We Can Do Better

Helping Policy Makers Make Informed Decisions about Marijuana

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September 5, 2013

The Honorable Patrick Leahy
Chairman, Judiciary Committee
United States Senate
437 Russell Senate Building
Washington, DC 20510

Dear Senator Leahy:

Several national organizations are forming a coalition, *We Can Do Better*,[1] to educate the public about the impact of marijuana legalization on the nation's children. Others are signing on to this letter as well.

Just last week, the journal *Neuropharmacology* published an article[2] in which researchers reviewed 120 marijuana studies published in the scientific literature. They warn:

> **Most of the debates and ensuing policies regarding cannabis were done without consideration of its impact on one of the most vulnerable populations, namely teens, or without consideration of scientific data. . .**

"Addiction is a serious concern, but it is not nearly the only significant harm. Like alcohol, marijuana-related car accidents, missed school, poor attention, and loss of interest in healthy activities are just some of the realistic and prevalent concerns associated with marijuana use among teens," says A.Thomas McLellan, former Deputy Director of the Obama Administration's Office of National Drug Control Policy and founder and CEO of the Treatment Research Institute, which is a member of the coalition.

Since 1996, some 21 states and the District of Columbia have legalized marijuana for medical use. This gave rise to a quasi-legal marijuana industry. With Colorado and Washington fully legalizing marijuana last November, the industry is becoming a full-fledged, commercial industry. It is already selling a variety of marijuana products, including edibles, such as the marijuana-infused chocolate chip cookies pictured here, marijuana concentrates with levels of THC so high users are overdosing, and marijuana infused E-cigarettes, or E-joints. The industry is attracting investment groups. It is advertising and marketing products to increase consumption in order to increase profits. Lessons learned from the alcohol and tobacco industries suggest that a marijuana industry will target children, adolescents, and young adults, whose developing brains make them more vulnerable to becoming addicted—and lifetime customers. The number of edibles designed to appeal to children make industry intentions clear, as the examples below show.

The last thing the United States needs is a third commercial industry that, like tobacco and alcohol, is likely to expose children heavily to marketing marijuana. There must be room for a sensible, evidence-based middle course between "drug wars" and outright legalization that risks

putting another addictive drug into the hands and minds of our children. To this end, we offer several recommendations we hope Congress will consider to protect children, and the nation, from the disaster that is currently unfolding.

Recommendation 1. Enforce federal law.

States that have legalized medical marijuana violate both the federal Food and Drug Act of 1906 (and some 200 subsequent laws) and the federal Controlled Substances Act of 1970. The promise of medical use lies in marijuana's individual constituents, not the whole drug.[3] In the 1980s, FDA approved two drugs, Marinol® and Cesamet®, for the treatment of chemotherapy-induced nausea. Both are synthesized THC made with pure chemicals to guarantee safety. Physicians may prescribe (rather than "recommend") these drugs and they are sold in pharmacies (rather than "dispensaries"). Sativex, a mouth spray containing THC and CBD, two ingredients extracted from research-grade marijuana, is in Phase III FDA trials. It may soon be available to treat spasticity due to multiple sclerosis and perhaps cancer and neuropathic pain. Other medicines are likely to be tested under FDA protocols as scientists isolate additional marijuana constituents. Let FDA continue to regulate the cannabis-based drugs available in the marketplace.

Recommendation 2. Commission a study from the Institute of Medicine.

We recommend that Congress commission the Institute of Medicine to study and propose options for a new marijuana policy based on scientific research. Leaving it up to the states to make 50 different versions of marijuana policy, based on little if any evidence, seems unwise. Let science guide policy.

Recommendation 3. Make low-level marijuana possession a civil rather than criminal offense.

By fully legalizing marijuana, Colorado and Washington have opened the door to a burgeoning commercial marijuana industry. This action violates the federal Controlled Substances Act and several international treaties to which the United States is signatory. The Justice Department's announcement[4] that it will not challenge these laws sets the stage for more states to legalize commercial marijuana and for the industry to explode. One of the biggest risk factors for drug use is availability. With hundreds, perhaps thousands, of marijuana stores opening for business, a stunning rise in adolescent marijuana use and problems is inevitable. Proponents of full legalization have convinced Americans that we have only two choices regarding marijuana policy: either lock offenders up or legalize the drug. But there is a middle road between these two stark choices. Make low-level marijuana possession a civil offense that is tied to health assessments and treatment or social services for those in need as Project SAM proposes.

Recommendation 4. Study legalization's impact in Colorado and Washington. Call a halt to further state legalization until actual outcomes in these two states are determined through research.

Several critical questions need to be answered before the nation embraces marijuana legalization and endangers its children. These states present two "laboratories" in which to find answers. Will legalization and the commercialization of marijuana:

1. Increase use and intoxication?
2. Increase harmful use and addiction?
3. Increase the number of people who need treatment?
4. Increase school drop-out rates?
5. Increase auto crash injuries and fatalities?
6. Increase ER admissions?
7. Increase mental illness?
8. Increase overdoses among very young children who accidentally consume marijuana edibles?
9. Increase overdoses and deaths from vaporizing marijuana concentrates (dabbing)?
10. Increase negative effects (if any) of second-hand marijuana smoke?

