

Transcript of Interview with Robert Mikos, Vanderbilt Professor of Law

Interview by Aaron Edelheit

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*Lightly edited for readability

Aaron: Robert Mikos, thank you so much for this interview, and I'm really excited to learn from you. I read your white paper about cannabis and interstate commerce restrictions. And my question was it's my understanding that only the federal government is able to govern interstate commerce and states can't create interstate commerce. So, since cannabis is illegal, do we have a chicken and an egg problem where you need the federal government to come in to either pass some law or decriminalize? How do states actually even if they wanted to create interstate commerce in cannabis?

Robert: Well, it's a fair question, although I think it rests on kind of an outdated view of what Congress's commerce power is. For almost 80 years now, the court has said the Commerce Clause of the Constitution gives Congress the power not only to regulate the buying and selling that goes on between states, but also to reach inside of states. In fact, we had a case not so long ago, Gonzales versus Raich, where the court said Congress has the authority over intrastate activities like growing and selling of cannabis. So, constitutionally speaking, there's no real difference between a sale that goes on entirely within, let's say, Colorado and one that goes on between, say, a seller in Oregon and a buyer in Colorado. They're both subject to congressional regulation. And, of course, we've got lots of commerce going on in cannabis that the states have approved that intrastate commerce. But what they've done is they've selected selectively prohibited just the sales that go on between states. And that raises a problem under a very different constitutional doctrine. This obscure thing that most people, if they went to law school, they might have spent a day on it in Econ Law. It's this principle called the Dormant Commerce Clause. And to simplify it a little bit, it simply means that states can't discriminate against non-residents. They can't treat shipments across state line differently than they treat the same activities within a state. And that's where the states are running into a problem with cannabis, because you have this strong constitutional default rule that says you're not supposed to block interstate movement of goods. You need sort of affirmative congressional permission to do that.

But I think that that federal ban that you mentioned doesn't really give the states that permission. They've assumed that it does. But I think on closer inspection, it doesn't.

Aaron: Now, if I understand correctly. Every state, and Oregon did something a little different, but every state not only bans importing, but exporting as well. And Oregon said, well, once the federal government approves it, we will. You know, I think they passed a law that basically says that they can, you know, that you can export. But I'm curious about, like, who is best suited to challenge the state's current prohibition? Because you not only have let's say I'm a California producer and I wanted to sell where prices are much more competitive here, where in Maine the prices may be as much as five times higher. When I think about who's best suited to challenge that, you'd have to not only get California to approve or get through the export, but then you'd have to fight Maine as well. And I'm wondering if standing is an issue for how who exactly you know, legally, assuming that the federal government doesn't do anything or there's no change. How do you see that, how do you see that working out?

Robert: Well, it's a great question and it is it is very complicated because you have two different sets of laws that you would need to challenge, exactly as you put it. If you are a California based grower and you want to sell some product in Maine because there's demand for it out there, you'd first need to challenge California's law saying don't ship your stuff out of state because you don't want to get in trouble with those California licensing authorities. Then you'd also have to challenge Maine's law because Maine says don't ship your stuff into our state, we're just going to grow it here in Maine. I think it really would be a supplier like that, but that would need to step up to challenge these things. I think part of the reason they've survived for so long is that these companies would have to incur a big legal expense to do this.

Aaron: And possibly upset the very regulators that are allowing them to do business, right?

Robert: Oh, yeah. And there's no guarantee of success. I mean, I believe strongly that they've got a good claim and that they should win on the merits. But the court may not agree with that or it might take a court several years to rule in their favor. And you probably have to get two courts to do that because you'd have to challenge two sets of state laws. So that would be a lot of expense for one firm to take on. And if that firm

won, they wouldn't capture all of the benefits of that because their rivals in California, plus all their rivals up in Oregon would all of a sudden say, hey, wait a second, we've got these favorable rulings that say we can export our products, we can import it into other states. They might take advantage of that as well. So that company that thought, hey, we can sell a lot of our product in Maine, well, all of a sudden, they're going to be competing with other California growers and Oregon growers. So, I think that's part of the reason we haven't seen challenges to those import and export bans yet. By contrast, we have seen a growing number of challenges to a related restriction that states have imposed. These are residency requirements for cannabis licenses. So, there are a lot of states that say if you want to sell a product in our state, you've got to get a license from the state. And what's more, to get that license, you have to be a local. You have to be a state resident. And those are coming under increasing scrutiny. And that's kind of a low hanging fruit, because if you're a California resident and you want to grow in Maine, you want one of those Maine licenses, but you only have to challenge Maine's law to do that. You don't have to challenge California's law because California doesn't care if you open a business in another state. The other thing is you'll capture the full benefit of that, because if you meet that residency requirement, you might be the one who wins a license there. And that might be a valuable government perk that you can claim from the lawsuit. So, we've actually seen lawsuits challenging these residency requirements in at least five different states that are going on right now. And one of these has already proven successful.

