

# State & Federal Conflict: Considerations for Local Cannabis Regulations in California

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# Two Key Factors Regarding Federal Interference

- 1) Conflict between state and federal law:** Can the states legalize what is the federal government has made illegal?
- 2) Federal Enforcement or Non-enforcement of Federal Law:** Can and should the federal government enforce federal marijuana law?

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# Brief History of Cannabis Law in California

1975

- Reclassification of Cannabis Possession (felony to misdemeanor) (SB 95)

1996

- Medical Cannabis (Prop. 215)

2010

- Decriminalization of Cannabis Possession (misdemeanor to infraction) (SB 1449)

2016

- Adult Use Cannabis (Prop. 64)

2018

- State Regulation of Adult and Medical Cannabis Begins

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# Prop 64: The Control, Regulate & Tax Adult Use of Marijuana Act

January 6, 2016  
Initiative 15-0103 (Amdt. #1)

The Attorney General of California has prepared the following title and summary of the chief purpose and points of the proposed measure:

**MARIJUANA LEGALIZATION. INITIATIVE STATUTE.** Legalizes marijuana and hemp under state law. Designates state agencies to license and regulate marijuana industry. Imposes state excise tax on retail sales of marijuana equal to 15% of sales price, and state cultivation taxes on marijuana of \$9.25 per ounce of flowers and \$2.75 per ounce of leaves. Exempts medical marijuana from some taxation. Establishes packaging, labeling, advertising, and marketing standards and restrictions for marijuana products. Allows local regulation and taxation of marijuana. Prohibits marketing and advertising marijuana to minors. Authorizes resentencing and destruction of records for prior marijuana convictions. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local government: **Net reduced costs ranging from tens of millions of dollars to potentially exceeding \$100 million annually to state and local governments related to enforcing certain marijuana-related offenses, handling the related criminal cases in the court system, and incarcerating and supervising certain marijuana offenders. Net additional state and local tax revenues potentially ranging from the high hundreds of millions of dollars to over \$1 billion annually related to the production and sale of marijuana. Most of these funds would be required to be spent for specific purposes such as substance use disorder education, prevention, and treatment.** (15-0103.)

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# Federal Preemption Overview...

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# Supremacy Clause

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI cl. 2. Supreme Law of Land

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# Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people

U.S. Const. amend. X

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# Commerce Clause

[The Congress shall have Power] To regulate Commerce with foreign Nations,  
and among the several States, and with the Indian Tribes;

U.S. Const. art. I, § 8, cl. 3



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# *Gonzales v. Raich*

Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that ***failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.***

*Gonzales v. Raich*, 545 U.S. 1, 22 (2005)

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# Four Types of Federal Preemption

Express

Field

Conflict

Obstacle

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# The Anti-Preemption Clause of the Federal CSA

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

21 U.S. Code § 903. Application of State Law

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# Conflict Preemption

Under a conflict preemption analysis, state law may only be preempted when it requires a violation of the federal CSA.

Robert A. Mikos, Preemption  
Under the Controlled Substances Act

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# Obstacle Preemption

Federal law will preempt if the state law or action at issue creates an “obstacle to the purposes and objectives” of the federal law.

*Id.*

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# Other State-Federal Conflicts

Examples include:

- 5th Amendment Issues
- Banking
- Federal Tax Rule 208E
- Access to Law
- Employment
- Family Law

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# Other Limits on Federal Power

Constitutional limits?

- First Amendment?
- Right to Privacy?
- Right to Develop one's personality?

