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## The 2015 Federal Budget's Medical Marijuana Provision: An "End to the Federal Ban on Marijuana" or Something Less Than That?

Alex Kreit

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# The 2015 Federal Budget’s Medical Marijuana Provision: An “End to the Federal Ban on Marijuana” or Something Less Than That?

ALEX KREIT\*

*In 2014, Congress began to face the nearly 20-year conflict between state medical marijuana laws and federal prohibition. It did so in a somewhat curious way, however--tacking on an rider to the 2015 federal budget to block the Department of Justice from spending money to “prevent” medical marijuana States from “implementing” their laws. Some news reports trumpeted the development as an “end” to the federal ban on marijuana. But the handful of court decisions to consider the 2015 budget provision so far suggest it might not have much effect at all on federal marijuana enforcement. This essay, written for the Northing Illinois University Law Review’s symposium on medical marijuana laws, examines the 2015 federal budget’s medical marijuana provision and offers an argument in favor of interpreting it broadly.*

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## INTRODUCTION

The federal ban on medical marijuana is no more, at least according to a December 2014 *Los Angeles Times* headline, which declared: “Congress Quietly Ends Federal Government’s Ban on Medical Marijuana.”<sup>1</sup> The body of the article reported that, “[t]ucked deep inside the 1,603-page federal spending measure [was] a provision that” meant “states where medical pot is legal would no longer need to worry about federal drug agents raiding retail operations. Agents would be prohibited from doing so.”<sup>2</sup>

The *Times*’ observation that the 2015 federal budget contained a noteworthy medical marijuana spending provision was accurate. The amendment in question blocks the Department of Justice (DOJ) from using funds “to prevent . . . States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”<sup>3</sup> Politically, this was indeed a significant development—the first congressional vote in support of adjusting federal marijuana law in order to accommodate state-level reforms.

But does this provision really “effectively end[] the federal government’s prohibition on medical marijuana”?<sup>4</sup> Putting aside the fact that the spending restriction is only temporary, with no guarantee it will make it into next year’s budget, the few court decisions to address the provision so far have read it narrowly.

In January 2015, for example, an Eastern District of Washington magistrate judge found that the provision does nothing to stop the federal government from prosecuting medical marijuana patients or caregivers. At most, the judge concluded, federal prosecutors might be barred from spending money to go after state officials.<sup>5</sup> But, when it comes to private parties, “this legislation is but one factor [for] agencies [to] consider when exercising their charging discretion.”<sup>6</sup>

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1. Evan Harper, *Congress Quietly Ends Federal Government’s Ban on Medical Marijuana*, L.A. TIMES (Dec. 16, 2014, 4:00 AM), <http://www.latimes.com/nation/la-na-medical-pot-20141216-story.html>.

2. *Id.*

3. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130 (2014).

4. Harper, *supra* note 1.

5. *United States v. Gouve*, No. 2:14-PO-0157-JTR-1, 2015 WL 417928, at \*3 (E.D. Wash. Jan. 30, 2015) (order denying defendant’s motion to suppress) (“Such language *may* avoid interference with the legislation and enforcement of state laws by state authorities, but it does not reference or presume to alter the Controlled Substances Act.”) (emphasis added).

6. *Id.*

If that is all the appropriations restriction means—that the federal government cannot prosecute state and local officials—then it is not worth much. After all, the federal government has never once prosecuted a government employee for carrying out a state or local medical marijuana law. But, of course, this is not the only possible interpretation of the spending restriction.

A different Eastern District of Washington judge read the provision to block prosecutions for “conduct *sanctioned* by state medical marijuana laws,”<sup>7</sup> an interpretation that would appear to protect private parties like patients and dispensary operators so long as they strictly comply with state law. But even this is a somewhat constrained reading. All it would take to overcome the spending block is a mere *allegation* that someone is out of compliance, even slightly, with a state medical marijuana rule or regulation. Indeed, after explaining his position on the law, the judge denied a motion to dismiss criminal charges against a group of medical marijuana patients because, “[a]ccording to the United States,” they had engaged in “conduct . . . not authorized or sanctioned by Washington’s medical marijuana laws.”<sup>8</sup>

This essay attempts to make sense of the 2015 federal budget’s medical marijuana spending restriction. As I’ve argued elsewhere,<sup>9</sup> a spending restriction is no long-term solution to the conflict between state marijuana reforms and federal prohibition. But until Congress amends the Controlled Substances Act to harmonize state and federal marijuana laws, could this appropriations restriction be a quick fix? How much protection is it likely to provide medical marijuana patients and providers? Because the spending limit’s language is far from a model of clarity, only time will provide an answer. I argue, however, for a much broader construction than the early cases have adopted. Under the interpretation I propose, the Department of Justice would be barred from prosecuting state-recognized medical marijuana patients or providers for in-state marijuana activity, regardless of compliance with state law. While making the appropriations rider’s protection contingent on state-compliance may have intuitive appeal, a closer look at the language of the provision and the logistical problems that would come with limiting it to state-compliant defendants counsels in favor of a broader reading.

Part I briefly recounts the history of federal interference with state medical marijuana laws, which provides critical context for interpreting the appropriations restriction. Part II gives an overview of the appropriations

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7. United States v. Firestack-Harvey, No. 13-CR-0024-TOR-1, 6 (E.D. Wash. Feb. 12, 2015) (Bloomberg Law) (order denying defendants’ motion to dismiss).

