UNITED STATES TAX COURT
WASHINGTON, DC 20217

VERDE WELLNESS CENTER, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 23785-17.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

Verde Wellness Center, Inc. (the dispensary) is a medical marijuana dispensary registered under the laws of the state of Arizona. In the course of preparing his case for trial, the Commissioner issued a subpoena to the Arizona Department of Health Services (the Department) requesting information relating to the dispensary. The Department filed a motion to quash that subpoena.

Arizona law requires marijuana dispensaries to register with the State. A.R.S. § 36-2804(A). Registration requires a dispensary to submit an application that includes information relating to the dispensary, its owners, and its dispensary agents, along with documentation of its operating and record-keeping procedures. A.R.S. § 36-2804(B). Registration must be renewed annually. A.R.S. § 36-2804.06.

Specific categories of information collected by the Department are protected from disclosure by State law. Specifically, A.R.S. § 36-2810(A) provides:

> A. The following information received and records kept by the department for purposes of administering this chapter are confidential, exempt from title 39, chapter 1, article 2, exempt from section 36-105[1] and not subject to disclosure to any individual

[1] Section 36-105 of the Arizona Revised Statues generally requires the Arizona Department of Health Services, upon request, to "furnish information to any agency of the United States which is charged with the administration of health

> or public or private entity, except as necessary for authorized employees of the department to perform official duties of the department pursuant to this chapter:
>
> 1. Applications or renewals, their contents and supporting information submitted by qualifying patients and designated caregivers, including information regarding their designated caregivers and physicians.
>
> 2. Applications or renewals, their contents and supporting information submitted by or on behalf of nonprofit medical marijuana dispensaries in compliance with this chapter, including the physical addresses of nonprofit medical marijuana dispensaries.
>
> 3. The individual names and other information identifying persons to whom the department has issued registry identification cards.

Distilled to its essence, the Department's principal argument is that the State-created confidentiality rule should trump a subpoena issued in a Federal case.

When determining whether a privilege or confidentiality rule applies, Federal Rule of Evidence Rule 501 governs. In short, that rule provides that Federal law governs questions of privilege in Federal cases, "[b]ut in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." This is a Federal tax case, and no State-law claim or defense is at issue. Accordingly, we look to Federal rules to resolve questions of privilege.

Courts have repeatedly confirmed, in a variety of contexts, that Federal privilege law controls. For example, in United States v. Cal. Rural Legal Assistance, Inc., 722 F.3d 424 (D.C. Cir. 2013), the United States District Court for the District of Columbia enforced a Federal subpoena issued to California Rural Legal Assistance. Cal. Rural, 824 F. Supp. 2d 31 (D.D.C. 2011). The subpoenaed party argued that the California Constitution, the California Business

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services." Section 36-2810(A), Arizona Revised Statutes, exempts the Department from furnishing such information insofar as it relates to marijuana dispensaries.

and Professional Code, and the California Rules of Professional Conduct all provided broader protections than the Federally recognized attorney-client privilege. The district court stated that "a subpoena issued pursuant to federal law is governed by the federal law of privilege." Cal. Rural, 824 F. Supp. 2d at 43. On appeal, the D.C. Circuit was more succinct: "Federal law exclusively governs." Cal. Rural, 722 F.3d at 427.

The Ninth Circuit has been similarly succinct, stating "In federal question cases, federal privilege law applies." NLRB v. N. Bay Plumbing, Inc., 102 F.3d 1005, 1009 (9th Cir. 1996). In that case, North Bay Plumbing argued, inter alia, that a subpoena violated State privacy laws. The Ninth Circuit, to which this case is appealable, summarily dispatched that argument.[2]

In the tax area, courts have often addressed the question of whether a privilege created by state statute is to be recognized, specifically with regard to the accountant-client privilege often created under state law. The Supreme Court addressed this in Couch v. United States, 409 U.S. 322, 335 (1973), holding that "no confidential accountant-client privilege exists under federal law, and no state-created privilege had been recognized in federal cases." See also, United States v. Arthur Young & Co, 465 U.S. 805 (1984). Except where the Federally authorized tax practitioner privilege of section 7525 applies, this remains the law today. This remains true even when (like here) the records are in the possession of the State and disclosure of the State's records is a crime under State law. The United States District Court for the Northern District of New York addressed this, writing:

> Under the Constitution's Supremacy Clause, state laws that "interfere with, or are contrary to the laws of congress" are invalid. U.S. Const. art. VI, cl. 2. There are numerous means by which a federal law may preempt a state law, even when Congress does not specifically express its intent to preempt state laws in a given field. Most notably, in the absence of explicit Congressional direction, the doctrine operates to preempt those state law which "conflict with" federal law. Such a conflict occurs when "'compliance with both federal and state regulations is a physical impossibility,' or when a state law 'stands as an obstacle

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[2] Likewise, in In re Special April 1977 Grand Jury, the Court of Appeals for the Seventh Circuit wrote: "As a general matter, courts consistently have rejected the view that state records are privileged from disclosure, even in cases in which state law prohibited the disclosure of the records." 581 F.2d 589, 592 (7th Cir. 1978) (internal citations omitted).

> to the accomplishment and execution of the full purposes and objectives of Congress.'"

United States v. New York State Dep't of Taxation & Fin., 807 F. Supp. 237, 240 (N.D.N.Y. 1992).

In sum, issues of privilege and confidentiality arising in a Federal tax case brought in a Federal court are governed by Federal rules of privilege and confidentiality. And the Department has not directed us to any Federally recognized privilege or rule of confidentiality that would apply in this case.

In the event the Court enforces the Commissioner's subpoena, the Department requests that the Court state that, for purposes of complying with the subpoena, the Supremacy Clause defeats A.R.S. § 36-2816(D). That provision makes it a class 1 misdemeanor under Arizona law for an employee or official of the Department to breach the confidentiality of information obtained pursuant to the Arizona Medical Marijuana Act. Courts have previously addressed this issue as well. As in Arizona, the Michigan Medical Marijuana Act makes it a misdemeanor for an employee or official of their equivalent department to disclose confidential information. The District Court for the Western District of Michigan, when enforcing a subpoena seeking the Michigan department's records, directly addressed the Supremacy Clause issue:

> The Supremacy Clause operates to resolve conflicts between federal and state law in areas, such as drug enforcement, where Congress does not 'occupy the field.'
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> > Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.
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> Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985) (internal quotation marks and citations omitted).

United States v. Mich. Dep't of Cmty. Health, No. 1:10-mc-109, 2011 U.S. Dist. LEXIS 59445, at *35-36 (W.D. Mich. 2011). Likewise, Federal supremacy renders the confidentiality provision of the Arizona Medical Marijuana Act (and its corresponding criminal sanction) inapplicable insofar as responding to the Commissioner's subpoena is concerned. Accordingly, it is

ORDERED that the Arizona Department of Health Services' motion to quash filed January 4, 2019, is denied. It is further

ORDERED that, in addition to regular service, the Clerk shall serve a copy of this order on the Arizona Department of Health Services at the following address:

Aubrey Joy Corcoran
Assistant Attorney General
Arizona Attorney General's Office
2005 North Central Avenue
Phoenix, AZ 85004-2926

(Signed) Ronald L. Buch
Judge

Dated: Washington, DC
January 24, 2019