Aaron: So how would you expect or if you were to put on your forecasting hat and think about how this plays out practically. Put aside the federal government enacting new laws and there's been talk from Senator Schumer about working on a broad legalization bill, but put that aside for a second, assume that that's not or maybe not. I'm just curious of what your thought is on how this practically plays out.

Robert: Yeah, so I think we'll have decisions on more and more of these challenges to residency requirements, and that'll be the first domino to fall. I think depending on the rulings the courts issue in those cases, if they're favorable to companies challenging the residency requirements, you might see some language in there that sort of sets the stage for a bigger challenge, a challenge to those import and export bans. So that might be the next thing that we see challenged in lawsuits. And I guess like you, I wouldn't bank anything on the promise of some federal reform actually being passed. It's been a

long time coming and it's hard to read the tea leaves. But I think one point that's important to take away is that if Congress legalizes cannabis, so if it passes something like the Moore Act which de-schedules cannabis or the States Act, which simply follows state law, then I think you have a much stronger case for challenging the state import and export bans. Congress, if it wants to preserve those state markets, it's got to explicitly authorize them neither the States Act or the Moore Act nor any other federal proposal under consideration even considers granting the states this authority. So if the federal government does legalize, this is all going to accelerate.

Aaron: Or just decriminalize? Right? To an extent, if they just remove and they say if you operate under state rules, you're fine from a federal government perspective. Why would that accelerate things like if they just said we're not, because it's my understanding with alcohol, they don't prohibit it, they don't legalize it. They're just saying the federal government is you just operate under state rule. I don't think there's much in the way of alcohol legislation or at least legally. I'm just curious, why does that decriminalize and why does any of the States or Moore act, why does that increase the likelihood or improve the chances legally of interstate commerce?

Robert: The big reason is that for the last 10 years or so we've had these intrastate commercial markets in cannabis where the states have sort of created these bubbles and they barred out of state product. They've done that sort of on the assumption that the federal ban gives them permission to discriminate against interstate commerce of cannabis, so that the whole premise all along that the states have relied upon is that because Congress banned all commerce in cannabis, they can go ahead and discriminate at will against that out-of-state product. They can arrest you if you try to sell Oregon cannabis in Colorado, even though if it were Colorado cannabis, Colorado wouldn't arrest you. So that's been the premise all along. And probably the strongest defense that the states can raise against any Dormant Commerce Clause challenges to their import and export bans. But if you take that argument away, you say, hey, wait, Congress has legalized cannabis. That argument goes away. And really the only excuse the states have had for doing this goes out the window.

Aaron: Gotcha. If I'm the states, how can I protect my key interests within the bounds of the Constitution if and when cannabis is de-scheduled? Is there a difference between issuing a tariff or tax on out of state imports versus requiring imports to meet state

operational standards? I know on alcohol they have kind of a three-tiered kind of distribution or system. I'm just curious of what your opinion is on what if you're the state of Maine, what they're allowed to do and what they're not allowed to do?

Robert: The big difference is that states aren't allowed to discriminate. They're not allowed to treat outsiders differently than insiders. And think of how unusual cannabis markets are today. It's hard to think of any other product where if you're out in California, California can't say, hey, we don't want avocados grown in Florida, sold here. California can't do that. So, you can't discriminate against out-of-state products, but you can apply the same standards to them. So, a state like California, when it comes back to cannabis, could continue to say, hey, when you sell your product here, you've got to have it tested using these standards. You've got to put a label on your product that says how much THC is in it, how much CBD, you've got to test for harmful pesticides. And if they're in there, you can't sell it. You've got to stamp this universal symbol on it. It's got to be packaged this way. As long as you don't set up different rules for out-of-state companies than you do for in-state companies, then you're fine. The states can continue to do that. They just can't treat outsiders differently than insiders.

Aaron: Gotcha. Is there a risk of a heavy hand from the FDA a la hemp or what other Federal regulators will have a voice in the fate of a more permissible or more legal federal laws around cannabis? The ATF, the Tobacco Trade Bureau, what have your thoughts?

Robert: It's hard to predict. It sort of depends if there is federal legislation that might simplify things. Something like the Moore Act or the States Act really would get all of these different federal agencies out of the way. But otherwise, right now, federal law touches on so many different activities implicated by cannabis. You've named some of the agencies, but I can rattle off half a dozen other ones. The Department of Transportation, for example, big motor carriers like FedEx and UPS, they have specific policies that say we are not going to ship your cannabis products across state lines. We won't even ship them within the state because we are regulated by the Federal Department of Transportation and cannabis remains a prohibited product. So, if you legalize cannabis, you'll do away with a lot of those sort of incidental barriers to this market that we've got right now. But there's just a whole slew of federal agencies and federal regulations governing all sorts of different activities: banking, insurance on

transportation, firearms, housing, employment that right now are sort of sticking points for this industry.