8. *Id.* at 7.

9. Alex Kreit, *What Will Federal Marijuana Reform Look Like?*, 65 CASE W. RES. L. REV. (forthcoming 2015).

restriction and describes three possible interpretations of it. Part III lays out the case for interpreting the provision to apply to all state-licensed medical marijuana operators, whether or not their actions meet state law requirements. Part IV concludes.

#### I. A BRIEF HISTORY OF FEDERAL INTERFERENCE WITH STATE MEDICAL MARIJUANA LAWS

When California enacted the first modern state medical marijuana law in 1996, it did not take long for the federal government to move to block its implementation. In February of 1997, the Drug Enforcement Administration (DEA) threatened to “revoke the DEA registrations of physicians” for recommending marijuana.<sup>10</sup> This would have left impacted doctors unable to prescribe other controlled substances, from Oxycodone to Ambien. The plan might have short-circuited state medical marijuana laws by making it impossible for prospective patients to find a doctor willing to recommend the drug to them. But the Ninth Circuit stepped in and enjoined the strategy, declaring it unconstitutional under the First Amendment.<sup>11</sup>

The federal government’s other anti-medical marijuana efforts were much more successful, at least as judged by the results of court rulings. In 2001, the Supreme Court unanimously sided with the government in its lawsuit against a handful of early medical marijuana cooperatives in *United States v. Oakland Cannabis Buyers’ Cooperative* (OCBC).<sup>12</sup> There, in response to civil lawsuits seeking to enjoin their operations, the medical marijuana dispensaries argued the common law medical necessity defense protected them. In ruling for the government, *OCBC* appeared to resolve the legal status of medical marijuana under federal law. But just four years later, in *Gonzales v. Raich*,<sup>13</sup> the issue was back in front of the Supreme Court. This time, the question concerned federalism—specifically, whether the federal government’s power to regulate interstate commerce included purely intrastate noncommercial medical marijuana activity, like the possession and manufacture of the drug for personal medical use. By a split vote of 6-3, the Court held that it did, on the theory that reaching this sort of conduct was “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>14</sup>

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10. Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164, 6164 (Feb. 11, 1997).

11. *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).

12. *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001).

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

14. *Id.* at 24 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

Between them, *OCBC* and *Raich* made clear that federal drug law enforcers could constitutionally target state-legal medical marijuana providers, growers, and even patients. In dissent in *Raich*, Justice O'Connor lamented that the case would "prevent[] States like California from devising drug policies that they have concluded provide much-needed respite [for] the seriously ill."<sup>15</sup> The next three years saw the Bush administration continue to vigorously target medical marijuana dispensaries. By Obama's election in 2008, the federal government had conducted nearly two hundred medical marijuana raids and initiated a significant number of criminal prosecutions.<sup>16</sup>

And yet, contrary to Justice O'Connor's concern, the federal effort slowed but did not stop the proliferation of medical marijuana dispensaries and the adoption of new state medical marijuana laws. In fact, there were between three hundred thousand and four hundred thousand medical marijuana patients and over seven hundred medical marijuana storefronts in California alone by the time Obama took office.<sup>17</sup> Although the federal government had the legal authority to shutter dispensaries and prosecute patients, it only had the resources to pursue a small fraction of the offenders.<sup>18</sup> To be sure, the unlucky few to have faced federal prosecution suffered serious consequences, with some still serving lengthy mandatory minimum sentences. Ultimately, however, it seems this was not enough to credibly deter others from openly operating in defiance of federal law. Instead of shutting down state medical marijuana laws, the primary consequence of the federal government's enforcement effort was to make the market that did exist harder for states to regulate.<sup>19</sup>

Seemingly recognizing the futility of the federal campaign against state medical marijuana laws, as a candidate for president, Barack Obama said he did not plan to "us[e] Justice Department resources to try to circum-

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15. *Gonzales*, 545 U.S. at 74 (O'Connor, J., dissenting).

16. MARIJUANA POLICY PROJECT, *State-by-State Medical Marijuana Laws: How to Remove the Threat of Arrest*, MPP F-25 (2011), <http://www.scribd.com/doc/99860988/State-by-State-Laws-Report-2011#scribd>. For a discussion of federal efforts to interfere with state medical marijuana laws during the 2000s, see Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen's Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673, 674–75 (2009).

17. Roger Parloff, *How Marijuana Became Legal*, FORTUNE, [http://archive.fortune.com/2009/09/11/magazines/fortune/medical\\_marijuana\\_legalizing.fortune/index.htm](http://archive.fortune.com/2009/09/11/magazines/fortune/medical_marijuana_legalizing.fortune/index.htm) (last updated Sept. 18, 2009, 3:30 PM ET).

18. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1464 (2009) ("Though the CSA certainly threatens harsh sanctions, the federal government does not have the resources to impose them frequently enough to make a meaningful impact on proscribed behavior.").

