition to Initial Proceedings to Reschedule Marijuana, 81 Fed Reg. 53,767, 53,792 (Aug. 12, 2016). Indeed, the DEA asked the Federal Drug Administration ("FDA") to provide "a scientific and medical evaluation of the available information and a scheduling recommendation for marijuana." *See id*. After extensive review of the available studies and data, the FDA accepted the DEA's recommendation that marijuana remain a Schedule I drug. The FDA found:

> [T]he available evidence is not sufficient to determine that marijuana has an accepted medical use. Therefore, more research is needed into marijuana's effects, including potential medical uses for marijuana and its derivatives…we recommend that studies need to focus on consistent administration and reproducible dosing of marijuana, potentially through the use of administration methods other than smoking.

Id. Thus, there is a positive conflict between the UMCA's provisions that allow physicians to prescribe marijuana and the CSA's prohibitions. Such conduct by a physician may render the

physician's registration to dispense controlled substances inconsistent with the "public interest," and, therefore, subject to suspension under 21 U.S.C. 824 (a)(4). This conclusion applies regardless of whether a state law authorizes or permits such conduct by practitioners or others. Moreover, the United States Supreme Court has found that "Congress' express determination that marijuana had no accepted medical uses forecloses any argument about statutory coverage of drugs available by a doctor's prescription." *Gonzales v. Oregon*, 546 U.S. 243, 269, 126 S. Ct. 904, 922, 163 L. Ed. 2d 748 (2006) (citing *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001)).

Moreover, the broad purposes of the CSA are positively frustrated by the UMCA because the UMCA permits the growth, manufacturing, processing and cultivation by patients. *See* UMCA § 26-60b-201 (5)(d). "The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Gonzales*, 545 U.S. at 12, 125 S. Ct. at 2203, 162 L. Ed. 2d 1. "[T]he CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner." *Id*. at 27, 125 S. Ct. at 2211, 162 L. Ed. 2d 1. In *Raich*, a California resident who suffered from several serious medical conditions, and who used marijuana pursuant to their physician's advice, sought to have the CSA's application to their uses barred based on the Commerce Clause. The *Raich* court found that the "congressional judgement that an exemption for [growing medical cannabis for personal use] would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity." *Id*. at 28, 125 S. Ct. at 2212, 162 L. Ed. 2d 1.

The *Raich* court further found:

> The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. The likelihood that all such

> production will promptly terminate when patients recover or will precisely match the patient's medical needs is remote; whereas the danger of excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious. Moreover, that the national and international narcotics trade has thrived in the face of vigorous criminal enforcement efforts suggests that no small number of unscrupulous people will make the use of California exemptions to serve their commercial ends whenever it is feasible to do so….

Id. at 31, 125 S. Ct. at 2214, 162 L. Ed. 2d 1. Moreover, the DEA's 2016 review also found that use of marijuana: (1) "has a high potential for abuse"; (2) "use of marijuana impairs psychomotor performance, including complex task performance, which makes operating motor vehicles or heavy equipment after using marijuana inadvisable (Ramaekers et al., 2004; Ramaekers et al., 2006a). A meta-analysis conducted by Li et al. (2011) showed an association between marijuana use by the driver and a significantly increased risk of involvement in a car accident."; (3) "Psychic or psychological dependence has been shown in response to marijuana's psychoactive effects."; and (4) "Abuse of marijuana is widespread and significant." Denial of Petition To Initiate Proceedings To Reschedule Marijuana, 81 FR 53688-01 (August 12, 2016).

The "main objectives of the CSA… to conquer drug abuse and to control legitimate and illegitimate traffic in controlled substances" is so severely undermined by the UMCA that "the two cannot stand together." As the DEA found, use of marijuana leads to drug abuse, addiction, health problems, dependence, and presents a public safety hazard. Justice Stevens' observations in *Raich* clearly state the real-world effect of allowing private cultivation for personal use, such as under the UMCA, would lead to a proliferation of access and abuse of a Schedule I drug in direct contradiction of the purposes and objectives of the CSA.

