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October 6, 2026

Senator John Carley
South Dakota State Senator
Vice Chair, Medical Marijuana Oversight Committee
500 E. Capitol Ave.
Pierre, SD 57501
Via email: john.carley@sdlegislature.gov

OFFICIAL OPINION 26-06

Re: Official Opinion Concerning Impact of Federal Rescheduling of Marijuana

Dear Vice Chair Carley,

In your capacity as a member of the South Dakota Medical Marijuana Oversight Committee, you, along with Chair Josephine Garcia, Senator Lauren Nelson, and Representative Bobbi Andera, have requested an official opinion from the Attorney General on the following consolidated question:

QUESTION:

What specific impact will the federal government's reclassification of marijuana to a Schedule III controlled substance have on South Dakota's existing medical-marijuana program?¹

¹ This memorandum addresses exclusively the question of the impact of the federal rescheduling of Marijuana to a Schedule III controlled substance by the Drug Enforcement Administration. The below analysis omits examination of the discretionary enforcement of any additional federal regulation of marijuana by other federal entities as those questions existed prior to the rescheduling at

ANSWER:

Because current Drug Enforcement Administration (DEA) administrative rules permit state medical-marijuana facilities to continue operating with proper federal and state registration, the federal rescheduling of marijuana will likely have a negligible impact on South Dakota's medical-marijuana program.

FACTS:

South Dakota's current medical-marijuana program arose from Citizen Initiated Measure 26 approved by the South Dakota voters on November 3, 2020, and effective on July 1, 2021. See SDCL ch. 34-20G. Since that time, the Legislature has continued to refine the requirements governing South Dakota's medical-marijuana program. The Medical Marijuana Oversight Committee is responsible for evaluating the program and making recommendations to the Legislature. SDCL §§ 34-20G-92 through -93.

While marijuana is not scheduled in South Dakota as a controlled substance pursuant to SDCL ch. 34-20B, possession and distribution of marijuana remain prohibited outside the medical marijuana program. *E.g.*, SDCL § 22-42-6.

As South Dakota law surrounding medical marijuana has continued to develop, so too has federal law. On April 28, 2026, the DEA issued a final order that rescheduled marijuana (and marijuana extract) that is subject to a state medical-marijuana license, as well as naturally derived delta-9-tetrahydrocannabinols found therein, to Schedule III. The same is true for these substances when contained in FDA-approved products. Other marijuana remains in Schedule I. See Schedules of Controlled Substances: Rescheduling of Food and Drug Administration Approved Products Containing Marijuana From Schedule I to Schedule III; Corresponding Change to Permit

issue and will persist into the future. Further, while the changes to the federal rule are very recent and remain untested, this Opinion prioritizes the specific regulation over more general enforcement statutes consistent with the tenets of statutory construction relative to 21 C.F.R. § 1301.13(k)(1) (2026). "[I]t is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S. Ct. 2065, 2071, 182 L. Ed. 2d 967 (2012) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992)).

Requirements, 91 Fed. Reg. 22714 (Apr. 28, 2026) (to be codified at 21 C.F.R. pts. 1300, 1301, 1308, and 1312).²

The Medical Marijuana Oversight Committee is now compelled to consider whether South Dakota's existing medical-marijuana program conflicts with the DEA's current scheduling of marijuana. Because federal rules explicitly accommodate state medical-marijuana programs, no conflict exists.

IN RE QUESTION:

The interplay between federal law and state law is governed by the doctrine of federal preemption. "The general law of preemption is grounded in the Constitution's command that federal law 'shall be the supreme Law of the Land.'" *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1021-22 (8th Cir. 2015) (quoting *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Pracs. Litig.*, 621 F.3d 781, 791 (8th Cir. 2010)). This foundational principle—commonly known as the Supremacy Clause—establishes that federal law overrides conflicting state laws when Congress has acted within its constitutional authority. However, courts have consistently emphasized that the doctrine of preemption is not to be applied lightly. As the Eighth Circuit reiterated, "Congress does not cavalierly pre-empt state-law causes of action." *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d. 700 (1996)).

In determining whether federal law should be interpreted as preempting state law, courts operate with a presumption against preemption in areas traditionally regulated by the states. "In the interest of avoiding unintended encroachment on the authority of the States, ... a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption." *Id.* at 1022 (quoting *Heart of Am. Grain Insp. Serv., Inc. v. Mo. Dep't of Agric.*, 123 F.3d 1098, 1103 (8th Cir. 1997)). This judicial hesitancy reflects the longstanding respect for the role of states in regulating matters such as health, safety, and agriculture—areas where states have historically exercised broad police powers. See *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-64, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993). A federal court should therefore only find that a state law is preempted when doing so aligns with the "clear and manifest purpose of Congress," a standard

² Fed. Reg., <https://www.federalregister.gov/documents/2026/04/28/2026-08176/schedules-of-controlled-substances-rescheduling-of-food-and-drug-administration-approved-products> (last visited Oct. 5, 2026).

that can be satisfied either through the statute's express language or by analyzing its overall structure and underlying objectives. *Id.*

Federal law may preempt state law in three ways. *Bio Gen, LLC v. Sanders*, 690 F. Supp. 3d 927, 936 (E.D. Ark. 2023).