19. See, e.g., Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 574 (2010).

vent state laws” when it came to medical marijuana.<sup>20</sup> Once in office, Obama appeared to make good on this pledge when his Department of Justice issued a 2009 memorandum to all federal prosecutors, advising them “not [to] focus federal resources in [their] State on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”<sup>21</sup> At the time, newspapers reported the new policy meant an end to federal medical marijuana raids and prosecutions. The *New York Times*, for example, ran a front-page article with the headline “U.S. Won’t Prosecute in States That Allow Medical Marijuana,” reporting that people operating in compliance with state medical marijuana laws would no longer risk federal prosecution.<sup>22</sup>

The reality did not quite match the rhetoric, however. The memo was only advisory—prosecutorial guidance that, according to the fine print (there for all to see in the memo itself but absent from the media reports), did “not alter in any way the Department’s authority to enforce federal law” and was “intended solely as a guide to the exercise of investigative and prosecutorial discretion.”<sup>23</sup> With local United States Attorneys enjoying a great deal of autonomy,<sup>24</sup> many decided to say “thanks but no thanks” to the advice. Though federal medical marijuana defendants tried to rely on the memo for protection, arguing it should give them an affirmative defense in federal court, courts were not persuaded.<sup>25</sup> As more and more offices ignored the memo, it soon became apparent the DOJ did not have the will to make local DEA agents and federal prosecutors abide by its medical marijuana non-enforcement policy. Soon came a second DOJ memo on medical marijuana, ostensibly issued to provide “additional guidance” about the first memo but, in effect, abandoning it.<sup>26</sup> By 2012, a *Rolling Stone* article ar-

20. Tim Dickinson, *Obama’s War on Pot*, ROLLING STONE, Feb. 16, 2012, <http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216>.

21. Memorandum from David W. Ogden, Deputy Attorney Gen., to Selected U.S. Attorneys (Oct. 19, 2009), available at <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [hereinafter Memorandum from David W. Ogden].

22. David Stout & Solomon Moore, *U.S. Won’t Prosecute in States That Allow Medical Marijuana*, N.Y. TIMES, Oct. 20, 2009, at A1.

23. Memorandum from David W. Ogden, *supra* note 21.

24. Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633, 643 (2011) (“[T]he DOJ is a fragmented agency, one in which several autonomous decision-makers help shape enforcement policy.”).

25. See, e.g., *United States v. Stacy*, 696 F. Supp. 2d 1141, 1149 (S.D. Cal. 2010). The court held that “[e]ven if Defendant’s prosecution were contrary to the guidance set forth in the Memorandum” this fact did not provide any legal protection from federal prosecution. *Id.*

26. Notwithstanding the 2009 memo’s instruction not to “focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with

gued that the Obama administration's "multiagency crackdown on medical cannabis" had gone "far beyond anything undertaken by George W. Bush."<sup>27</sup>

In California, for example, Matthew Davies was prosecuted for running a medical marijuana operation that included compliance lawyers, state and local business permits, and—according to Davies—carefully complied with state law. But federal prosecutors characterized him as "one of the most significant commercial marijuana traffickers to be prosecuted in this district" and charged him with crimes carrying a mandatory ten years in prison.<sup>28</sup> In 2013, Davies pled guilty in exchange for a mandatory sentence of five years.<sup>29</sup> In Montana, meanwhile, a group faced federal charges in 2012 for running a medical marijuana dispensary that had "routinely conducted tours" for local "lawmakers and law enforcement officers."<sup>30</sup> One of the defendants, Chris Williams, decided to go to trial and was convicted of crimes carrying eight decades of mandatory federal prison time.<sup>31</sup> His sentence was reduced to five years after prosecutors took the extraordinary step of reducing the charges after trial.<sup>32</sup>

The Davies and Williams cases help to give a sense of where things stood when voters in Colorado and Washington passed the first state laws legalizing marijuana entirely in 2012. Federal prosecutors in a number of states had re-declared war on medical marijuana, with little sign of letting up.

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existing state laws providing for the medical use of marijuana[.]" the second memo somewhat implausibly claimed that the first "was never intended to shield" medical marijuana dispensaries "even where those activities purport to comply with state law." *Compare* Memorandum from David W. Ogden, *supra* note 21 with Memorandum from James M. Cole, Deputy Attorney Gen., to Selected U.S. Attorneys (June 29, 2011), available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> [hereinafter Memorandum from James M. Cole].

27. Dickinson, *supra* note 20.

28. Adam Nagourney, *In California, It's U.S. vs. State Over Marijuana*, N.Y. TIMES, Jan. 14, 2013, at A3 (quoting Benjamin B. Wagner, United States attorney for E.D. Cal.).

29. Peter Hecht, *Stockton Entrepreneur Saw Future in Pot, Now Eyes Prison*, SACRAMENTO BEE (Jan. 21, 2014, 12:00 AM), <http://www.sacbee.com/news/politics-government/marijuana/article2589267.html>.

30. Gwen Florio, *Medical Marijuana Activist Daubert Gets Probation in Federal Drug Case*, MISSOULIAN (Sept. 7, 2012, 6:15 AM), [http://missoulian.com/news/local/medical-marijuana-activist-daubert-gets-probation-in-federal-drug-case/article\\_e279b332-f850-11e1-abe0-0019bb2963f4.html](http://missoulian.com/news/local/medical-marijuana-activist-daubert-gets-probation-in-federal-drug-case/article_e279b332-f850-11e1-abe0-0019bb2963f4.html).

31. Gwen Florio, *Montana Medical Marijuana Grower Gets 5 Years in Federal Prison*, MISSOULIAN (Feb. 1, 2013, 8:30 PM), [http://missoulian.com/news/local/montana-medical-marijuana-grower-gets-years-in-federal-prison/article\\_89211f90-6ca5-11e2-aa17-001a4bcf887a.html](http://missoulian.com/news/local/montana-medical-marijuana-grower-gets-years-in-federal-prison/article_89211f90-6ca5-11e2-aa17-001a4bcf887a.html).