C. The UMCA Conflicts with U.S. Treaty Obligations and Is, Therefore, Preempted. In addition to preemption by the CSA, Utah's attempt to license and regulate marijuana runs afoul of United States' treaty obligations. For this independent reason, the

UMCA must give way. When a treaty that is ratified by congress requires that a drug must be controlled, then the Attorney General must "issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations" without regard to scientific or medical findings. Under the *Single Convention on Narcotic Drugs*, cannabis and cannabis resin are scheduled under Schedule IV, that treaty's most strictly controlled category of drugs. Single Convention Treaty, Article 2, 28. Article 2, (5)(b) of the Single Convention Treaty states that for Schedule I drugs:

> A party shall, if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision and control of the party.

Moreover, 21 U.S.C. § 811 (d)(2)(B) of the CSA states that if the *United Nations Commission on Narcotic Drugs* proposes rescheduling a drug, the HHS Secretary "shall evaluate the proposal and furnish a recommendation to the Secretary of State which shall be binding on the representative of the United States in discussions and negotiations relating to the proposal." Because cannabis restrictions are embedded in the text of the *Single Convention*, complete legalization of marijuana would require denunciation of the *Single Convention*, amendment of the treaty, or a reinterpretation of its provisions.

Treaties are unquestionably the "supreme law of the land" and trump any contrary state statutes, including the UMCA. *See* U.S. Const. art. VI, cl. 2. Not only is the Federal Government obligated under this international drug treaty regime, but the individual states are as well. "As law of the United States, international law is also the law of every State, is a basis for the exercise of judicial authority by State courts, and is cognizable in cases in State courts,

in the same way as other United States law." Restatement (third) of Foreign Relations Law of the United States § 111 cmt. d (1987).

Notably, the U.S. Congress has recognized:

> The courts of the United States have repeatedly found that any State law that conflicts with a federal law or treaty is preempted by such law or treaty. (8) The Controlled Substances Act (21 U.S.C. 801 et seq.) strictly regulates the use and possession of drugs. (9) The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances [Dec. 20, 1988, S. Treaty Doc. No. 101-4 (1989)]. similarly regulates the use and possession of drugs. (10) Any attempt to authorize under State law an activity prohibited under such Treaty or the Controlled Substances Act would conflict with that Treaty or Act.

Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, PL 105–277, October 21, 1998, 112 Stat 2681. The UMCA is, therefore, in conflict with the U.S. treaty obligations and federal law, and is preempted. Further, the UMCA stands as an obstacle to the United States Government's adherence to the *Single Convention Treaty*.

D. The UMCA Is Preempted by the Agricultural Act of 2014. Section 7606 of the Agricultural Act of 2014 governs the growth and cultivation of industrial hemp by States.[9] The UMCA defines (*see* UMCA 4-41b-101(8)) "cannabis product" to "mean the same as the term defined in UMCA's Section 58-37-36b," which in turn defines "Cannabis" as "any part of the plant cannabis sativa, whether growing or not." Thus, the UMCA allows growth of a marijuana that Section 7606 of the Agricultural Act of 2014 (the "AA") forbids. The purpose of the AA is to define the scope and limits of state cultivation and medical research testing of marijuana. The AA limits permissible cultivation "to growth and cultivation by an institution of higher learning" and then only as incident to a state agricultural research pilot program.

[9] The term "industrial hemp" includes the plant Cannabis sativa L and any parts or derivatives of such plant, including seeds of the plant used for fiber and seed with tetrahydrocannabinoids concentration of not more than 0.03 percent and all isomers, acids, salts of isomers tetrahydrocannabinoids. *See* Statement of Principles on Industrial Hemp, 81 FR 53395-01 (Aug. 12, 2016).

Section 7606 (a)(1) and (2). Utah has enacted the "Hemp Cannabidiol Act" to provide for such research. *See* UMCA 4-41-101 *et. seq.* However, the UMCA goes well beyond he permissible limits of the AA and adds to Utah's Hemp Cannabidiol Act permission to grow, cultivate, process, and license "production facilities" and "cannabis establishments" to sell cannabis to cannabis cardholders. *See* UMCA 4-41b-201 to 701.

However, as the Ninth Circuit Court of Appeals recently found, any growth of the cannabis sativa plant outside of this permitted use has been preempted by Congress: "The Agricultural Act contemplates potential conflict between the Controlled Substances Act and preempts it." *Hemp Indus. Ass'n v. U.S. Drug Enf't Admin.*, No. 17-70162, 2018 WL 2000087, at *2 (9th Cir. Apr. 30, 2018). Similarly, Congress expressly considered the condition under which cannabis sativa could be cultivated by states and expressly limited growth to cultivation by an institution of higher learning pursuant to a state's pilot research program in § 7606 of the AA. The FDA and DEA concluded that the AA does not allow any cultivation, manufacture, distribution or dispensing of marijuana except as allowed in § 7606 of the AA: "The Federal Government does not construe section 7606 to alter the requirements of the [CSA] that apply to manufacture, distribution, and dispensing of drug products containing controlled substances. Manufacturers, distributors, dispensers of drug products derived from cannabis plants … must continue to adhere to the CSA requirements." Statement of Principles on Industrial Hemp, 81 FR 53395-01 (Aug. 12, 2016).

