



April 28, 2011

TO: Interested Parties

FR: Alison Holcomb, Drug Policy Director

RE: Why E2SSB 5073 Is a Wise Approach that Provides Safe Access to Quality-Controlled Medical Cannabis in a Manner That Protects Our Communities

State Employees Do Not Break Federal Law by Licensing and Regulating Activities That Are Legal Under State Law.

States are free to pass medical marijuana laws that exempt certain people from criminal liability under state law. The “structure and limitations of federalism ... allow the States “great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.” ” *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (internal citations omitted) (striking down a federal rule aimed at undermining Oregon’s Death with Dignity law). The powers reserved to the states include the power to decide what is criminal and what is not under state law. *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting). Respecting states’ broad authority on matters related to the exercise of police power is a key feature of our system of federalism that “promotes innovation by allowing for the possibility that ‘a single courageous State’ may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *Id.* (internal citations omitted).

States are also free to exercise their regulatory, licensing, and zoning powers to establish the parameters of conduct that is legal under state law. *Gonzales v. Oregon*, 546 U.S. at 270-72; *Qualified Patients Ass’n v. City of Anaheim*, 187 Cal. App. 4th 734, 759-60, 115 Cal. Rptr. 89, 107 (2010); *County of San Diego v. San Diego NORML, et al.*, 165 Cal. App. 4th 798, 825, 81 Cal. Rptr. 3d 461, 481 (2008). No provision exists within the federal Controlled Substances Act that makes it a crime for a state employee to issue licenses and adopt regulations that help the state define conduct that is legal under its laws. Moreover, the federal government cannot conscript state employees to execute its regulatory programs or punish them for implementing state law that is inconsistent with federal law. *Printz v. United States*, 521 U.S. 898 (1997) (the federal government could not require local law enforcement officials to conduct background checks before issuing state firearms licenses).

There Has Been No Clear Shift in the Federal Policy Decision to Respect States’ Medical Marijuana Laws.

While states possess the right to adopt medical marijuana laws exempting people from state penalties for certain marijuana-related activities, the federal government also maintains the right to enforce the federal Controlled Substances Act within those states. The doctrine of “dual sovereignty” permits both states and the federal government to adopt criminal laws regarding marijuana, and each sovereign may enforce those laws within a given state. This means that even though individuals may

be exempted from state criminal penalties under that state's medical marijuana law, they are still subject to possible arrest and prosecution under the federal law.

However, on October 19, 2009, U.S. Deputy Attorney General David W. Ogden issued a memorandum to all U.S. Attorneys serving in states with medical marijuana laws, directing that they “should not focus federal resources in [their] States on individuals in clear and unambiguous compliance with state laws providing for the medical use of marijuana” (the “Ogden Memo”). At the time, two medical marijuana states – New Mexico and Rhode Island – had already passed laws requiring their respective Departments of Health to license and regulate the production and dispensation of marijuana for qualifying patients' medical use. New Mexico had licensed its first producer seven months prior. Notably, the Ogden Memo went to pains to distinguish the types of “sales” and “financial and marketing activities” that would be “inconsistent with the terms, conditions, or purposes of state law” from those that would be deemed in compliance with applicable state law:

- Sales *to minors*; and
- Financial and marketing activities *inconsistent with the terms, conditions, or purposes of state law*, including evidence of money laundering activity and/or financial gains or *excessive* amounts of cash *inconsistent with purported compliance with state or local law*.

(Emphasis supplied.) Clearly, the U.S. Department of Justice was aware that two states had already passed laws providing for licensed, regulated medical marijuana dispensaries, and the Ogden Memo obviously contemplates that such systems likely will involve sales and financial transactions. The memo's advice is that federal resources are to be directed at those sales and financial transactions that are inconsistent with a state's medical marijuana law.

On January 14, 2011, Oakland City Attorney John Russo wrote to U.S. Attorney General Eric Holder seeking guidance on the applicability of the Ogden Memo to an Oakland city ordinance that permits the licensing of “industrial cannabis cultivation and manufacturing facilities” (California state law does not provide for licensing and regulation of dispensaries; what regulations exist in that state exist only at the local level). U.S. Attorney for the Northern District of California Melinda Haag responded to the letter on February 1. Ms. Haag reiterated the unquestioned *authority* of the federal government to enforce the federal Controlled Substances Act even in states with medical marijuana laws, but seemed to signal a backtracking on the policy declared by the Ogden Memo: “we *will* enforce the CSA vigorously against individuals and organizations that participate in unlawful manufacturing and distribution activity involving marijuana, *even if such activities are permitted under state law*” (emphasis supplied).

However, subsequent letters of guidance requested by officials in Montana, Colorado, and, of course, Washington, have retreated from Haag's declaration of a specific intent to enforce the federal Controlled Substances Act against individuals in compliance with state laws that allow production and dispensation of medical marijuana. The letters issued by the U.S. Attorneys in Washington (April 14), Montana (April 20), and Colorado (April 26) have simply reiterated the enforcement power the federal government retains, regardless of the policies it adopts to guide deployment of federal law enforcement resources, policies like those announced in the Ogden Memo:

“... we *maintain the authority* to enforce the CSA against individuals and organizations that participate in unlawful manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law.”

(Emphasis supplied.) This is not a statement of intent, and it does not announce any policy shift that suggests the Ogden Memo, which already contemplates state-regulated medical marijuana dispensaries, can no longer be relied upon.

The Washington letter is the only letter that even mentions state employees. It declares that “state employees who conducted activities mandated by the Washington legislative proposals would not be immune from liability under the CSA.” This statement is vague and misleading, merely reiterating the truism that state law cannot supply immunity from federal statute.. But to say that someone “would not be immune from liability” under a particular law is not the same as saying that she would, in fact, be liable. If Washington’s U.S. Attorneys believed state employees would be criminally liable – would actually be breaking federal law – when conducting regulatory and licensing activities in compliance with Washington’s medical marijuana law, they could have said so.