32. *Id.*



Both Colorado and Washington's laws included a built-in delay before sales were to begin, assigning state agencies the time-intensive job of writing detailed regulatory guidelines. As the two states worked to setup their recreational marijuana regulations, pressure mounted on the Obama administration to announce whether it planned to let the laws go forward unmoled or follow the same approach it had on medical marijuana. Finally, in August 2013, the Department of Justice issued another memo, again advising federal prosecutors not to interfere with state recreational and medical marijuana legalization laws.<sup>33</sup>

Like the 2009 memo, the new incarnation also cautions that it "is intended solely as a guide to the exercise of investigative and prosecutorial discretion."<sup>34</sup> But, whether due to behind-the-scenes pressure from top Justice Department officials or some other force, federal drug agents and prosecutors have mostly abided by the guidance this time (at least so far). Marijuana businesses are openly operating throughout Colorado and Washington, with next to no federal interference. A small town in Washington has even opened up its own government-run marijuana store.<sup>35</sup> Indeed, the lack of federal intervention has led Nebraska and Oklahoma to sue Colorado, in an effort to try and enforce federal law for itself.

Notwithstanding the boom in state-legal marijuana businesses, the DOJ's non-enforcement policy is not a solution to the conflict between state and federal marijuana laws.<sup>36</sup> The policy can be rescinded at any time and, even while it is in force, it is only advisory. If a federal prosecutor is set on bringing marijuana charges in a reform state, it is ultimately in their discretion. The scores of federal medical marijuana raids and prosecutions that took place while the DOJ's 2009 non-enforcement memo was in effect is a testament to just how fragile the current truce between state and federal marijuana laws really is.

Will the 2015 federal budget's medical marijuana rider help to clarify the legal status of medical marijuana patients and caregivers under federal law?

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33. Memorandum from James M. Cole, *supra* note 26.

34. *Id.*

35. Trevor Hughes, *Wash. Town Opens First Government-Run Marijuana Store*, USA TODAY (Mar. 10, 2015, 10:46 PM EDT), <http://www.usatoday.com/story/news/nation/2015/03/09/washington-town-pot-shop/24660263/>.

36. Kreit, *supra* note 9.

## II. THE MEDICAL MARIJUANA APPROPRIATIONS RIDER: OVERVIEW AND THREE POSSIBLE INTERPRETATIONS

The idea of an appropriations rider to block the Department of Justice from spending money to interfere with state medical marijuana laws has been kicking around Congress for some time. In 2007, it came up for a vote in the House of Representatives but failed fairly decisively, attracting only 165 votes at a time when the Democrats had a majority in the chamber.<sup>37</sup> By spring 2014, the political winds had changed enough for the House to narrowly pass it, with a majority of 219 voting in favor.<sup>38</sup> Though the Senate never voted on the provision directly, it ultimately made its way into the final budget for 2015.<sup>39</sup>

While unquestionably significant from a political standpoint, the practical impact (if any) of the appropriations rider remains to be seen. Like the Justice Department memo, the spending restriction is only temporary. It does not change federal marijuana statutes and lasts only as long as it remains in the budget.<sup>40</sup> Congress could decide to lift the restriction next year or the year after that. If and when the appropriations restriction is ever removed, there would be no legal barrier to federal prosecutions for acts committed while the spending limit was in effect. In other words, even activity covered by the spending limit and committed this year (while the limit is in effect) could be prosecuted as soon as the restriction is removed from the federal budget.

While in effect, however, the appropriations restriction is legally enforceable in court,<sup>41</sup> unlike the DOJ's advisory memo. In this sense, the budget limit unquestionably provides a more robust assurance than prosecutorial guidance. What remains to be seen is exactly what it is that the ap-

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37. Marijuana Policy Project, *Congress Votes to End War on Medical Marijuana Patients and Providers*, MPP (May 30, 2014), <http://www.mpp.org/media/press-releases/congress-votes-to-end-war-on.html>.

38. Ryan J. Reilly & Matt Ferner, *House Blocks DEA From Targeting Medical Marijuana*, HUFFINGTON POST (May 30, 2014, 12:24 AM), [http://www.huffingtonpost.com/2014/05/30/dea-medical-marijuana-house-vote\\_n\\_5414679.html](http://www.huffingtonpost.com/2014/05/30/dea-medical-marijuana-house-vote_n_5414679.html).

39. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130 (2014).

40. See *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 146 (2d Cir. 2002). The court discussed the “presumption that an appropriation provision applies only to the fiscal year in which it is enacted.” *Id.*

41. *E.g., Env'tl. Def. Ctr. v. Babbitt*, 73 F.3d 867, 872 (9th Cir. 1995) (“[W]e find that lack of available appropriated funds prevents the Secretary from complying with the Act.”). The Anti-Deficiency Act codifies this rule, providing that government employees may not “make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.” 31 U.S.C.A. § 1341(a)(1)(A) (West 2015).

appropriations rider forbids the Justice Department from doing. By its terms, the provision blocks the use of funds “to prevent . . . States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”<sup>42</sup> A brief discussion on the House floor suggests legislators had federal raids and prosecutions of private parties in medical marijuana states in mind when voting on the bill.<sup>43</sup> But will courts see it that way?

