**HB 2655 and the Supremacy Clause: an unlikely preemption**

**Introduction**

HB 2655 would amend ORS 659A.315 to make it an unlawful employment practice for an employer to require, as a condition of employment, an employee's abstinence during nonworking hours from using "a substance that is lawful to use under the laws of this state," except insofar as that use has an actual impact on the workplace, *viz.*, if the restriction reflects a *bona fide* occupational qualification or if it relates to impairment in the workplace. This would expand the scope of the current statute to include, in addition to the use of tobacco products, the use of other substances that are lawful to use under Oregon law, such as alcohol, sugar, or marijuana. The amendment would also explicitly permit employers to restrict the employee's use of such substances to the extent that they might impair the employee in the workplace.

HB 2655 does not create any conflict with Federal law, or, in particular, with the Controlled Substances Act, 21 USC §801, *et seq.* (CSA). There is nothing in the CSA, either express or implied, that suggests a Congressional intent to preempt the State's regulation of employment relationships within the State or to prohibit this kind of legislation.

**Discussion**

The Supremacy Clause, Article VI, section 2 of the US Constitution,[1] provides that the Constitution and Federal laws enacted thereunder are the supreme law of the land and will

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[1] 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 [sic] in the Constitution or Laws of any State to the Contrary notwithstanding.

preempt those state or local enactments that are in conflict. As the Oregon Supreme Court recently summarized:

> "The United States Supreme Court has identified three circumstances that result in the preemption of state law by federal law: (1) when the federal law expressly provides for preemption; (2) when a congressional statutory scheme so completely occupies the field with respect to some subject matter that an intent to exclude the states from legislating in that subject area is implied; and (3) when an intent to preempt is implied from an actual conflict between state and federal law. *Crosby v. National Foreign Trade Council,* 530 US 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). The third type of preemption exists not only when it is physically impossible to comply with both the state and federal law, but when 'under the circumstances of the particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz,* 312 U.S. 52, 67-68, 61 S.Ct. 399, 85 L.Ed. 581 (1941)."

*Willis v. Winters*, 350 Or. 299, 308 (2011).[2] *See also Freightliner Corp. v. Myrick,* 514 U.S. 280, 287 (1995).

The inquiry into the "scope of a statute's preemptive effect is guided by the rule that ''[t]he purpose of Congress is the ultimate touchstone' in every preemption case.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (internal citations omitted); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (holding that the preemptive effect of a federal act is "governed entirely" by an express preemption provision).

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[2] Thus, the typology of preemption: 1) express preemption; 2) field preemption; and 3) implied preemption, which includes preemption by impossibility and obstacle preemption. The second circumstance, "field preemption," is often treated as an "actual conflict," as that term is used in the implied preemption context. Whether considered as an "actual conflict" or as a standalone consideration, the Congressional intent to preempt a particular field may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touches a field in which federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). As will be discussed, *post*, the plain language of 21 USC §903 makes it clear that field preemption is not part of the calculus under the CSA in this analysis.

Even in the absence of express preemption language in the Federal statute, preemptive intent may still be implied.

> "Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.' *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 111, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (Kennedy, J., concurring in part and concurring in judgment); *see Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). Our precedents 'establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act.' *Gade*, *supra*, at 110, 112 S.Ct. 2374, 120 L.Ed.2d 73."

*Chamber of Commerce of United States of America v. Whiting,* 563 U.S. 582, 607 (2011) (plurality opinion). Thus,

> "[w]hen addressing questions of express or implied preemption, we begin our analysis 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act *unless that was the clear and manifest purpose of Congress*.' *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)."

*Altria Group,* 555 U.S. at 77 (emphasis added). That assumption is based on a profound "respect for the States as independent sovereigns in our federal system." *Wyeth v. Levine*, 555 U.S. 555, 565 n 3 (2009) (internal quotation marks omitted). It is for that reason that "Congress cannot compel the States to enact or enforce a federal regulatory program." *See Printz v. United States*, 521 U.S. 898, 935 (1997) (so stating); *New York v. United States*, 505 U.S. 144, 162 (1992) ("the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions").[3] In further deference to the sovereignty of the

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[3] This is an exposition of Supreme Court's so-called anti-commandeering doctrine, based on the Tenth Amendment reservation clause. The federal government may not commandeer states by forcing them to enact laws or by requiring state officers to assist the federal government in enforcing its own laws within the state. *See Printz*, *supra*; E. Chemerinsky, J. Forman, A. Hopper, S. Kamin, "Cooperative Federalism and Marijuana Regulation," 62 *UCLA L. Rev.* 74,

states, "when the federal courts attempt to determine whether a state law stands as an obstacle to congressional purposes, they attempt to define the effect of the state statute with considerable precision. *See, e.g., Florida Avocado Growers v. Paul*, 373 U.S. 132, 144-46, 83 S.Ct 1210, 10 L.Ed2d 248 (1963)." *Willis*, 350 Or. at 312.