Provide additional funding to federal agencies that survey these areas to enable them to oversample Colorado and Washington and release findings from these two states promptly. Just one example is the National Survey on Drug Use and Health, which provides data about substance use, substance use disorders, mental health disorders, and treatment for people aged 12 and older. However, to provide data at the state level, two years of findings must be combined and the survey is released annually two years after the current year. This means the earliest we will know from this survey whether marijuana use and health problems increase in these two states will be in 2017, three years after legalization begins in January, 2014.

Recommendation 5. Strengthen the Department of Justice enforcement priorities by setting minimum national regulatory standards to protect children with which Colorado and Washington must comply.

Create an advisory body drawn from children's rights organizations, the alcohol and tobacco control communities, and the prevention and public health communities to recommend the standards. National Families in Action's 12 Provisions, attached, can provide a base on which to

build the standards. Use federal enforcement powers provided by the Controlled Substances Act to shut down businesses that do not comply with the standards.

Recommendation 6. Educate the nation about how marijuana harms children.
We recommend that Congress charge the Surgeon General with compiling a report to the nation on the harms marijuana poses to children, adolescents, and young adults. Let the Surgeon General educate Americans about how marijuana harms children.

In closing, we ask you to protect the nation's children from legal, commercial marijuana. Thank you for considering our recommendations.

Very truly yours,

We Can Do Better:
Sue Rusche, National Families in Action
A. Thomas McLellan, Treatment Research Institute
Kevin Sabet, Project SAM (Smart Approaches to Marijuana)

cc: The Honorable Dianne Feinstein, D-California
The Honorable Chuck Schumer, D-New York
The Honorable Dick Durbin, D-Illinois
The Honorable Sheldon Whitehouse, D-Rhode Island,
The Honorable Amy Klobuchar, D-Minnesota
The Honorable Al Franken, D-Minnesota
The Honorable Christopher A. Coons, D-Delaware
The Honorable Richard Blumenthal, D-Connecticut
The Honorable Mazie Hirono, D-Hawaii
The Honorable Chuck Grassley, Ranking Member, R-Iowa
The Honorable Orrin G. Hatch, R-Utah
The Honorable Jeff Sessions, R-Alabama
The Honorable Lindsey Graham, R-South Carolina
The Honorable John Cornyn, R-Texas
The Honorable Michael S. Lee, R-Utah
The Honorable Ted Cruz, R-Texas
The Honorable Jeff Flake, R-Arizona

Others signing on to this letter:

CeDAR (Center for education Dependency Addiction and Rehabilitation), University of Colorado Hospital, Aurora, CO

The Council on Alcohol and Drugs, Atlanta, GA, Chuck Wade, Executive Director and CEO

Greenville Family Partnership, Greenville, SC, Carol Reeves, Director/CEO

Gwinnett United in Drug Education (GUIDE), Ari Russell, Executive Director, Lawrenceville, GA

Hawaii Legislature: *Representative Marcus R. Oshiro*, State Representative, District 46

The Hills Treatment Center, Los Angeles, CA, Howard C. Samuels, Psy D., Founder and CEO

Illinois TASC, Inc., Chicago, IL, Pamela F. Rodriguez, President
Institute for Behavioral Health, Rockville, MD, Robert L. DuPont, M.D., Founding President

Learn to Grow, Atlanta, GA, Vincent Vandiegriff, Executive Director

NAADAC: The Association for Addiction Professionals, Alexandria, VA .

National Association of Drug Court Professionals, Alexandria, VA

Phoenix House, New York, NY

References

[1] National Families in Action, Project SAM, Treatment Research Institute, and others.

[2] Yasmin L. Hurd, Michael Michaelides, Michael L. Miller, Didier Jutras-Aswad. Trajectory of adolescent cannabis use on addiction vulnerability. *Neuropharmacology*, 2013; DOI: 10.1016/j.neuropharm.2013.07.028

[3] Alison Mack and Janet Joy for the Institute of Medicine, *Marijuana as Medicine? The Science Behind the Controversy*, National Academy Press, Washington D.C., 2001.

[4] James M. Cole, Deputy Attorney General, *Memorandum for All United State Attorneys*, "Guidance Regarding Marijuana Enforcement," August 29, 2013.

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Subcommittee on Space
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September 10, 2013

The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
437 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy,

I want to thank you for the courage you've shown by your recent decision to hold a hearing on the issue of the disparity between state and federal marijuana laws. As you are well aware, the gradual change in public opinion in recent years has resulted in numerous states taking steps to legalize marijuana to some degree. As public opinion and state laws continue to change and more states are expected to take action in coming years, it is only appropriate that the people's representatives understand this issue and develop a sensible approach to dealing with the inconsistency between state and federal law.

In my own state of California, marijuana was legalized for medicinal purposes in 1996. Since that time, numerous California residents have been prosecuted for violating federal law even though they were in compliance with state law. To solve not only California's problem, but the problem of every state that has taken steps to loosen its prohibition against marijuana, I recently introduced H.R. 1523, the "Respect State Marijuana Laws Act of 2013," which would legalize marijuana at the federal level to the extent it is legal at the state level. In other words, my proposal would prevent the federal government from continuing to prosecute residents who are acting in accordance with their state's marijuana laws.