This section briefly describes three possible ways of reading the appropriations rider.

#### A. THE “STATE EMPLOYEES ONLY” INTERPRETATION

The narrowest take on the appropriations rider would limit its reach only to the federal prosecution of state and local officials, or lawsuits against states themselves (on a preemption theory, for example). The prosecution of private parties—medical marijuana patients, growers, and sellers—would be left unaffected. The Department of Justice has announced this is how it interprets the provision.<sup>44</sup> And, in a January 2015 order, an Eastern District of Washington magistrate judge seemed to agree. The judge explained that in his view, the provision “may avoid interference with the legislation and enforcement of state laws by state authorities, but it does not reference or presume to alter the Controlled Substance Act.”<sup>45</sup>

Though the Washington judge did not discuss his reasoning in much detail, the best argument in favor of this reading would seem to go as follows. The restriction only applies to funds used “to prevent . . . States from implementing their own” medical marijuana laws.<sup>46</sup> If the federal government prosecutes a licensed medical marijuana operator in Chicago, the State of Illinois has not been *prevented* from implementing its own laws. Illinois was still able to issue its license to the medical marijuana business

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42. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130 (2014).

43. *E.g.*, 160 CONG. REC. 4984 (2014) (statement of Rep. Titus). Representative Titus explains that under the appropriations amendment “[p]hysicians in [medical marijuana] States will not be prosecuted for prescribing the substance, and local businesses will not be shut down for dispensing the same.” *Id.*

44. Erik Eckholm, *Federal Law, State Law and Medical Marijuana Law*, N.Y. TIMES, Apr. 9, 2015 at A14. Eckholm reports that “the Justice Department asserts that the amendment does not undercut its power to enforce federal drug law” and “says that the amendment only bars federal agencies from interfering with state efforts to carry out medical marijuana laws.” *Id.*

45. *United States v. Gouve*, No. 2:14-PO-0157-JTR-1, 2015 WL 417928, at \*3 (E.D. Wash. Jan. 30, 2015).

46. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130 (2014).

without federal interference, thereby implementing its laws. The licensee getting prosecuted by the federal government may have been operating under Illinois law but—this interpretation would say—was not *implementing* Illinois law.

On this understanding, the Justice Department could not spend money to prosecute a state official for issuing a license to a medical marijuana dispensary. But using money to go after the person who got the license would be fair game, whether or not they were operating in compliance with state law.

#### B. THE “STATE COMPLIANCE ONLY” INTERPRETATION

A second possible interpretation of the appropriations language would block the DOJ from spending money to go after state-compliant medical marijuana operators. Anyone operating in conformity with state medical marijuana laws would receive protection, while anyone who ran afoul of state law would not. An Eastern District of Washington judge adopted this position in ruling on a motion to dismiss marijuana charges in *United States v. Firestack-Harvey*. The *Firestack-Harvey* judge found that the provision might block prosecutions for “conduct *sanctioned* by state medical marijuana laws”<sup>47</sup> but that the defendants, who the government claimed had violated Washington law, did not qualify.

This reading of the provision might allow for a few different possible variations. First, how strictly would a defendant need to have followed state law for the budget limit to apply? On one end of the spectrum would be absolute compliance, where the failure to abide by a single state regulatory provision on a single occasion—like an hours of operation or security camera requirement—would be enough to allow for federal prosecution. Another possibility would be to require only substantial compliance with state law, though a standard like that would leave much more room for interpretation. Second, whatever the required level of compliance, who should make the determination? In the Washington case, it was the judge. But this sort of fact-finding seems to be much better suited to a jury. Third, what burden of proof should apply? Is it enough for the government to allege the defendant was out of compliance (as in the Washington case)? While that sort of approach is most consistent with prosecutorial discretion, it would risk leaving the spending proviso toothless. Without a hearing, the defendant would have no way to test the government’s evidence of lack of state compliance.

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47. *United States v. Firestack-Harvey*, No. 13-CR-0024-TOR-1, 6 (E.D. Wash. Feb. 12, 2015) (Bloomberg Law) (order denying defendants’ motion to dismiss).

### C. THE “STATE LICENSEE” INTERPRETATION

Last, the appropriations restriction might be read to prevent the federal government from bringing marijuana charges against *anyone* licensed under a state medical marijuana law for activity occurring within that state, including licensees who had disobeyed state law. In effect, this interpretation would leave medical marijuana enforcement entirely to the state. If a state medical marijuana licensee or patient failed to comply with state law, the state would be solely responsible for addressing the problem.

At the core of this interpretation is the idea that part of implementing a state medical marijuana law is the authority to impose sanctions for licensees who run afoul of the rules. This interpretation would still leave room for the federal government to go after state licensees for certain sorts of abuses. State medical marijuana programs do not apply to conduct involving other controlled substances, for example, so the Justice Department could still use funds to go after a state-licensed dispensary operator for selling cocaine on the side. Similarly, this interpretation would not bar the use of funds to prosecute a state-legal dispensary or patient that shipped marijuana to a different state. But patients or providers who failed to follow state medical marijuana regulations—by, for example, growing more than was allowed—would be off-limits for federal prosecutors.