Congress has simplified the analysis of any preemptive effect the CSA might have on the viability of HB 2655 by expressly identifying its intent:

> "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 USC §903 (emphasis added).

Congress has thus affirmatively declared that no field preemption of state law, including state criminal penalties, was intended by the passage of the CSA, so long as the state statute at issue was in an arena in which the state was authorized to act. The express Congressional intent was that state law may be preempted by the CSA only in the case of a "positive conflict" between the state and federal provisions such that the two are incompatible. "Positive conflict," in this context, has been construed as being essentially the same "actual conflict" (impossibility and/or obstacle preemption) as discussed by the court in *Willis,* 350 Or. 309, n 5; *see also Wyeth,* 555 U.S. at 567; *Emerald Steel Fabricators, Inc. v. BOLI*, 348 Or. 159, 174-5 and n 15 (2010).

Turning to the application of the Supremacy Clause to HB 2655, the bill prohibits termination of an employee for using "a substance that is lawful to use under the laws of this

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102-3 (2015).

state" during nonworking hours. The first question must be whether, due to the fact that it includes in its employee protection the use of marijuana, a controlled substance under the CSA, HB 2655 is preempted by federal law. Following the analytical framework described by the Court in *Willis*, the express intent of Congress was not to preempt state legislation by way of field preemption, but to consider whether there is a positive or actual conflict. There isn't.

Under Oregon law, the use of marijuana is lawful (*see, e.g.,* ORS 475B.301(2), .337, which impose no criminal penalty on persons over the age of 21 for use or possession of relatively small amounts of marijuana). The statutes do not "authorize" any conduct prohibited by Federal law or, for that matter, any conduct at all: ORS ch 475B simply declines to impose a criminal penalty for the use and possession of marijuana, within its stated limitations, notwithstanding the fact that the conduct is prohibited by federal law. *Cf. Emerald Steel*, 348 Or. at 178 (2010) (holding that former ORS 475.306(1) – *cf* current ORS 475B.791(21) – was preempted by the CSA as a matter of obstacle preemption because it *authorized* persons holding medical marijuana permits to use marijuana, which is conduct prohibited by the CSA). In drawing the distinction between the authorization and the decriminalization components of the medical marijuana law, the Court noted: "Congress lacks authority to require states to criminalize conduct that the states choose to leave unregulated, no matter how explicitly Congress directs the states to do so." *Id.*, at 186. *See also New York v. United States,* 505 U.S. at 166 ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."); *Abbate v. United States*, 359 U.S. 187, 195 ("the States under our federal system have the principal responsibility for defining and prosecuting crimes"); *Willis,* 350 Or. at 309, *citing Murphy v. Waterfront Commission of New*

*York*, 378 U.S. 52, 96 (1964) (White, J, concurring) ("states have primary responsibility for the administration of the criminal law and federal preemption of areas of crime control traditionally reserved to the states has been relatively unknown"). In any event, nothing in ORS ch. 475B prevents the federal government from enforcing its own marijuana laws against marijuana users in Oregon if the federal government chooses to do so. Plainly the legislative decision not to impose criminal penalties for marijuana use under state law does not in any way create a conflict, either express or implied, with the CSA, and thus the CSA does not preempt ORS ch 475B, insofar as it decriminalizes marijuana. *See Willis*, 350 Or. at 312.

The next question is whether HB 2655 itself creates such conflict. There is, again, a high threshold to be met if a state law is to be preempted for conflicting with the purposes of a federal act, and where, as here "'the field which congress is said to have pre-empted' includes areas that have 'been traditionally occupied by the States, congressional intent to supersede state laws must be "*clear and manifest.*" *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S., at 230." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (emphasis added).

The Supreme Court in *Gonzales v. Raich*, 545 U.S. 1 (2005) determined that the central objectives of Congress in enacting the CSA – "the ultimate touchstone" – "were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Id.,* at 12-13. To accomplish those objectives, Congress created a regulatory scheme that classifies controlled substances, and criminalizes and punishes their unauthorized possession, manufacture and distribution. *Id.* at 13; *see Emerald Steel*, at 173.