The UMCA purports to mandate that the Utah Department of Agriculture and Food grant licenses to private interests to cultivate, manufacture, and process marijuana for sales to cannabis card holders. In addition, UMCA § 26-60b-201 (5)(b) allows a card holder who lives more than 100 miles from a cannabis dispensary to grow up to six (6) cannabis sativa plants.

Such broad permission is contrary to the AA's purposes of limiting cultivation to those specific conditions expressly permitted by Congress. Therefore, the UMCA is preempted by the express intention of Congress to limit the conditions in which a state could legally permit cannabis cultivation, manufacture, distribution and dispensing of cannabis sativa.

E. The UMCA Violates the Open Courts Provision of Utah's Constitution. Article I, § 11 of Utah's Constitution States:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil counsel, any civil cause to which he is a party.

Utah Const. art. I, § 11. The Utah Constitution embraces a substantive conception of open court's protection. *See Berry By & Through Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 680 (Utah 1985). The Open Court's Clause "acts as a substantive check on legislative power." *Waite v. Utah Labor Comm'n*, 2017 UT 86, ¶18. However, this clause says nothing about the legislature. Rather, it is a limitation on any type of law – including initiatives.

The UMCA violates this clause because it forecloses any remedies for the well-established causes of action negligence and medical malpractice. Section 26-60b-108 states:

> **Standard of care-Medical Practitioners-Not Liable-No Private Right of Action**. A physician who recommends treatment with cannabis or cannabis product to an individual in accordance with this chapter may not, based on the recommendation, be subject to civil liability, criminal liability, or licensure actions under Title 58, Chapter 67, Utah Medical Practice Act or Title 58, chapter 68, Utah Osteopathic Medical Practice Act.

This exemption from negligence and malpractice liability is granted in the face of Congressional and DEA findings that cannabis use is harmful and that there is no permissible medical use for it. The UMWC permits prescribing cannabis for children in the face of clear studies showing that use of cannabis for minors can cause severe brain damage – and without

studies showing that no less damaging alternatives is available. The UMCA does not provide any guideline for proper dosages. In other words, the UMCA sets up a text-book claim for medical malpractice and then denies patients any remedy.

In *Berry*, the Utah Supreme Court established a three-part test to determine whether a law violates the Open Courts Clause: (1) does the law abrogate a cause of action; (2) If it does, then the court assesses whether "the law provides an injured person an effective and reasonable remedy." *Berry By & Through Berry*, 717 P.2d at 680. If there is no alternative remedy, then the "abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective." *Id*. (citations omitted).

Claims for common law negligence and medical malpractice are eliminated by the UMCA. No other remedy for malpractice against physicians and osteopaths is provided. Further, there is no clear evil to be eliminated. The DEA has determined that there are no accepted medical uses for marijuana. To the contrary, the UMCA would promote the evils of abuse and a host of health problems. Further, eliminating claims for malpractice is an arbitrary and unreasonable means to accomplish the purposes of the proposed UMCA. It is not enough that no responsible physicians would prescribe cannabis but for immunity to liability of any kind in light of the fact that the DEA has found that there is no acceptable medical use for marijuana. A reasonable means must include FDA approval after the kinds of rigorous studies required for FDA approval.

The UMWC runs afoul of the Utah Open Court's Clause. It must, therefore, be found to clearly violate Utah's Constitution.

F. The UMCA Violates Utah Constitution Art. I § 23. The Utah Constitution Article I, § 23, provides: "No law shall be passed granting irrevocably any franchise, privilege or immunity." Utah Const. art. I, § 23. This section was in the original Utah Constitution and remains unchanged. It was proposed by Lawyer-delegate David Evans to prevent irrevocable grants to railroads or to individuals for the right to timber or other natural resources. Unless the legislature had the right to revoke such franchises or privileges, he argued, it would be powerless to withdraw them without violating the obligation of the contract. *Proceedings of Utah Constitutional Convention*, 1:366. There has been no judicial interpretation of this clause.