## III. WHY THE MEDICAL MARIJUANA APPROPRIATIONS RIDER SHOULD PROTECT STATE LICENSEES, WITHOUT REGARD TO COMPLIANCE WITH STATE LAW

How should courts decide between these possible views of the medical marijuana appropriations rider? At first blush, the second interpretation—which would bind the federal prosecutors’ hands only for state-legal medical marijuana activity—might seem to make the most sense. After all, why should someone who was out of compliance with the state’s medical marijuana law be protected from prosecution under federal law, which prohibits *all* marijuana possession, manufacture, and distribution? In this section, I argue that the provision’s language, its legislative history, and the logistical problems that limiting its application to state-compliant activity would entail weigh in favor of a broad interpretation.

### A. THE APPROPRIATIONS RIDER’S TEXT

The appropriations rider’s text is not a model of clarity, as evidenced by the range of plausible interpretations. Ideally, Congress would have spelled out more precisely what sort of conduct it intended the restriction to cover (and, perhaps, if the amendment makes it into next year’s budget Congress will do just that). But, for now, we are left with a restriction on

using funds “to prevent [medical marijuana] States from implementing their own . . . laws that authorize the use, distribution, possession or cultivation of medical marijuana.”<sup>48</sup>

The “state employee only” interpretation would read these words very narrowly. Federal prosecutors would be barred from spending money on cases against local or state officials, but remain free to prosecute patients and caregivers in medical marijuana states. Though not wholly implausible, this sort of tightfisted reading is very difficult to square with the context and legislative history of the provision. For more than a decade, the federal government raided and prosecuted medical marijuana patients and caregivers. But not once has it prosecuted a government employee for carrying out a state or local medical marijuana law. This might be because issuing a state or local medical marijuana license is not a violation of federal law—it does not make the employee guilty of marijuana possession or distribution, nor would it make the employee an accomplice of the licensee (after all, the employee’s purpose in issuing the license is to effectuate state law, not join a marijuana distribution enterprise). For these reasons, adopting the “state employee only” interpretation would make the appropriations rider essentially meaningless—the Justice Department would only be blocked from spending money on something it had never spent money on before. As discussed more below, the floor debate over the appropriations rider also weighs heavily against the “state employee only” view.

The only basis for adopting the “state employee only” view of the spending provision would be its text. As noted above, the theory would be that prosecuting private medical marijuana licensees does not “prevent” a state from “implementing” its own medical marijuana law in the sense of stopping state action, since the state would remain able to issue its licenses. But the “state employee only” interpretation is actually hard to square with the spending provision’s text because the dictionary definition of the word “prevent” is not so narrow.

Indeed, in adopting the more expansive “state compliance only” interpretation, the judge in *Firestack-Harvey* cited the following relevant dictionary definitions:

The operative words under the rider are prevent, implement, and authorize. Black’s Law Dictionary defines “prevent” as “[t]o hinder or impede,” and “authorize” as “to formally approve; to sanction.” The Oxford English Dictionary defines the verb form of implementation, “implement,” as “[t]o

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48. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130 (2014).

complete, perform, carry into effect” or “to fulfill.”<sup>49</sup>

The Black’s definition of prevent—which includes acts that hinder or impede the implementation of state law—poses a very serious problem for the “state employee only” interpretation. Prosecuting an Illinois medical marijuana licensee does not prevent (meaning stop) the state of Illinois from issuing a license. But it does prevent (meaning hinder or impede) Illinois from carrying into effect or fulfilling its medical marijuana law.

Based on these definitions, the *Firestack-Harvey* court adopted a “state compliance only” interpretation of the spending provision. As discussed above, this interpretation would apply the spending restriction to state medical marijuana licensees, but only for those operating in compliance with their state’s laws. The *Firestack-Harvey* court reasoned that compliance with state law was a prerequisite for application of the spending provision because prosecuting “persons who are *not* in compliance with their state’s medical marijuana laws . . . does not interfere with sanctioned conduct and otherwise remains illegal under federal law.”<sup>50</sup>

The *Firestack-Harvey* court correctly understood the word “prevent” to encompass federal prosecutions that impede state medical marijuana laws (and not just those that block the laws entirely). But once one adopts this view, it becomes much more difficult to find a textual basis for distinguishing medical marijuana licensees who have complied with their state’s regulations from those who have not.

The problem for the “state compliance only” interpretation is that the rider concerns itself with impeding the implementation of state medical marijuana laws, not with impeding *conduct sanctioned by* state medical marijuana laws. Recall, the appropriations provision’s text “prevent[s] [medical marijuana] States from implementing their own . . . laws that authorize the use, distribution, possession or cultivation of medical marijuana.”<sup>51</sup> If the question is whether federal prosecution would impede the implementation of state laws that authorize medical marijuana activity, the case for distinguishing patients and providers on the basis of state compliance grows weak. This is because carrying into effect state medical marijuana laws means imposing state regulatory penalties for licensees who break the rules, not just seeing that those who obey the rules are allowed to operate. To be sure, a federal prosecution would not prohibit the state from dish-

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49. *United States v. Firestack-Harvey*, No. 13-CR-0024-TOR-1, at 5-6 (E.D. Wash. Feb. 12, 2015) (Bloomberg Law) (order denying defendants’ motion to dismiss) (citations omitted).

50. *Id.* at 6.

51. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130 (2014).

ing out its own punishment. But, of course, the prosecution of state licensees would not prohibit the states from issuing licenses.