It is my hope that you are able to explore some of these challenges during your hearing and identify some potential solutions. I believe my legislation is the most comprehensive and pragmatic solution that has been offered thus far. Therefore, it is my hope that you will take a close look at it and ultimately consider supporting it or a similar approach in the Senate.

Thank you again for your leadership on this issue and please let me know if I can be of any assistance moving forward. I look forward to working with you as we confront the challenges posed by this state-federal dichotomy.

Sincerely,

Dana Rohrabacher
Member of Congress

September 10, 2013

The Hon. Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate

Dear Mr. Chairman:

Thank you for the invitation to submit a statement of my views on conflicts between state and federal marijuana laws.

By way of introduction, I am a Professor of Public Policy at the UCLA Luskin School of Public Affairs. With Jonathan Caulkins, Angela Hawken, and Beau Kilmer, I wrote a book last year called *Marijuana Legalization* published by Oxford University Press. Kilmer and I jointly edit the *Journal of Drug Policy Analysis*.

In addition to my academic work, I provide advice on crime control and drug policy to governments in the United States and abroad through BOTEC Analysis Corporation. BOTEC has been advising the Washington State Liquor Control Board on the implementation of a regulated market for cannabis.

The opinions here expressed are entirely my responsibility, and should not be taken to reflect the views of UCLA, of the State of Washington, or of my co-authors.

The Nature of the Conflict and the Case for Accommodation

The combination of the Controlled Substances Act and state-level legalization creates a conflict: the states are licensing individuals and firms to commit federal felonies. The question is how the federal government should deal with that conflict. Neither of the obvious answers to that question – simple acquiescence nor a complete crackdown – is either workable or consistent with the requirements of the CSA itself.

It is undisputed that the states could repeal their marijuana laws entirely – as New York State did with alcohol in 1923 - leaving the federal government with an impossible task: 4000 DEA agents can't replace 500,000 state and local police.

It's clearly more desirable, in terms of controlling drug abuse – which, after all, is the purpose of the CSA – for the states to tax and regulate than for them to declare a free-for-all. To make those taxes and regulations effective, the states will have to maintain or even increase enforcement against the

remaining illicit market. It has proven impossible to eliminate cannabis use and sales entirely, because arresting a grower or dealer creates a market niche for another grower or dealer. It should not be impossible, once a state allows a reliable competing state-licensed source of supply, to drive most of the purely illicit market out of business, just as the legal alcohol industry has largely eliminated moonshining.

Therefore it makes sense for the federal government to work with the states – as the CSA requires – rather than against them, even when the states decide to regulate and tax cannabis rather than continuing to prohibit it. That does not change the illegal status of the activity under federal law. But it does hold out hope of preventing these two local experiments from becoming national problems.

Indeed, the federal government could easily destroy the licensed, taxed, and regulated systems Colorado and Washington are now putting into place. But that would not mean that no one in those states would produce, sell, or consume marijuana: it would merely leave production and sale in the hands of unlicensed, untaxed, and unregulated illicit and quasi-medical producers and distributors. Would that really be a better result than is likely to emerge if the state-level experiments are allowed to run their course?

On the other hand, simple deference to the states seems equally unwise. The CSA remains the law of the land, and other states have a right to expect the federal government to ensure that decisions made in Washington and Colorado do not lead to a national flood of cheap, high-potency cannabis.

The DoJ announcement of August 29 seems to me a serious and well-considered effort to deal with a situation without any easy solutions.

Alternative Approaches: Sec. 873 Contractual Agreements and Waivers

Still, the uncertainties and ambiguities created by the conflict of laws represent undeniable problems. In a recently published paper, "Cooperative Enforcement Agreements and Policy Waivers: New Options for Federal Accommodation to State-Level Cannabis Legalization," (*Journal of Drug Policy Analysis*. Volume 6, Issue 1, August 2013) I attempt to lay out two alternatives.

One, which could have been done – or could still be done – within the confines of the current law, would be for the federal government and the legalizing states to enter into "contractual agreements" as provided for in Section 873 of the CSA. That section gives the Attorney General the power to make such agreements "notwithstanding any other provision of law." In the negotiations leading up to such agreements, the Justice Department could and should require specific, verifiable commitments from Colorado and Washington with respect both to the controls to be placed on the state-legal markets and

the efforts to be undertaken with respect to the frankly illicit markets. In my view, the risks of interstate smuggling from purely illegal activity, and from the unregulated and unregistered production for personal use allowed under the Colorado law and under Washington's medical marijuana law, are more substantial than the risks of diversion from licensed producers.

A second alternative – requiring new legislation – would be to create a formal "waiver" process under which states would be allowed to experiment with taxed and regulated cannabis production and distribution, as states were allowed to experiment with alternative forms of income support under AFDC waivers. The waiver process could be made as strict as Congress desired. With a waiver in place, state-legal activity would become legal under federal law as well, a substantial improvement, for state regulators and industry participants alike, over simply being a low enforcement priority. That promise would provide a substantial incentive for states seeking waivers, or wanting to hold on to waivers, once granted, to do their utmost to prevent sales out of state. That would also create an incentive for the newly-legal industries to self-police and to support enforcement efforts against rogue licensees and entirely illicit traffickers, since the threat of having a waiver withdrawn as the result of misbehavior by a few bad actors or the state's failure to rein in the illicit market would be a potent one.