The UMCA grants licenses to private individuals to open cannabis production establishments. *See* UMCA § 4-41b-201. It also grants to individuals the right to obtain up to 15 licenses to operate "cannabis cultivation facilities" to grow and sell cannabis. *Id.* at. § 4-41b-203 and 204.

However, the UMCA bypasses Utah's Procurement Code so that there is no competitive bidding for cannabis license opportunities. *See* Utah Code Ann. § 63-6a-101 *et seq.* Instead, the UMCA grants to the Utah Department of Agriculture and Food (the "Department") the mandatory obligation to issue irrevocable licenses to grow, to process and to sell cannabis. Further, the Department is required to renew these licenses as long as the entrepreneur lucky enough to get such a lucrative license complies with the provisions of UMCA § 4-41b-201 and pays a fee. *See* UMCA § 4-41b-202. The Department cannot revoke any license granted under the UMCA without cause.

Thus, the State of Utah is granting a franchise to private interests to grow, process, and exploit cannabis sales that the Department cannot revoke. These provisions grant an "irrevocable franchise" in violation of Utah's Constitution, Article I, § 23.

G. The UMCA Violates Articles V and VI of the Utah Constitution by Interfering With the Executive and Administrative Function. The UMCA violates Articles V and VI of the Utah Constitution because it invades the executive enforcement of laws left to the executive branch of government. Article V of the Utah Constitution provides:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Utah Const. art. V, § 1. Article VI of the Utah Constitution vests legislative power in the people to be exercised by petition for ballot initiatives. *Carter v. Lehi City*, 2012 UT 2, ¶ 17, 269 P.3d 141, 147. That power is limited to actions that constitute "a valid exercise of legislative rather than executive or judicial power." *Krejci v. City of Saratoga Springs*, 2013 UT 74, ¶ 21, 322 P.3d 662, 666 (quotations omitted). The UMCA purports to direct the way in which the police powers of the law enforcement officers may execute their duties with respect to enforcement of the State's marijuana criminal laws. The UMCA 58-37-3.8 states:

> **58-37-3.8. Enforcement.**
> (1) No law enforcement officer employed by an agency that receives state or local government funds shall expend any state or local resources, including the officer's time, to effect any arrest or seizure of cannabis, or conduct any investigation, on the sole basis of activity the officer believes to constitute a violation of federal law if the officer has reason to believe that such activity is in compliance with the state medical cannabis laws, nor shall any such officer expend any state or local resources, including the officer's time, to provide any information or logistical support related to such activity to any federal law enforcement authority or prosecuting entity.
> (2) No agency or political subdivision of Utah may rely on a violation of federal law as the sole basis for taking an adverse action against a person providing professional services to a cannabis dispensary or a cannabis

> production establishment if the person has not violated the state medical cannabis laws.

The Utah Supreme Court adopted a new framework for assessing whether a proposed act is legislative nature or encroaches the executive powers in a way that violates Article V of the Utah Constitution in *Carter v. Lehi City*. With respect to the specific instance of drug law enforcement the *Carter* court stated:

> In the criminal realm, the legislature makes threshold policy decisions on matters such as drug enforcement. It decides, for example, whether to designate a particular substance as illegal and how to punish its manufacture or sale. The product of those decisions is a statute that applies to all who fall under its general terms. That is not to say that a statute must always extend to more than one person to qualify as legislation. If the legislature identifies a new synthetic substance with properties identical to an already-illegal drug, for example, the criminalization of that new substance conceivably could apply to only one manufacturer (if, for example, there is only one source of the substance when the law is enacted). So long as the law is formulated in a way that would encompass all who come within its terms, it is an appropriate legislative act.

Carter, 2012 UT 2, ¶ 45, 269 P.3d at 154 (internal citations omitted). The *Carter* court specified that the legislative domain is transcended when the action purports to govern the way or manner in which the criminal law is administered:

> Once a particular substance is criminalized by statute, it is the executive that applies the law to those who make or deal it. Executive acts typically are based not on broad policy grounds, but on individualized, case-specific considerations as to whether the acts of a particular person fall within the general rule adopted by the legislature. Thus, the executive encompasses not just prosecutorial decisions involving proposed sanctions, but parallel acts like permitting or licensing in circumstances where the law opts for that form of regulation. Such decisions, again, involve case-specific evaluation of specific individuals (for example, whether they meet the permitting or licensing standards prescribed by the legislature), not the policy-based promulgation of the rules to be applied.