Congress has expressly declared that the CSA is not preemptive of the entire field of drug

law, and the states are not categorically prohibited from legislating regarding controlled substances. *See* 21 USC § 903. As discussed above, there is nothing in the "substance that is lawful to use under the laws of this state" language, in and of itself, that triggers any preemption concerns. Furthermore, the express language in the CSA is duly deferential to the State's legislative authority and there is nothing in that language that suggests the Act is in any way concerned with preempting the states from legislating about what have traditionally and exclusively been state *employment law* matters. *See De Canas v. Bica*, 424 U.S. 351, 356 (1976) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."). Thus, any "positive conflict," and, therefore, any preemption, must be in the nature of the kind of "actual conflict" described in *Willis*, 350 Or. at 308. A review of HB 2655 in that light reveals no conflict of any sort.

First, as recognized by the Supreme Court in *Raich*, the CSA is essentially a criminal statute. 545 U.S. at 13. There is nothing in the CSA that compels or even encourages an employer to take any kind of punitive or remedial action, or to do anything at all, with regard to an employee who might smoke marijuana or consume alcohol on the weekend or on vacation. There is certainly nothing that requires the employer to summarily terminate the employee. As far as the CSA is concerned, an employer may ignore an employee's weekend marijuana consumption with complete impunity. The CSA, as written, is entirely indifferent to employees and employers and the effect of a law like as HB 2655, which would prohibit an employer from taking such action against an employee for non-work-related conduct. Perhaps more pointedly, as is true of ORS 475B.301(2) and .337, *ante*, nothing in HB 2655 would prevent the federal government from enforcing its marijuana laws against marijuana users in Oregon if the federal government wanted

to do so. There is simply no logical reason why both the CSA and the HB 2655 amendments cannot peacefully coexist in the same legislative universe.

Secondly, there is nothing in the proposed statutory amendment that might stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." As noted, those purposes are "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." The means chosen by Congress to accomplish that goal – the sole means – is the criminalization of certain conduct and the prosecution, conviction and punishment of persons who engage in that conduct; the CSA doesn't use employers as its enforcement agents. The Act has been in place for more than 45 years and, in furtherance of its purposes, Congress has never seen any need to depend on the participation of employers as conscripts or allies, or to require them to do or refrain from doing anything, or to even mention them in the Act.[4] Whether, under present law, an employer voluntarily decides to fire employees for conduct that would be protected under HB 2655 is a sufficiently indeterminate event that it cannot be said that the CSA can reasonably rely on that kind of employer behavior as a means to achieve its purpose. In that regard, HB 2655 changes nothing and presents no more of an obstacle than does current law.

The consequence of determining that HB 2655 presents an obstacle to the accomplishment

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[4] It is not the province of the court to read such absent language into this already complex and comprehensive statutory scheme that has for that entire time explicitly and exclusively relied on criminal prosecution as its mode of enforcement *See, e.g., Iselin v. United States*, 270 U.S. 245, 251 (1926) (doing so would result "not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court."); *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *see also United States v. Locke*, 471 U.S. 84, 95 (1985) ("[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that the legislative purpose is expressed by the ordinary meaning of the words used.")

of the objectives of Congress necessarily requires the assumption that putting people out of work is an effective – or even logical – way to "conquer drug abuse." This is a far from obvious or even demonstrable proposition.[5] If the conclusion is to be that HB 2655 is an obstacle, then employers *must* be permitted under state law to terminate employees who are merely suspected of using marijuana, even though they may not have, or, if they did, it was in a manner entirely unrelated to job safety, qualification or performance. However, such a Congressional restriction on the state's historic and traditional regulation of its own domestic employment relationships is inconsistent with the anticommandeering doctrine, discussed *ante*, at n. 3 and accompanying text, and is not a predicate for preemption. Beyond that, in terms of the Congressional purpose – conquest of drug abuse – requiring Oregon to permit employers to fire employees for non-job-related use of marijuana likely would have the unintended effect of *increasing* the risk of substance use, substance abuse disorders and relapse after successful treatment (*see* n 5, *ante*); perhaps ironically, HB 2655 may actually remove an obstacle to the achievement of that Congressional purpose.

Another problem arises from the nature of the CSA itself. As discussed above, the method Congress has determined to accomplish its objective through the CSA is by criminal prosecution and punishment. If HB 2655 is to be considered an obstacle, and employers *must* be permitted under state law to fire employees for non-work related marijuana use in the service of Congressional purposes, it is difficult to escape the fact that termination contemplated by the

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[5] In fact, the contrary appears to be true. *See, e.g.*, D. Henkel, "Unemployment and substance use: a review of the literature (1990-2010)," 4(1) *Current Drug Abuse Reviews*, 4-27 (2011) ("Unemployment is a significant risk factor for substance use and the subsequent development of substance use disorders. . .Unemployment increases the risk of relapse after alcohol and drug addiction treatment." *Id.*, at 4).