The goals established, either under contractual agreements or under waivers, would have to be realistic. Even under existing laws, we have notably failed to prevent the distribution of cannabis to minors, just as age restrictions have not prevented a major alcohol-abuse problem among people under 21. A rule that required states to promise that no cannabis from licensed sellers ever find its way into the hands of minors would be a demand for the Moon. However setting reasonable goals and requiring sensible policies about, for example, labeling, marketing, and child-resistant or child-aversive packaging, could produce reasonable results.

Commercialization is Not the Only Option

The voters in Colorado and Washington State have created "alcohol-like" cannabis industries: competing for-profit firms acting under state regulation. There is reason to doubt that such a system is anywhere close to the ideal one. Whether the drug involved is cannabis or alcohol, commercial vendors have interests directly opposed to the public interest, because their most reliable and lucrative customers are precisely the minority of cannabis users or drinkers who have lost control over their consumption. The public interest is in allowing adult access to intoxicants for those who will use them moderately and responsibly. The commercial interest is in maximizing revenues and profit, which means creating and serving a market of people with substance abuse problems. The ability of regulators to rein in market excesses is limited by the Supreme Court's "commercial free speech" jurisprudence. In what seems (to a

non-lawyer) a complete absurdity, the Court has held that Congress or a state legislature may ban an activity entirely, but may not allow it while banning its promotion.

There are at least two alternatives to commercial availability, short of complete prohibition. One would be to create a state monopoly on retail sales, as used to be the policy toward alcohol in many states. The other would be to allow production and sale on a strictly not-for-profit basis, exemplified by the Spanish "cannabis clubs" where users band together to hire people to produce cannabis for them, on the model of a consumer-owned organic farm. Neither of those approaches is simple or without its own problems, but either would dampen what will otherwise be the enthusiastic efforts of state-licensed cannabis vendors to create bad habits. A "state-store" system could both limit its own marketing and require its suppliers to limit theirs as a contractual matter. (There is no guarantee that a state monopoly system would avoid relentless promotion; consider the excesses of the state lottery system, But the federal government could insist on such restraint as the price of a waiver.)

While the Controlled Substances Act in its current form remains in place, the "state-store" system is not an option, because no state can instruct its officials to violate the federal law, as selling cannabis clearly does. (Regulating the behavior of private parties, even when that behavior violates the federal law, does not create the same problem.) Production and sales activity under a waiver of the kind proposed would be legal, rather than merely tolerated, eliminating the legal problem. Thus a "waivers" approach could allow a state monopoly on sales.

In creating authority for cannabis policy waivers, the Congress could even require either state-monopoly sales or an entirely not-for-profit industry. Or it could choose to give the Executive Branch, and the states, more leeway. But without new legislation the Federal response will necessarily continue to be purely reactive, and without substantial legislative input. Surely it would be better for the Congress to take an active role, lest the country wind up stuck with the commercial-sales model simply because that was the choice of the first two states to attempt cannabis regulation.

Discouraging Marketing

Even under the prosecutorial-discretion approach adopted by the Justice Department, there are opportunities for discouraging marketing activity which the memo issued last month does not fully exploit. A retailer needs a modest sign on the outside of the building and a website listing what it has to sell. There is no need to tolerate anything more than that: billboards, flyers, newspaper/television/radio advertising, "social marketing." The Justice Department could, and I submit should, add marketing efforts to the list of eight categories of activity that will attract enforcement and prosecution. That

would do more to prevent increased drug abuse and increased use by minors than any single other step the Federal government could take.

Both in Washington State and in Colorado, there are two major categories of risk: the risk of increased drug abuse and its consequences within the state, and the risk of exports to other states worsening drug abuse problems there. In each case price is a key consideration. If prices in the licit market are so much higher than illicit prices that they help keep the black market in business, it will frustrate the goal the voters had in mind. But there is no good reason to allow licit-market prices to fall much below current illicit-market or medical-market prices. (In Colorado especially, some of the reported medical-market prices are already at dangerously low levels, and they are likely to fall – even taking taxation into account – when producers are able to enjoy the efficiencies that go with open rather than covert production.) For a non-habituated user, cannabis intoxication is already available at a price of less than a dollar per hour. Paraphrasing an old ad for a premium Scotch, "If the price bothers you, you're toking too much." It should be an explicit goal of state and federal policy to prevent any further decrease in price. Both Washington and Colorado use *ad valorem* taxes, which will fall along with market prices. A better approach would be a specific excise based on the quantity of THC, and rising as market prices fall.