Id. at ¶ 47 (internal citations omitted).

The UMCA intrudes into executive functions because it details the ways in which law enforcement officers may interact with federal officials and laws to enforce Utah's drug laws.

The UMCA purports to govern the way that the executive applies the law in enforcing it; not to broad policy considerations about what should be illegal and the penalties for such violations. Police officers would be required to decide on a case-by-case basis whether their acts further only Federal interests. For example, an officer cannot determine when he or she pulls a car over and detects the smell of marijuana whether the pot has been obtained using a medical cannabis card or illegally. The UMCA requires the enforcing officer to determine whether the person could someday qualify for such a medical cannabis card or the person in the car could have been diagnosed with a qualifying condition. The officer does not know whether he or she is spending time only furthering Federal law until after a lengthy search of the driver's medical status to obtain information that the officer can never obtain under HIPPA. The UMCA places enforcement officers in an impossible position.

In addition, there are many instances when enforcement of Utah's laws is best done by cooperating with federal law enforcement to achieve the purposes of enforcing even Utah's criminal laws against the illegal use of marijuana whether for medicinal purposes or not. However, these provisions of the UMCA would prevent such cooperation. Indeed, a large part of any investigation may be to determine, in cooperation with federal law enforcement, *whether* the conduct is subject to Utah's medical cannabis act in the first instance. In such instances, the manner of enforcing Utah's criminal marijuana laws in cooperation with Federal officials is forbidden by the UMCA.

In any event, the enforcement limitations embodied in the UMCA are not laws of general applicability, but specific prohibitions which must be decided on a case-by-case basis in which the officer has to do considerable investigation that can be obtained only after the decision whether to arrest has to have been made to have any effective operation of marijuana

drug enforcement laws. Indeed, this is another reason that UMCA in effect decriminalizes all marijuana use in the State of Utah whether it would be legal under the UMCA or not – it renders enforcement of any marijuana laws of any nature – both Federal and State -- impossible in the State of Utah.

The UMCA also invades the judicial function because it disregards the best interests of a child in considering whether a child has been abandoned with respect to relinquishing parental rights of a minor. *See* Utah Code Ann. § 78A-6-508(3). It also prohibits a court from considering marijuana use under the UMCA for purposes of deciding the best interests of a child in custody cases. *See* UMCA 30-3-10(b).

V. THE PLAINTIFFS AND CITIZENS OF UTAH WILL BE IRREPARABLY HAMRED.

Irreparable harm inherently results from the enforcement of a preempted law. *See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 366, 109 S. Ct. 2506, 2517, 105 L. Ed. 2d 298 (1989) (internal citations and quotations omitted) ("irreparable injury may possibly be established…by a showing that the challenged state statute is 'flagrantly and patently violative of…express constitutional proscriptions of the Supremacy Clause."); *Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1020-29 (9th Cir. 2013) (finding irreparable harm where Supremacy Clause is violated); *Arizona v. United States*, 567 U.S. 387, 132 S. Ct. 2492, 2495, 183 L. Ed. 2d 351 (2012) (same); *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 784 (5th Cir. 1990) ("[P]ermitting states to regulate" where Congress has preempted state laws "would violate the Supremacy Clause, causing irreparable injury….").

Indeed, none of the United States Supreme Court's seminal preemption cases casts any doubt on the presumptive availability of declaratory and injunctive relief under the Supremacy Clause. To the contrary, the Court has consistently assumed – without comment – that the Supremacy Clause provides a cause of action to enjoin implementation of allegedly unlawful state legislation. *See generally Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963); *see also Indep. Living Ctr. of S. California, Inc. v. Shewry*, 543 F.3d 1050, 1056 (9th Cir. 2008) (citing Richard H. Fallon, Daniel J. Meltzer, & David L. Shapiro, Hart & Wechsler's, The Federal Courts & The Federal System 903 (5th ed.2003) (describing "the rule that there is an implied right of action to enjoin state or local regulation that is preempted by a federal statutory or constitutional provision" as "well-established"). Further, allowing the Lieutenant Governor to authorize an election to move forward to approve an initiative that is preempted or contrary to Utah's State Constitution would be futile and a nullity. The time expense and money spent on the effort would be wasted and irrecoverable. *See Hunsaker v. Kersh*, 1999 UT 106, ¶¶ 8-9, 991 P.2d 67, 69.[10]