In fact, none of the U.S. Attorneys’ letters says that state, county, or city employees engaged in licensing and regulating medical marijuana dispensaries in compliance with state law could or would be prosecuted under federal law. This makes sense, because the federal Controlled Substances Act does not make these activities illegal. And because these activities are not illegal, the Ogden Memo and subsequent U.S. Attorney letters interpreting it bear only limited relevance to the Governor’s voiced concern about state employee liability. The policy announced in the memo and discussed in the letters relates to individuals engaged in acts that are criminal under federal law – manufacturing and distribution of marijuana – not to state employees performing administrative licensing and regulatory functions.

State Employees Performing Administrative Acts in Compliance with State Law Would Not Be Arrested and Prosecuted by Federal Law Enforcement.

Even if a colorable legal argument could be made that the state licensing and regulatory functions described in E2SSB 5073 create federal criminal liability for state employees, and even if the federal administration were to backtrack on the Ogden Memo policy, it strains credulity to believe that federal law enforcement resources would be deployed to arrest, prosecute, and incarcerate state employees carrying out administrative functions dictated by law. The much more likely targets of such action would be the private medical marijuana producers and dispensers actually engaged in growing and selling marijuana. If action were to be taken against state employees, a civil action seeking an injunction requiring the employees to cease and desist licensing dispensaries seems much more plausible than the federal government rounding up state workers and putting them behind bars.

States have had medical marijuana dispensary laws on the books since 2007, and the first state-licensed dispensary began operations over two years ago – even before the Ogden Memo was issued. No state employee has ever been arrested or threatened with arrest for licensing or regulating a medical marijuana dispensary.

The State Legislature Has Made Extensive Efforts to Address Executive Concerns about State Agency Involvement in Regulating Patient Access to Medical Marijuana.

SB 5073's prime sponsor, Sen. Jeanne Kohl-Welles, has been working with state agencies on this piece of legislation since last summer. In June 2010, after sharing an early draft of the bill, Sen. Kohl-Welles met with Karen Jensen, Department of Health Assistant Secretary and head of Health Systems Quality Assurance; and Brian Peyton, Director of DOH's Policy, Legislative, and Constituent Relations, to discuss the regulatory provisions relating to dispensaries. Sen. Kohl-Welles received and incorporated multiple rounds of input from Department of Health staff both before and during session.

A week later, again after sharing an early draft of the bill, Sen. Kohl-Welles met with Department of Agriculture Director Dan Newhouse, Deputy Director Jeff Canaan, and Assistant Director Mary Martin Toohey to discuss the sections describing the licensing and regulation of cannabis producers and processors. She received and incorporated multiple rounds of input from Department of Agriculture staff both before and during session.

On the same day, Sen. Kohl-Welles met with Department of Corrections Assistant Secretary Anna Aylward; Tim Lang, Chief of the Attorney General's Corrections Division; and Chris Johnson, Policy Director for the Attorney General's Office to discuss the issue of qualifying patients' medical use of cannabis while on DOC supervision. Again, multiple rounds of input from Department of Corrections staff were received and incorporated.

The Governor has recognized Senator Kohl-Welles's extraordinary efforts to collaborate with state agencies. During her March 17 media availability event,¹ after SB 5073 had already been passed by the Senate and heard in the House Committee on Health Care and Wellness, she stated,

The people of the state said they wanted medical marijuana, and I want to clean that up if at all possible. Sen. Jeanne Kohl-Welles has been a true partner to work with every concern expressed by every one of my state agencies.

It was not until April 13, after the House had passed Engrossed Second Substitute Senate Bill 5073 and sent it back to the Senate for concurrence – and just nine days before the end of the legislative session – that the Governor requested guidance from U.S. Attorney General Holder as to whether state employees “would be immune” from arrest or liability. This delay is troubling and confusing, since federal law on this issue has not changed since Sen. Kohl-Welles first began discussing this legislation with state agency staff ten months ago.

Washington Has the Right to Regulate Medical Marijuana, and the State Can't Wait Any Longer for Clarification of Its Law.

Qualifying patients with terminal and debilitating medical conditions, whose doctors have authorized their medical use of cannabis, have been waiting for twelve years for the legislature to craft a workable system for providing access to an “adequate, safe, consistent, and secure source”² of

¹ Available at TVW.org.

² RCW 69.51A.080(3).

medical marijuana. The 62nd Legislature has delivered. E2SSB 5073 provides state oversight of safe access for patients; tools that allow local governments to control how access is provided in their communities; and clarity for law enforcement so that their limited resources are not wasted on unnecessary arrests and prosecutions.

Eighty-four percent of Washington voters favor “allowing patients with terminal or debilitating conditions to possess and consume marijuana if their doctors recommend it.”³ Eighty-three percent of Washington voters agree that “Washington State – not the federal government – should be able to make its own laws regarding medical marijuana, that it marijuana recommended by doctors to relieve pain and suffering.”⁴ The United States Constitution “contemplates that a State’s government will represent and remain accountable to its own citizens.” *Printz*, 521 U.S. at 920.

The ACLU of Washington urges the Governor to stand by the will of the people of Washington and sign E2SSB 5073 into law.

³ Greenberg Quinlan Rosner Research, statewide survey of 800 likely voters in the 2012 elections, conducted December 13-19, 2010, margin of error of +/- 3.40 at a 95 percent confidence level.

⁴ Belden Russonello & Stewart Research and Communications, statewide survey of 1,200 registered voters conducted January 4-8, 2006, margin of error of +/- 2.8%.