The Financial-Services Issue

Federal responsibility does not begin and end with the Department of Justice. Treasury Department (and Federal Reserve Board) regulations, and the guidance provided to financial institutions by their regulators and inspectors from the Fed, the Comptroller's office, the Federal Deposit Insurance Corporation, and the National Credit Union Administration currently mean that in practice the entire state-legal medical marijuana industry, and the new state-legal commercial cannabis industries in Washington and Colorado, have to operate almost entirely in cash – without being able either to accept credit cards or to have checking accounts – unless they conceal their identity from their financial institutions by calling themselves "flower shops" or "natural products suppliers" or "herbalists" or some such, or maintaining what are in fact business accounts under personal names. Even those prepared to engage in such subreption face the constant risk of having their accounts terminated.

Once Washington and Colorado have their commercial systems up and running, those regulatory practices, if not changed, will mean hundreds of millions of dollars per year in cash transactions, with attendant risks of robbery. That risk to public safety seems to me unnecessary and unaccompanied by any good result. I would suggest that the Committee, having asked the Justice Department what it plans to do and gotten the August 29 memo as an answer, now ask the Treasury Department whether it plans to offer new guidance to the bank regulators, or whether it believes that

new legislation is needed. This matter deserves, I submit, more attention than it has received heretofore.

The States as Laboratories

Now, as to the longer term:

I have been a long-time skeptic about proposals for cannabis legalization. But the changes in public opinion, and in market behavior, over the past decade now make me doubt that there is a operationally and politically sustainable version of cannabis prohibition still available. It seems to me that the burden of the argument now falls on those who wish to retain the legal *status quo*. What specific policies would they put in place, and what resources would they be willing to provide, that could realistically be expected to shrink what is now a $30 billion-per-year illicit market? If they have no more idea than I do how to accomplish that, then it is time to ask whether whatever benefits we get from continued cannabis prohibition in the form of reduced drug abuse are really large enough to justify offering criminal organizations such a huge economic prize.

The answer to that question depends in part on whether the states and the federal government can design and implement effective systems of taxation and regulation to replace the cannabis provisions of the CSA and of the corresponding state laws. Right now, no one knows. The Colorado and Washington experiments will provide substantial help in finding some answers. (Since those data will not collect themselves federal and philanthropic research-funding agencies should be ready to take advantage of the opportunity to learn from experience.) That – along with the sheer impossibility of enforcing federal law without state and local help – seems to me the best argument for accommodating to the Washington and Colorado initiatives rather than merely clamping down hard.

Very truly yours,

Mark A.R. Kleiman

Written Testimony of Washington Governor Jay Inslee and Washington Attorney General Bob Ferguson

Senate Judiciary Committee Hearing on
Conflicts Between State and Federal Marijuana Laws
September 10, 2013

Thank you Chairman Leahy, Ranking Member Grassley, and members of the Senate Judiciary Committee for holding a hearing on this important topic and for allowing us to submit written testimony. We write to update the Committee on developments in our state, to thank President Obama and Attorney General Holder for clarifying federal enforcement priorities, and to highlight for the Committee areas where we could benefit from further federal guidance or potential changes in federal law.

Since the voters of Washington approved Initiative 502 last November, authorizing the creation of a highly regulated market for marijuana, we have been working diligently to respect the will of the voters and implement the measure. Washington's Liquor Control Board has spent months developing detailed rules and regulations to implement Initiative 502, through an extensive process of public testimony and deliberation, and will soon adopt final rules and begin issuing licenses to qualified marijuana producers, processors, and retailers.

In light of our voters' choice and the extensive work we have done to implement that choice, we welcomed the recent announcement from the Department of Justice that it will not act to challenge our state's law. We appreciate the leadership that President Obama and Attorney General Holder have shown in carefully considering this issue and ultimately concluding that the federal government should allow Washington and Colorado to implement our states' laws and serve as the laboratories of democracy on this issue (in Justice Brandeis's famous words), while continuing to enforce federal law in the areas of highest priority for the federal government.

We look forward to working with the Department of Justice and other federal agencies to ensure that our state's effort complies with and advances federal priorities. Specifically, Deputy Attorney General James Cole listed eight enforcement priorities in his recent memorandum to United States Attorneys. Initiative 502 and the proposed rules to implement it developed by the Liquor Control Board address each of these issues in important ways. We address each of the priority areas in turn:

(1) "Preventing the distribution of marijuana to minors;"

-Initiative 502 allows marijuana sales only to adults age 21 and older. RCW 69.50.354.

-No retailer, processor, or grower can be located within 1,000 feet of a school, park, playground, recreation center, child care center, transit center, video arcade, or library. RCW 69.50.331(8); proposed WAC 314-55-010 (definitions).

-The Liquor Control Board's proposed rules restrict advertising that could reach minors. RCW 69.50.345(9)(b); proposed WAC 314-55-155.
-No one under 21 can enter a licensed marijuana retailer, obtain a license under Initiative 502, or be an employee of a licensee. RCW 69.50.357(2); RCW 69.50.331(1)(a); proposed WAC 314-55-015(2).
-The Board's proposed rules require specific child resistant packaging for marijuana and marijuana-infused products in solid or liquid forms. Proposed WAC 314-55-105.
-Marijuana possession by those under 21 remains illegal under state law. RCW 69.50.4013.