First, federal law may preempt state law where Congress has expressly stated that it intends to prohibit state regulation in a particular area. Second, federal law may preempt state law where Congress has implicitly preempted state regulation by the "occupation of a field." A field is occupied when the federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Finally, even if Congress has not completely precluded the ability of states to regulate in a field, state regulations are preempted if they conflict with federal law.

Id. at 936-37.

Here, the federal rescheduling of marijuana does not preempt South Dakota's medical-marijuana program because Congress has not expressly preempted state action, it has not totally occupied the field of marijuana regulation, and South Dakota's medical-marijuana law does not conflict with the federal scheduling. In fact, under the DEA's April 2026 rule, an existing manufacturer, distributor, or dispensary operating under a valid state license may now do so in compliance with federal law if they register with the DEA. 21 C.F.R. § 1301.13(k)(1) (2026).³

South Dakota has faced a somewhat analogous situation previously. The 2018 Farm Bill "decoupled hemp from the federal definition of marijuana." See *Hempquarters 605 v. Noem*, 3:24-cv-03016-ECS (Opinion and Order Denying Motion for Preliminary Injunction) at *3. The 2018 Farm Bill also contained a specific "no preemption" clause, expressing that the law does not preempt or limit state hemp regulations that are more stringent than federal law. *Id.* at *4. The district court agreed with the State that "police powers" are traditionally reserved to the states and that the "no preemption" clause of the Farm Bill eliminated any potential for preemption. *Id.* at *9-10.

Similarly, federal rules currently permit actors in the state medical-marijuana industry to continue to function so long as they obtain the proper federal and state credentials. 21 C.F.R. § 1301.13(k)(1) (2026). Because federal law

³ Code of Fed. Regs., <https://www.ecfr.gov/current/title-21/chapter-II/part-1301/subject-group-ECFR0f5a129834f0129/section-1301.13> (last visited Oct. 5, 2026).

accommodates the state's medical-marijuana program, state law does not conflict with dispensing of Schedule III marijuana or cannabinoid medication under federal law. As noted above, the DEA's April 2026 final rule rescheduled marijuana that is subject to a state license to Schedule III, but the rule also rescheduled FDA-approved medications that contain naturally derived delta-9 THC to Schedule III. The contemporaneous creation of dual pathways necessarily implies the expectation of concurrent systems.

Notably, the DEA's placement of marijuana on Schedule III did not make it an FDA-approved drug. The FDA has not approved cannabis itself for the treatment of any disease or condition.⁴ But the FDA has approved one cannabis-derived drug product, Epidiolex (cannabidiol), and three synthetic cannabis-related drug products, Marinol (dronabinol), Syndros (dronabinol), and Cesamet (nabilone).⁵

If South Dakota were to choose to reschedule marijuana to a Schedule III controlled substance, then the general rules regarding Schedule III substances would apply to marijuana as with any other Schedule III substance. But this action would have to be taken by either the Legislature or the voters, independent from the rescheduling of marijuana federally. The Department of Health is statutorily tasked with making recommendations to the Legislature as to where particular substances should be placed on the Schedule. SDCL § 34-20B-18. The Attorney General is not the entity statutorily designated to make determinations on abuse and dependence risks for particular substances.

The Committee Members set forth six potential options of future actions for evaluation. After reviewing each of these options, none of them would be excluded by current federal or state law. Which option will provide the greatest benefit to South Dakota is a policy determination for the Legislature or the voters of South Dakota.

CONCLUSION

Changes to marijuana's scheduling by the federal government were accompanied by an explicit pathway through which participants in state medical-marijuana programs may be registered with the federal government

⁴ *FDA & Cannabis: Research & Drug Approval Process*, U.S. Food & Drug Admin., <https://www.fda.gov/news-events/public-health-focus/fda-and-cannabis-research-and-drug-approval-process> (last visited Oct. 5, 2026).

⁵ *Id.*

and continue to operate. 21 C.F.R. § 1301.13(k)(1) (2026). Because federal law explicitly permits state medical-marijuana programs, South Dakota's program may continue to operate as it has without impact from marijuana's federal rescheduling to a Schedule III controlled substance. How the program functions in the future will be a policy determination at the discretion of the Legislature or the voters of South Dakota.

Sincerely,

A handwritten signature in blue ink, appearing to read "Marty Jackley", with a long horizontal flourish extending to the right.

Marty J. Jackley
ATTORNEY GENERAL

MJJ/GWF/CAD/dd