The case for concluding that federal prosecutions of state licensees who break state rules would impede the state's ability to carry out its regulatory scheme is fairly straightforward. The risk of severe federal criminal penalties (enacted to enforce marijuana prohibition) is irreconcilably at cross-purposes with state medical marijuana regulations (enacted to oversee a legal marketplace).<sup>52</sup> A state regulator in a legal market might impose a minor criminal sanction, a small fine, or perhaps even a warning for a licensee or patient who is out of compliance. But a federal marijuana prosecution would mean steep criminal penalties. A typical dispensary would easily meet the one-thousand-plant quantity trigger for a ten-year-mandatory minimum sentence.<sup>53</sup> Exposing a dispensary operator to that sort of federal penalty simply for failing to abide by state regulations would surely impede the implementation of the state's regulatory system. Not only would it leave individual operators in danger of long prison terms, it would undermine the regulatory system itself by making state-level enforcement more difficult. Marijuana operators would be loath to self-report violations to the state (or even check to confirm compliance) if they knew the punishment might be a federal sentence, rather than a state fine.

The best textual support for the "state compliance only" interpretation would seem to be the inclusion of the word "authorize" in the appropriations proviso. As the *Firestack-Harvey* court observed, "'authorize" is defined "as 'to formally approve; to sanction.'"<sup>54</sup> But the placement of the word "authorize" in the rider—"State laws that authorize the use, distribution, possession, or cultivation of medical marijuana"<sup>55</sup>—reveals that it is there only to identify the state laws that are covered. The rider does not say, for example, that the Justice Department may not use funds to prosecute "conduct authorized by States laws pertaining to the use, distribution, possession, or cultivation of medical marijuana." If, indeed, Congress had intended the restriction to be limited to state-compliant conduct, language like this would have been an easy drafting option. Instead, the spending provision is focused on state laws authorizing medical marijuana, not individual

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52. See, e.g., Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 746 (2014). Larkin argues against the use of the criminal law . . . to enforce a regulatory regime because "[t]he function of the criminal law is to enforce [a] moral code," while "the function of the regulatory system is to efficiently manage components of the . . . economy." *Id.*

53. 21 U.S.C.A. § 841(b) (West 2015) (providing for a mandatory ten year sentence for offenses involving one-thousand-marijuana plants or more).

54. *Firestack-Harvey*, No. 13-CR-0024-TOR-1, 5-6 (order denying defendants' motion to dismiss) (citations omitted).

55. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130 (2014).



conduct. And federal spending that impedes the implementation of those laws is the target of the restriction.

One last textual data point that might support the “state licensee” interpretation: the Department of Justice’s own guidance. The August 2013 DOJ memorandum advises federal prosecutors to consider “whether the [marijuana] operation is demonstrably in compliance with a strong and effective state regulatory system” before pursuing charges.<sup>56</sup> The 2009 DOJ memo counseled against using federal resources “on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”<sup>57</sup> Congress was surely aware of these DOJ memos when it drafted the spending provision. If Congress had intended to link the appropriations restriction’s coverage to compliance with state law, it could have easily used similar language. Instead, it employed broader wording that applies to any funds used to prevent state medical marijuana law implementation, not simply funds used to prosecute state law-compliant individuals.

## B. LOGISTICS

There is another reason courts should be wary of the “state compliance only” interpretation: it would be very hard to administer. As the overview of the “state compliance only” option indicates, adopting it would require courts to resolve a number of tricky problems. Would absolute compliance with state law be required, or would substantial compliance suffice? What should the government’s burden of proof be when alleging state law non-compliance—is it enough to allege the defendants failed to abide by state law or should the government be required to put on evidence? If the latter, should judges or juries decide the issue? These questions point to a fundamental flaw in a “state compliance only regime.” Federal law does not distinguish between medical and nonmedical use of marijuana—all possession, sale, and manufacture of marijuana is equally illegal, for any purpose and regardless of state law.<sup>58</sup> As a result, it is not clear there is any effective way for federal courts to determine who is following state medical marijuana laws.

The *Firestack-Harvey* case is particularly illuminating on this point. There, the judge adopted the “state compliance only” interpretation. Applying it resulted in a denial of the defendants’ motion to dismiss. The court explained that “[a]ccording to the United States, the records obtained from

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56. Memorandum from James M. Cole, *supra* note 26.

57. Memorandum from David W. Ogden, *supra* note 21.

58. The one exception, not relevant here, is marijuana research that has received the necessary federal approvals.

the search evidence the sale of marijuana to persons other than qualifying patients participating in the oversized collective garden. Because such conduct is not authorized or sanctioned by Washington's medical marijuana laws," the appropriations rider did not block the prosecution.<sup>59</sup>

A few weeks later, the case went to trial. And the jury acquitted the defendants on all charges with the exception of manufacture. One of the charges it acquitted on was conspiracy to distribute marijuana.<sup>60</sup> This means that the federal government failed to convince the jury that the defendants were selling marijuana.

The jury's verdict in *Firestack-Harvey* suggests that, contrary to the federal government's claim to the judge, the defendants may have been in compliance with state law after all. If the defendants did not conspire to sell marijuana *at all*, then the basis for the government's allegation that they ran afoul of Washington's law by selling marijuana "to persons other than qualif[ied] patients"<sup>61</sup> disappears. Nevertheless, unable to argue state-compliance to the jury, the defendants were convicted of manufacture.