(2) "Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;"

-The Liquor Control Board's proposed rules require criminal background checks of any person or member of any business entity (and their spouses and financiers) seeking a license to sell, grow, or process marijuana. Licenses can be denied or revoked for criminal violations. Proposed WAC 314-55-020; 314-55-035; 314-55-040.
-To obtain a license, business entities must be formed under the laws of the state of Washington, and all individual members of business entities must have resided in the State for at least three months before applying for a license. RCW 60.50.331(1)(b) and (c); proposed WAC 314-55-020(7).
-The Liquor Control Board will inspect licensed premises and their books to ensure that they are not acting as covers for other activities. Proposed WAC 314-55-087.

(3) "Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;"

-Initiative 502 and the Liquor Control Board's proposed rules require careful tracking of marijuana by producers, processors, and retailers. All licensees must track marijuana "from seed to sale" using a software system specified by the Board, and must notify the Board in advance of all shipments and waste disposal. Proposed WAC 314-55-083(4); 314-55-085; 314-55-097.
-The Board also capped the total amount of marijuana that may be grown statewide and the total number of retail stores, attempting to limit the marijuana supply to only what will be demanded in Washington. Proposed WAC 314-55-075(6); 314-55-081.
-Limits are placed on the amount of marijuana that each licensee may have on hand. Proposed WAC 314-55-075(9); 314-55-077(7); 314-55-079(7).
-Purchase and possession of marijuana by individuals is limited to specified quantities. RCW 69.50.360(3); 69.50.4013(3).
-Internet sales and delivery are prohibited. Proposed WAC 314-55-079(3).
-Marijuana packaging must have labels warning that: "This product is unlawful outside of Washington state." Proposed WAC 314-55-105(13)(f).

(4) "Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;"

-The Liquor Control Board will not license any location where law enforcement access is limited. This includes personal residences. Proposed WAC 314-55-015(5).

-All licensees must maintain surveillance systems with continuous recording twenty-four hours a day, subject to inspection by the Board. Proposed WAC 314-55-083(3).

-The Board will inspect licensed premises and their books to ensure that they are not acting as covers for other activities. Proposed WAC 314-55-087.

(5) "Preventing violence and the use of firearms in the cultivation and distribution of marijuana;"

-In addition to the required background checks mentioned above, the Liquor Control Board's proposed rules require licensed producers, retailers, and processors to have detailed plans for security and transportation of their products, and all licensees must have alarm and surveillance systems. Proposed WAC 314-55-083.

(6) "Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;"

-Impaired driving is illegal under state law, and Initiative 502 set a new "per se" blood THC limit for a conviction of driving under the influence of marijuana. RCW 46.20.308.

-Any marijuana advertisement must disclose the drug's potential health consequences and contain a warning not to operate a vehicle under the influence. Marijuana packaging must have labeling that discloses potential health risks, a warning not to operate a vehicle, and include accompanying material with other health warnings and information. Proposed WAC 314-55-155; 314-55-105.

-Licensed producers of marijuana must submit representative samples of their product to a licensed testing laboratory for inspection and testing to assure compliance with standards set by the LCB. If a representative sample fails to meet those standards, the entire lot from which it was taken must be destroyed. RCW 69.50.348; *see* proposed WAC 314-55-102 (quality assurance testing standards).

-Limits are placed on the amount of active ingredient in a single serving of an infused product and the number of servings in any single unit of a product for sale. Proposed WAC 314-55-095.

(7) "Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and"

-Outdoor production of marijuana is tightly regulated under the proposed rules and can only take place behind fences at least 8 feet tall and with security and surveillance systems. Proposed WAC 314-55-075.

(8) "Preventing marijuana possession or use on federal property."
    -The LCB will not approve any marijuana license for a location on federal lands. Proposed WAC 314-55-015(6).

As you can see, we have taken many steps to address the federal government's enforcement priorities, and we are confident that we can partner with the federal government in enforcing the law as to those who act outside the bounds of both Initiative 502 and federal law.

At the same time, certain aspects of federal law are making it difficult for entrepreneurs seeking to enter the regulated marijuana market and comply with Initiative 502. Most importantly, business owners attempting to comply with Initiative 502 are having great difficulty accessing banking services, because federal law can impose regulatory and criminal penalties on banks that accept money they know to be proceeds from drug sales, even if those sales are legal under state law.

This situation unfortunately undermines federal priorities, because it means that legitimate business owners acting in full compliance with state law may still need to operate on an all-cash basis. This will make it more difficult for the State to audit their books, track their income, and differentiate those acting within the law from those possibly using proceeds from regulated marijuana sales to fund illegal activities. We are additionally concerned that by operating on an all-cash basis, licensees may become a target for theft and burglary, thereby creating additional public safety challenges. We encourage the Department of Justice to provide federal banking regulators further guidance in this area. We would also ask you to consider legislation such as H.R.2652—the Marijuana Businesses Access to Banking Act of 2013, which would allow banks to accept deposits from legitimate marijuana businesses acting in compliance with state law.

We would like to again thank President Obama and Attorney General Holder for their leadership, and for allowing us to move forward with implementation of Initiative 502 in Washington state, in accordance with the will of our voters.

We appreciate the Committee's interest in this issue, the opportunity to update you on our State's progress implementing Initiative 502, and the chance to highlight areas where we could use additional federal assistance to ensure that we best achieve our shared goals of keeping drugs out of the hands of children, preventing drug money from fueling criminal gangs, and preventing the violence that can be associated with the illegal drug trade.