CSA would necessarily also be punishment inflicted on offending employees. This would impose an extra-judicial sanction on them without so much as a glimmering of due process, which is especially troubling in an at-will employment state like Oregon, in which any process at all is the exception rather than the rule. Indeed, if employers *must* be allowed to punish workers by firing them in order to effectuate federal government policy, such employers would be acting as agents of the government in doing so – they couldn't really be seen any other way. This must be viewed as nothing less than an effort to deprive people of liberty and property interests without due process, and that is something not to be tolerated lightly. In any case, if that were the intent of Congress, it is neither clear nor manifest nor defensible.

HB 2655, as an exercise of the state's undoubted historical and traditional power to regulate employment relationships within the state, would prohibit employers from terminating employees for marijuana use unless it impacts their qualifications or their conduct or performance in the workplace. There is nothing to suggest that the "*the clear and manifest purpose of Congress*" in enacting the CSA requires otherwise.

*Emerald Steel* is not to the contrary. In that case, the employee had a registry identification card under the Oregon Medical Marijuana Act and used marijuana for a medical problem, for which use he was discharged by his employer. As is relevant to the present discussion, the employee's position was that since medical marijuana was authorized, and, hence, lawful, under Oregon law, ORS 659A.112 prohibited his termination for use of medical marijuana. The Court disagreed, holding that, although its use may have been lawful under Oregon law, that portion of the Oregon Medical Marijuana Act that affirmatively *authorized* medical marijuana use was preempted by the CSA. The Court's reasoning was that ORS 659A.112 prohibits employment

discrimination based on disability. ORS 659A.124 denies the protections of ORS 659A.112 to any employee who is currently engaging in the illegal use of drugs. ORS 659A.122(2) excludes medical marijuana use from the definition of "illegal use of drugs" for the purposes of the state employment discrimination laws if state law authorizes that use. Former ORS 475.306(1) authorized the use of medical marijuana. To the extent that it did so, it posed an obstacle to the full accomplishment of Congress's purpose, in enacting the CSA, of preventing all use of marijuana, including medical uses. Federal law thus preempted that subsection, leaving it "without effect." Consequently, there was no enforceable state law that either authorized the employee's use of marijuana or excluded its use from the "illegal use of drugs," as that phrase was used in ORS 659A.124. The use of medical marijuana, therefore, was not included in the exception in ORS 659A.124, and the employee's termination did not implicate ORS 659A.112.

In reaching that conclusion the Court went to some lengths the explain that the holding was narrowly confined to the statutory language before it, specifically that part of ORS 475.306 that affirmatively authorized the use of medical marijuana, and was not directed at the laws which decriminalized the use and possession of marijuana.

> "We note that our holding in this regard is limited to ORS 475.306(1); we do not hold that the Controlled Substances Act preempts provisions of the Oregon Medical Marijuana Act that exempt the possession, manufacture, or distribution of medical marijuana from state criminal liability."

*Emerald Steel*, 348 Or. at 189; *see also id.*, at 172 n 12.

In reaching that conclusion, the Court distinguished affirmative authorization from exemption from criminal liability, and agreed with the Oregon Attorney General's opinion (*id.*, at 179-80 and n 17) that there was nothing in Federal law that preempted a state from decriminalizing marijuana: "As the Attorney General's opinion explained, however, Congress

lacks the authority to compel a state to criminalize conduct, no matter how explicitly it directs a state to do so." *Id.*, at 186. Most significantly, the Court noted that the legislature might well be able to draft legislation that accomplished the same goal without running afoul of the CSA. *Id.*, at 172, n 12. ("We also express no opinion on the question whether the legislature, if it chose to do so and worded Oregon's disability law differently, could require employers to reasonably accommodate disabled employees who use medical marijuana to treat their disability.").

The same may be said for other aspects of employment law as well. The footnote in *Emerald Steel* is, in effect, an invitation to the legislature to amend its employment laws to account for the statutory changes in Oregon law, which are now embodied in ORS ch. 475B. HB 2655 accepts that invitation and would amend ORS 659A.315 to broadly address the Court's preemption concerns and to effectively supersede *Emerald Steel.*

**Conclusion**

The criminal law and employment law are two areas that have been traditionally occupied by the states as an incident of their historic police powers. The presumption is that laws enacted by the states in the exercise of that power are not superseded by federal law unless preemption was the clear and manifest intent of Congress. That intent, expressed in the language of the CSA itself, is that state laws relating to those traditional exercises of the police power – including criminal and employment laws – can be preempted only if there is a positive conflict between the state and federal enactments so that they cannot consistently stand together.

There is no positive conflict and no incompatibility between HB 2655, or any of its statutory underpinnings, and the CSA. HB 2655 stands as no obstacle to the full effectuation of the CSA. HB 2655 would in all rational likelihood withstand any Supremacy Clause challenge.