[10] "Injunctive relief is not purely limited to cases where no other possible remedy will be available. Its broader purpose is preventive in nature. *See* 43 C.J.S. *Injunctions* § 5 (1978); 42 Am. Jur.2d *Injunctions* §§ 2, 4, 13 (1969). A preliminary injunction is "'an anticipatory remedy purposed to prevent the perpetration of a threatened wrong or to compel the cessation of a continuing one.'" *Sys. Concepts, Inc. v. Dixon*, 669 P.2d 421, 428 (Utah 1983) (quoting *Anderson v. Granite Sch. Dist.*, 17 Utah 2d 405, 407, 413 P.2d 597, 599 (1966)). It further serves to "preserve the status quo pending the outcome of the case." *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir.1986) (citations omitted). Consequently, the "irreparable harm" justifying a preliminary injunction includes "'[w]rongs of a repeated and continuing character, *or* which occasion damages that are estimated only by conjecture, and not by any accurate standard.... "Irreparable injury" justifying an injunction is that which cannot be adequately compensated in damages *or* for which damages cannot be compensable in money.'" *Dixon*, 669 P.2d at 427-28 (citing *Black's Law Dictionary* 707 (rev. 5th ed.1979) (emphasis added). It is evident from a plain reading of this definition that the court's analysis failed to recognize the full scope and nature of "irreparable harm." Where *Dixon* refers to an injury "which cannot be *adequately* compensated in damages," it does not limit injunctive relief to those harms which

The health risks of marijuana use and conclusion that there are no permissible medical uses of marijuana are already established by findings of the Federal DEA. It would be improper for this Court to independently reverse those findings. Plaintiffs will be harmed by the legalization of medical marijuana through the initiative because those who use marijuana under the new law will be more likely to use other drugs. The increased use of marijuana will harm Utah residents by increasing crime and the risk of car accidents due to the legalization of drugs. It will also harm parents and grandparents by increased spending on addiction recovery programs, especially for those children and grandchildren with mental health issues. Further, increased production of legal marijuana for some Utahns will increase the amount of illegal marijuana in the state. This is true both because it is almost impossible to prevent a black market of Utah-grown marijuana, and because cultural acceptance of marijuana will increase demand for it for illegal purposes. The individual plaintiffs, their relatives, and the City's citizens will inevitably suffer because of the increased (illegal) use of recreation marijuana.

Moreover, as a treatment for illnesses or chronic pain, the initiative legalizes medical marijuana without requiring that other, less harmful drugs or therapy be tried first. Utahns will be asked to pay for the long-term costs of legalizing marijuana—higher taxes, increased medical costs, mental health costs, addiction recovery costs, and more accidents and crime. Plaintiffs will also suffer because the initiative's presence on the ballot will make advocacy for violation of federal law more credible.

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could never be assigned a dollar value. Rather, it merely acknowledges that monetary compensation does not always make an injured party whole. *Id.*

While all Americans are free to advocate that they or others should be allowed to violate federal drug prohibitions, they are not free to use the taxpayer-paid ballot as a platform for such advocacy, especially when the initiative contradicts federal and state constitutional law and state statute. Plaintiffs benefit substantially from Utah's existing laws and culture that restrict consumption of alcohol. Among the fifty states, Utah is tied for the lowest per capita rate of death from drunk driving.[11] However, traffic accidents dramatically increase in states with legalized marijuana.

V. THE INJUNCTION IS NOT CONTRARY TO THE PUBLIC INTEREST.

Enjoining states from moving forward to approve laws that violate the Supremacy Clause and Utah's Constitution is in the public's interest for whom these laws were enacted to protect their health and to stop the epidemic of drug abuse and harms from marijuana use.

VI. IMMEDIATE RELIEF IS NECESSARY.

It is the Plaintiffs' understanding that the requisite signatures have been given to the Lieutenant Governor by proponents of the marijuana initiative. He could approve the issue to be placed on the ballot at any time. In order to achieve the relief necessary, a temporary restraining order and preliminary injunction is necessary.

Respectfully submitted,

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[11] *See* Center for Disease Control, Drunk Driving State Data and Maps, https://www.cdc.gov/motorvehiclesafety/impaired-driving/states-data-tables.html.