Written Statement of the American Civil Liberties Union Before the United States Senate Judiciary Committee

Hearing on

Conflicts Between State and Federal Marijuana Laws

Tuesday, September 10, 2013
at 2:30pm

Submitted by the
ACLU Washington Legislative Office,
The ACLU Criminal Law Reform Project
The ACLU of Washington

For further information contact Jesselyn McCurdy, Senior Legislative Counsel at
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The American Civil Liberties Union (ACLU) welcomes this opportunity to submit testimony to the Senate Judiciary Committee for its hearing on the "Conflicts Between State and Federal Marijuana Laws." We urge the Committee and its members to take action to protect states' ability to move forward with public safety-focused alternatives to marijuana prohibition. In addition, we call on the Committee and its members to assume a leading role in re-focusing our nation's drug policies towards a model premised on the understanding that drug abuse and addiction are health problems which should be primarily addressed through public health solutions rather than the over-criminalization and over-incarceration of our citizens, or the creation of violent and profiteering black markets.

The ACLU is a nationwide, nonprofit, non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of liberty and equality embodied in our Constitution and our civil rights laws. Consistent with that mission, the ACLU established the Criminal Law Reform Project (formerly the Drug Law Reform Project) in 1998 to focus on the front end of the criminal justice system, from policing to sentencing, with an emphasis on ending our nation's punitive drug policies, which have failed to achieve public safety and health while putting unprecedented numbers of people behind bars and eroding constitutional rights. Through public education, advocacy, and litigation, the Project has challenged government overreaches of this country's failed War on Drugs. The Project has worked extensively on marijuana reform. This work has included defending the rights of medical marijuana patients to access the medicine that most effectively alleviates their ailments, challenging the Drug Enforcement Agency's refusal to permit scientific research about the medicinal value of marijuana, vindicating doctors' First Amendment rights to discuss medical marijuana with their patients, establishing new limits on search and seizure law where marijuana has been decriminalized under state law, and publishing an unprecedented nationwide study on the significant and widespread racial disparities in marijuana arrests from 2001-2010. The Project has extensive expertise regarding the interaction of state and federal marijuana laws with a focus on the reach and limitations of federal preemption.

I. August 29, 2013 Deputy Attorney General Cole Memorandum.

Shortly after Senator Leahy scheduled this Hearing, the Department of Justice ("DOJ") issued a "Memorandum for All United States Attorneys," which provides "Guidance Regarding Marijuana Enforcement."[1] The ACLU joins Senator Leahy in welcoming this guidance and applauds DOJ's decision not to interfere with states that legalize and strictly regulate marijuana use and possession for adults as long as certain DOJ enforcement priorities are not interfered with.

Respecting the circumscribed marijuana legalization laws in Washington and Colorado is an ideal way to accumulate evidence about how we can dismantle our unnecessarily punitive drug policies and realize economic and civil rights rewards without sacrificing public safety. The Washington and Colorado laws represent the best of the experimental opportunities federalism was designed to promote. As Justice Brandeis explained, "[d]enial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system 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."[2]

Indeed, our constitution is structured to ensure that Congress cannot force its own policies upon the states and states have the flexibility to experiment. The reason for this separation between federal and state policy is compelling: "Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people."[3] The Supreme Court has explained that, in light of the Tenth Amendment, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[4] Simply put, this anti-commandeering principle means that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[5] Accordingly, Congress cannot force the states to enact their own wholesale criminalization of marijuana to complement federal policy. Regardless of federal criminal law, states have always been free to decriminalize marijuana under their own criminal codes. As Judge Kozinski has explained in reference to state medical marijuana laws, "[i]f the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal."[6] Thus, Washington and Colorado's decision to take a different path than the federal government on marijuana policy is consistent with

our constitutional structure.

The 40-year War on Drugs, waged on our own citizens, has been a deeply flawed and failed effort.[7] A key component of its failure has been the total prohibition of marijuana, which has resulted in the expenditure of vast amounts of money prosecuting and incarcerating countless people whose potential is decimated by wasted time behind bars and complex webs of collateral consequences that obstruct their ability to succeed in society.[8] Worse still, the burden of marijuana prohibition falls disproportionately on Black Americans who, across the country, are arrested, prosecuted, and convicted of nonviolent marijuana offenses at rates that far exceed their rates of offending behavior as compared to whites.[9]

Recognizing the harms associated with the criminalization of marijuana, the people of Washington and Colorado voted to regulate marijuana comprehensively instead of prohibiting it—a decision similar to the passage of the 21st Amendment, which repealed the nation's failed experiment with alcohol prohibition. Washington and Colorado's new marijuana laws complement federal efforts to minimize the public safety and public health impacts of the cultivation, distribution, and use of marijuana in our society by seeking to reduce and prevent substance abuse, reduce minors' access to marijuana, eliminate the violence associated with illegal drug dealing, and channel revenue to under-funded and socially constructive institutions like public health and education. Washington's Initiative 502, for example, features not only a tight regulatory system and restrictions on advertising, but also dedication of new revenues to prevention, treatment, public health education, intervention programs for at-risk youth, research, and independent cost-benefit evaluation. Moreover, by creating regulated, legal competition, Washington's new law will begin separating consumer dollars from the criminal organizations currently profiting from marijuana at the point of sale.

