SCHOOL OF LAW
UNIVERSITY of WASHINGTON

April 28, 2011

Governor Chris Gregoire
Office of the Governor
Legislative Building
416 Sid Snyder Avenue Southwest, Suite 200
Post Office Box 40002
Olympia, Washington 98504-0002

Re: E2SSB 5073: Medical Use of Marijuana

Dear Chris:

This is a personal comment on E2SSB 5073 and basic principles of federalism. (This letter does not reflect the views of any client or of the University of Washington).

I have read the April 14, 2011 letter that Jenny Durkan and Mike Ormsby wrote you that indirectly implied that this legislation could expose state employees to potential liability under the federal Controlled Substances Act. I understand and expect that Jenny and Mike were asked to write this letter by their superiors in Washington D.C. But their suggestion about state employee liability was a huge surprise to me. I am not aware of any situations during the past sixty years, and perhaps not since the Civil War, where state officials were *personally* prosecuted for carrying out ministerial functions under state law. Even during the civil rights era, when southern state and local officers were actively enforcing laws that were at odds with the U.S. Constitution and Federal statutes, we did not see individual prosecutions of those government employees. Instead, we saw Federal Court orders affecting them in their official capacities, and, rarely, contempt proceedings when those orders were ignored. More recently, we have *not* seen the Federal government going after state and local officials in California or in the other states with medical marijuana laws, and I am sure that we're not going to see that happen in Washington. I'm also sure that *if* the Federal government were to obtain U.S. District Court orders requiring our officials to cease and desist actions authorized by E2SSB 5073, our local officers would readily comply.

In effect, Jenny's and Mike's letter to you is an example of inappropriate Federal "bullying" of our state in connection with a controversial policy issue on where *this* Washington is undertaking an approach that is not preferred by *that* Washington.

The activities mandated for state employees by E2SSB 5073 are limited to adoption of rules that set the standards under which a person may be exempted from state penalties for engaging in marijuana-related activities; issuing state licenses to those who comply with the rules; and enforcing the rules against those who do not. California courts have ruled that a state's exercise of its regulatory, licensing, and zoning powers to determine who is and is not complying with state law is not preempted by Federal law and does not, in any event, violate Federal law. *Qualified Patients Ass'n, et al. v. City of Anaheim*, 187 Cal. App. 4th 734, 115 Cal. Rptr. 3d 89 (2010); *County of San Diego v. San Diego NORML*, et al., 165 Cal. App. 4th 798, 81

Cal. Rptr. 3d 461 (2008). (Note that neither of those cases have been overruled by Federal courts.) E2SSB 5073 does not require any state employee to engage in activities that are prohibited under the Controlled Substances Act, and therefore does not create any "positive conflict" with the federal law. *See* 21 U.S.C. § 903; *Qualified Patients; County of San Diego.*

Washington's participation in licensing people to engage in activities that might be illegal under Federal law is neither new nor unique to medical marijuana. For example, I understand that the State regularly issues concealed pistol licenses to people with the understanding that the recipients' possession of a pistol may violate federal law. In fact, State law specifically requires written warnings on both the applications and the licenses to provide notice that a state license is not a defense to federal prosecution. RCW 9.41.070(4). The reality that a licensee may be breaking Federal law does not make the state employee issuing the license complicit in the licensee's federal crime. It simply protects the licensee from state prosecution.

The national government cannot appropriately commandeer state actors to enforce its laws. *Printz v. United States*, 521 U.S. 898 (1997). Washington's governor should not stand in for the Federal government to frustrate the will of Washington's voters and a legislative policy decision favoring the type of regulatory control encompassed by E2SSB 5073. In our nation's federal system of government, the states have always played, and continue to play, an important role in serving as the testing grounds for policies that eventually shift federal law. Indeed, Washington re-legalized beer before national Prohibition had been abolished, and that re-legalization by this and several other states provided a significant boost to the repeal of Prohibition. The animating principle of federalism is respect for states' ability to tailor social experiments to their communities, so long as they do not violate the threshold protections of the Bill of Rights.

There is no legitimate reason that Washington State should not proceed with its legislatively-approved effort to improve public safety and public order in the connection with the safe access to medical marijuana for the sick and dying. I respectfully urge you to sign E2SSB 5073.

Sincerely,

Hugh D. Spitzer
Affiliate Professor
University of Washington
School of Law
(206) 447-8965

Cc: Narda Pierce
Jim Justin