Aaron: Are you aware of any sound arguments, constitutional or otherwise, in favor of removing the state legal cannabis from the IRS's punitive 280E rule, which doesn't allow them to deduct expenses? Is that something you could take a constitutional route or is that something that is in the IRS's domain to decide how and when they how they want to treat specific industries?

Robert: Well, to be fair, it wasn't the IRS's choice. That was Congress. Congress specifically said if you're an illicit drug dealer, and we've defined that term in the CSA, the Controlled Substances Act, if you're an illicit drug dealer, you can't deduct your business expenses, certain types of business expenses. So that was Congress's choice. The IRS, this is one of the themes I oftentimes press is if you don't like current federal cannabis policy, blame Congress. It's all Congress's fault. There's only a limited amount that federal agencies can do to sort of soften it and change that policy. And the IRS is a good example. I don't think we want to set a precedent where the IRS says we know there's this federal statute that tells us you've got to tax this particular industry, but we're going to ignore it because that seems unpopular. And you can imagine the president saying, all right, let's not tax the coal industry or let's not tax this other industry because, hey, my friends are in there and they contributed a lot during the last election cycle. That would be a bad precedent. So, I don't think there's I don't think the way that the statute is written that there's a way out of it. There's been constitutional challenges brought. They haven't been successful. I don't think there's a lot of merit to them. So it really would take an act of Congress, either one directed specifically at that section 280E of the tax code, sort of exempting the cannabis industry from it, Congress could do that. Or if Congress de-schedules cannabis or otherwise legalizes it, you'd get the same result because cannabis purveyors would no longer be illicit drug dealers in the eyes of the federal government.

Aaron: So, is it possible that if one of those acts, de-schedules or legalizes cannabis does 280E just automatically go away?

Robert Yes.

Aaron: Oh, that's interesting. I hadn't thought that that would specifically happen. With the Safe Banking Act, and just in letting financial institutions or does it need to be some broader thing that would force 280E to go away, it would have to be legalized, I guess. Right?

Robert: Yeah. So, there's two different ways that you can approach all these different headaches and obstacles that the federal ban now creates. You've got the banking problems, the Safe Banking Act would address those, but the Safe Banking Act wouldn't address any other problem. And so oftentimes, like in the federal ban on cannabis to that mythological Hydra from ancient Greek mythology, it's got many different heads, Section 280 is one of them. Banking is another one. Can't get trademarks. That's another one. You've got the criminal penalties and that's another one. Congress so far has kind of looked at chopping off those heads one by one, but not really killing the entire beast. So, the Safe Banking Act would chop off one of those heads, would chop off the difficulty companies have in getting banking services. But it wouldn't do anything about Section 280E. Congress could pass a law that simply turns off section 280E for the cannabis industry. But that wouldn't do anything about banking. So, you could pass a bunch of individual laws that cut off one head at a time. Or you could pass something like the States Act or the Moore Act which legalize cannabis at the federal level. That would kill the whole beast, because if marijuana is no longer considered a schedule one controlled substance under federal law, the Moore Act would de-schedule it entirely. Well, then it's no longer, again, an illicit substance. So, you're not an illicit drug dealer so section 280E doesn't apply. When you sell cannabis the money that you make from that would no longer be the proceeds of unlawful activity. So wouldn't be money laundering you're engaging in so banks wouldn't have to worry about dealing with you. So that's really the more comprehensive type of reform that Congress could adopt, it would help with all of these different obstacles. But otherwise, if you're talking about Safe Banking Act, that's legislation targeted at one specific problem. It won't do anything about the other ones.

Aaron: This is the craziest industry for me to follow because I can't think of another, you'd have, from a state perspective, legal companies operating, generating revenue and income, paying taxes, admitting to the federal government that you're breaking the federal law. The federal government saying pay us taxes, you can't deduct that. But we

recognize that you're illegal. It's really wild to me that you that the circumstances around this.

Robert: Yeah, there's no precedent for this.

Aaron: I wanted to ask is there any kind of historical precedent for some industry or some activity that is any way remotely like this, not necessarily in size, but do we have any precedent for this or is this completely unique?

Robert: I think it's unique in many ways. I mean, we've got some things that look roughly the same. Sports gambling was one.

Aaron: But were the bookies paying taxes?! I don't think so!

Robert: They were supposed to be paying taxes. Everybody is supposed to pay taxes on income. It's not just illicit drug dealers. They're supposed to pay the IRS. It's Al Capone, it's racketeers, it's everybody else.