As *Firestack-Harvey* reveals, the "state compliance only" view suffers from an unavoidable chicken-and-egg problem. The appropriations provision prohibits the DOJ from spending money. But if it only protects licenses that are in compliance with state medical marijuana laws, the Department of Justice *will have already used funds* on the prosecution by the time any determination about state compliance has been made. If, for example, a judge were to find a defendant facing federal prosecution had followed state law and dismissed the charges on that basis, the federal government would have already spent money charging the defendant and arguing the state law compliance issue to the court. Defendants like those in *Firestack-Harvey* are in an even more untenable position. They might find themselves convicted of a federal marijuana crime despite a verdict that suggests compliance with state law, with an appeal as their only possible recourse.

All this is to say that effectuating a spending restriction on prosecuting medical marijuana patients and providers who have followed state law will be very difficult (if not impossible) as a practical matter. This is because by the time a judge or jury has the opportunity to decide the issue, the money will have already been spent.

The "state licensee" interpretation avoids these problems. Determining whether someone is a state-licensed medical marijuana patient or provider

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59. *Firestack-Harvey*, No. 13-CR-0024-TOR-1, 7 (order denying defendants' motion to dismiss).

60. Kip Hill, *Federal Jury Acquits on 4 of 5 Pot Charges Against Kettle Falls Five*, THE SPOKESMAN-REVIEW (Mar. 3, 2015), <http://www.spokesman.com/stories/2015/mar/03/pot-growers-federal-charges/>.

61. *Firestack-Harvey*, No. 13-CR-0024-TOR-1, 7 (order denying defendants' motion to dismiss).

will typically be a straightforward task. The prosecutor will be able to figure this out relatively easily before deciding whether to file charges and spending funds pursuing the case. In sum, if the appropriations rider's text is ambiguous as between the "state compliance only" and "state licensee" choices, ease of administration should weigh heavily in favor of the latter option.

### C. LEGISLATIVE HISTORY

Judges often disagree about the relevance of legislative history to statutory interpretation. To the extent it matters, however, the brief legislative history surrounding the appropriations restriction points very clearly away from the "state employee only interpretation." When it comes to the "state compliance only" and "state licensee" options, however, it is more ambivalent.

Some of the representatives' remarks indicate that state-law compliance might be necessary to receive protection under the spending amendment. For example, California Congressman Sam Farr explained that, in his view, "[t]his [amendment] is essentially saying, look, if you are following State law, you are a legal resident doing your business under State law, the Feds just can't come in and bust you and bust the doctors and bust the patient."<sup>62</sup> Nevada's Dina Titus elaborated that the amendment "simply ensures that patients do not have to live in fear when following the laws of their States and the recommendations of their doctors. Physicians in those States will not be prosecuted for prescribing the substance [marijuana], and local businesses will not be shut down for dispensing the same."<sup>63</sup>

Others took a broader view, however. Representative Earl Blumenauer of Oregon spoke in favor of the amendment, saying that it would "get the Federal Government out of the way. Let this process work going forward where we can have respect for states' rights and something that makes a huge difference to hundreds of thousands of people around the country now and more in the future."<sup>64</sup> The measure's sponsor, Dana Rohrabacher of California, described the proposal in broad federalist terms and argued that "[f]or those of us who routinely talk about the 10th Amendment, which we do in conservative ranks, and respect for State laws, this amendment should be a no-brainer."<sup>65</sup> Speaking in opposition, Maryland's Andy Harris argued that "the amendment as written would tie the DEA's hands beyond medical

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62. 160 CONG. REC. 4984 (2014) (statement of Rep. Farr).

63. 160 CONG. REC. 4984 (2014) (statement of Rep. Titus).

64. 160 CONG. REC. 4984 (2014) (statement of Rep. Blumenauer).

65. 160 CONG. REC. 4983 (2014) (statement of Rep. Rohrabacher).

marijuana,” perhaps hinting at the possibility that all state-licensees (not just operators in compliance with state law) would be protected.<sup>66</sup>

In a choice between the “state compliance only” and “state license” interpretations, the legislative history appears inconclusive. Some comments would surely point toward the former option, while others suggest the latter. None of the comments, however, support the very narrow “state employee only” view.

#### IV. CONCLUSION

When it comes to marijuana law, the current state of affairs—a nationwide federal prohibition with more than half the states having adopted a medical marijuana law in some form and recreational legalization laws in four states—is untenable. Unless the state-level trend quickly and dramatically reverses course, a change to federal marijuana laws is inevitable.

This year, Congress took a small step in that direction by including a medical marijuana-related appropriations rider in the 2015 federal budget. Hailed by some as an “end[] [to] the federal government’s ban on marijuana,”<sup>67</sup> its true impact is likely to be much more modest. The change is only temporary. If similar language is not included in next year’s budget, the ban resumes. Even while it is in effect, however, the spending restriction’s impact remains to be seen. This essay argues that courts should interpret the restriction to block the federal prosecution of all state-licensed medical marijuana patients and providers for intrastate marijuana activity, whether or not they followed all of the applicable state medical marijuana regulations. This would leave state medical marijuana enforcement entirely to the states, at least as long as the spending restriction remains in place.

Whether or not you agree with my position on the 2015 federal budget’s medical marijuana provision, we may find common ground yet. If Congress decides to include a medical marijuana spending restriction in the 2016 budget, let’s all hope it uses clearer language than it did this year.

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66. 160 CONG. REC. 4983 (2014) (statement of Rep. Harris).

67. Harper, *supra* note 1.