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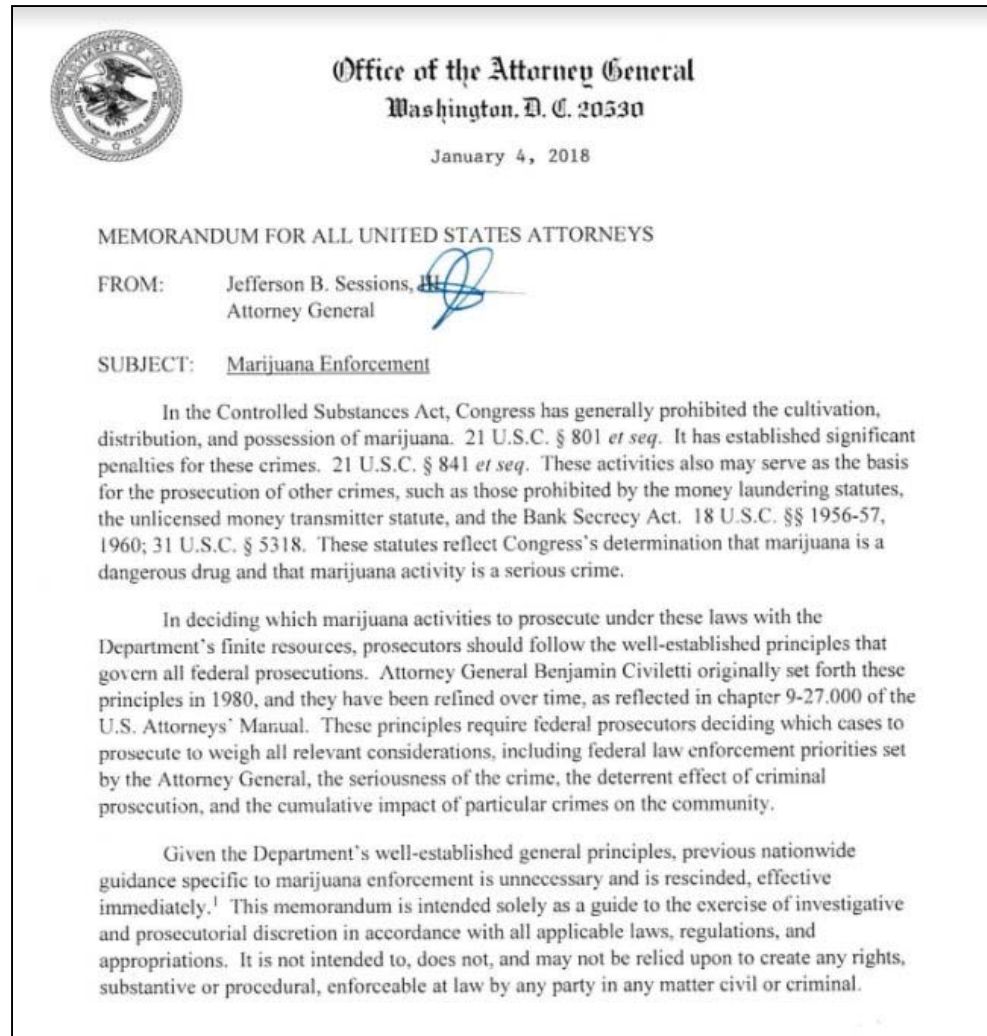
# Former DOJ Enforcement Priorities

- 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.

GUIDANCE REGARDING MARIJUANA ENFORCEMENT (“COLE MEMO”) (2013)



# A.G. Sessions Rescinds Cole Memo



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# Rohrabacher-Blumenauer Amendment

***None of the funds made available in this Act to the Department of Justice may be used***, with respect to any of the States of Alabama, Alaska, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, ***to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.***

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# *United States v. McIntosh*

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

STEVE MCINTOSH,  
*Defendant-Appellant.*

No. 15-10117

D.C. No.  
3:14-cr-00016-  
MMC-3

Appeal from the United States District Court  
for the Northern District of California  
Maxine M. Chesney, Senior District Judge, Presiding

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# Considerations for States Trying to Avoid Federal Intervention

*Including, but not limited to:*

- Repeal of State Law Penalties
- Legislative Intent
- No Direct Role for the State
- Strong Regulatory & Safety Controls
- Federal Drug Free Workplace Act
- Intrastate Design
- Protections of Minors
- Other Areas of State and Federal Law that are Implicated

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# Regulatory & Safety Control

- Rulemaking
- Licensing
- Enforcement
- Penalties
- Quality Control Measures
- Safety Standards
- Seed-to-Sale Tracking
- Packaging & Labeling Standards
- Marketing & Advertising Restrictions

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# Marijuana Legalization is Working

## From Prohibition to Progress: A Status Report on Marijuana Legalization

What We Know About Marijuana  
Legalization in Eight States and  
Washington, D.C.

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# Local Governments Can Intervene on Behalf of Local Cannabis Businesses



HARBORSIDE

# Noncooperation Bill or Ordinance

**ASSEMBLY BILL**

**No. 1578**

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**Introduced by Assembly Member Jones-Sawyer  
(Coauthors: Assembly Members Bonta, Chiu, Wood, Eggman, and  
Cristina Garcia)  
(Coauthors: Senators Skinner and Wiener)**

February 17, 2017

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An act to add Section 11362.6 to the Health and Safety Code, relating to ~~marijuana~~ *cannabis*.

LEGISLATIVE COUNSEL'S DIGEST

AB 1578, as amended, Jones-Sawyer. ~~Marijuana and cannabis~~ *Cannabis* programs: cooperation with federal authorities.



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