Aaron: It's a good point.

Robert: It's just that 280E makes the tax liability higher than it is for other industries. If you're a hitman for hire, you just pay the same tax rate that Wal-Mart does. But if you're an illicit drug dealer, if you're one of those state licensed cannabis shops, you pay a higher rate, which is bizarre. But there's really no other analogous industry, I would say sports betting, because there was a brief period of time where the states wanted to legalize it and the federal government was resisting trying to challenge that. But then the Supreme Court stepped in, threw out that federal ban that had really twisted the arms of the states and forced them to criminalize or at least ban sports betting, threw that out a couple of years ago in a case of Murphy versus NCAA. A very interesting case. That's why today we get bombarded with all these ads for Draft Kings and all these sports gambling sites, it's all because this federal prohibition got thrown out and the strong arming of the states. But other than that, there's no other big commercial activity I can think of that the states allow it and Federal government bans that. You have this weird gray zone where people are willing to do it, even though it's criminal under one set of laws and legal under another one.

Aaron: And the other thing that just makes it so interesting is that the market itself, both illegal and legal, is truly massive. It's like one hundred-billion-dollar market. So, it's just wild that you have this size and this confusion. When we look to the future, are there any court cases or legal actions that you're keeping an eye on that might continue to pave the way forward or to be roadsigns on the way? What are you looking for going forward?

Robert: A lot of it that I'm following right now are these dormant Commerce Clause cases that are maybe paving the way for the development of a national market in cannabis rather than one that's right now 37 different state cannabis markets. The other development is really on the hemp side, because, as you might know, a few years ago, Congress adopted what looked to most people like a really mundane agricultural bill that suddenly legalized hemp. And hemp is cannabis. It's just cannabis that has very low amounts of the psychoactive chemical THC, and that's created a huge boom in the market. A lot of that market that you spoke of really is derived from hemp. Its CBD oils could be extracted from hemp, which is legal at the federal level, although subject to just another Byzantine set of rules. The Food, Drug and Cosmetic Act regulates putting CBD into foods because that drug, about the same time that the Congress legalized hemp, that drug was approved as a pharmaceutical for use in treating rare forms of childhood epilepsy. So now it's subject to a variety of rules. So hemp is the other one where there's just a flurry of activity and it's been such a big boom that that it could end up taking over a large part of the market and I think it's important to keep an eye on those developments.

Aaron: Great. Well, thank you so much. I'm pretty sure on your website, you keep a blog, or you update from time to time, are there any future white papers or things that we should keep an eye on or will it just be updated from time to time? How can people who are interested in this either follow your work or what's the best way to follow you?

Robert: I do have that that blog. And maybe you can provide a link to that.

Aaron: Yes, I can.

Robert: It's on a website associated with I've got actually a textbook that's designed to kind of help people get their wrap their heads around this particular area of law, because it is like drinking from the fire hose. So many different issues. It tries to help people see all the connections among them and digest that a little bit more easily. So, the blog is actually tied in somewhat with the book, although it's also an independent resource. But apart from these interstate commerce issues, which I think are important, I'm always writing other things. I've written another paper that will be out soon on registering trademarks in the cannabis industry. That's something that the PTO is trying to block. But I think the grounds that they've used to block that are faulty and that in fact companies that sell cannabis should be able to register their marks with the PTO, which provides a lot of benefits nationally.

Aaron: That's for sure. The future of brands. You've got to think that if cannabis develops, it won't be different than any other market and the brands would become very important and trademarking those brands will become very important.

Robert: Absolutely. Especially if you're a company that has a strong brand, let's say, in Colorado, right now there's nothing preventing some other company in, let's say, California, from taking your brand and slapping it on their own product. As long as that Colorado firm isn't also licensed in California, you can go ahead and pilfer their brand at will because there's no national trademark protection that extends beyond the boundaries of any one state. And that's very risky for consumers. As I write in that paper, imagine, to use another market. Imagine if the Budweiser that you bought out there in California, suppose it's three percent alcohol by volume as it probably is. But then suppose you went on a trip to Colorado, you ordered your favorite Bud, but you got something that was 15 percent ABV. That'd be a bit of a shock.

Aaron: Or tasted completely different.

Robert: Or maybe you waste your money or maybe you get drunk off of a single can, which could be dangerous. So, lots of reasons we might want to protect trademarks nationally in this industry, but that's another big one that I think's out there.

Aaron: No, this is great. Thank you so much for your time. I really appreciate it. I've learned a lot. I'm already thinking now I haven't been following hemp or trademarks. So that's great. And I really appreciate your time.

Robert: Thanks for having me Aaron.

Aaron: Ok, thank you.