Indeed, the ultimate goals of any law that regulates marijuana should be the reduction of black market-driven violence and profiteering, and the reduction of drug abuse. We are pleased, therefore, that DOJ's August 29, 2013 Memorandum recognizes that "a robust system may affirmatively address [DOJ] priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulating market in which revenues are tracked an accounted for."[10] Further, the Memorandum states explicitly that "in exercising prosecutorial

discretion, prosecutors should not consider the size or commercial natures of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implications [DOJ's] enforcement priorities…."[11] Accordingly, the ACLU supports DOJ's Memorandum outlining its policy of non-interference with these state laws serving as laboratories for innovative public policy.

To ensure that U.S. Attorneys' decisions are aligned with DOJ objectives as delineated by the Memorandum, we call on DOJ to monitor implementation of its non-interference policy.

The August 29 Memorandum is a significant and reassuring step, but it is not sufficient. First, it does not address major impediments presented by federal law to safe and successful operating of the regulatory system, including the inability of the banking industry to provide financial services to licensees. If marijuana commerce remains a cash-only proposition, the risk of armed robbery will remain high, which in turn reduces the incentive to participate in the newly legal, regulated market, increasing the likelihood that the industry will continue to be dominated by those who pay little heed to laws and regulations. Congress should therefore pass legislation that protects entities in compliance with state marijuana laws from federal interference and provides clarity about such protected activity to law enforcement, businesses, the banking industry, states, and the nation as a whole.

Second, the exercise of prosecutorial discretion is only a temporary and partial solution, as demonstrated by the Memorandum's express limitations that "[i]f state enforcement efforts are not sufficiently robust . . . the federal government may seek to challenge the regulatory structure itself" and that "nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances . . . ."[12]

This Committee and its members have an indispensable role to play in providing more reliable and permanent protection of states' ability to explore public-safety focused alternatives to marijuana prohibition, and more broadly in ending the U.S. government's costly and counterproductive policies towards marijuana more generally. Accordingly, in the pages that follow, we provide a roadmap for Congressional reform and we urge this Committee and its members to spearhead the effort.

II. This Committee Should Spearhead a Congressional Effort to Re-Focus Drug Policy Towards a Public Health Model and Away from our Current Over-Criminalization and Over-Incarceration Model.

The ACLU urges this Committee and its members to take on a leading role in reshaping our national drug policy rather than continuing to wait for individual states to partially lead us out of the failed War on Drugs. Among the many reasons to do so, three are paramount: first, marijuana prohibition is disproportionately enforced against Blacks at the state level; second, marijuana prohibition is expensive but ineffective; and third, marijuana prohibition prevents research into the medicinal qualities of marijuana and obstructs seriously ill Americans from accessing a treatment that does or may provide them with much-needed relief.

A. Report Finds Staggering Racial Disparities in Marijuana Possession Arrests Nationwide Despite Comparable Usage Rates Among Blacks and Whites.

The ACLU recently published a comprehensive report ("the Report") that, for the first time, documents arrest rates for marijuana possession by race for all 50 states (and the District of Columbia) and their respective counties.[13] The Report analyzed data from 2001 to 2010 and found that Blacks are 3.73 times more likely than whites to be arrested for marijuana possession offenses despite using marijuana at comparable rates.[14] These racial disparities in marijuana possession arrests exist in all pockets of the country, in counties large and small, in rural and urban areas, in counties with high, medium, and low family incomes, and irrespective of the Black percentage of the overall population. In addition, the costs of these racially disproportionate arrests are hefty at a time of budget crises: in 2010, states spent over an estimated $3.6 billion on marijuana possession enforcement.[15]

i. Methodology

To document arrest rates per 100,000 for marijuana possession by race, the Report relies on arrest data from the Federal Bureau of Investigation's Uniform Crime Reporting Program ("FBI/UCR Program"), which compiles data voluntarily reported by more than 18,000 city, university and college, county, state, tribal, and federal law enforcement agencies,[16] and the United States Census, which publishes annual county population estimates by age, sex, race, and ethnicity.[17]

To document marijuana use, the Report relies on data from the Substance Abuse and Mental health Services Administration's National Survey on Drug Use and Health ("NSDUH"), which is the primary source of information on the use of illicit drugs, alcohol, and tobacco in the civilian, non-institutionalized population of the United States aged 12 years old or older.[18]

ii. Key Findings

1. *Marijuana arrests have risen since 2001 and accounted for more than half of all drug arrests in the United States in 2010.*

In 2010, there were 1,717,064 drug arrests in the United States, and more than half—889,133, or 52%—were for marijuana related offenses.[19] Put another way, someone was arrested for marijuana every 37 seconds in 2010.[20]

In fact, in 2010 there were 300,000 more marijuana arrests than arrests for all violent crimes combined.[21]

There were 140,000 more marijuana arrests in 2010 (a total of 889,133) than there were in 2001.[22] In fact, while overall drug arrests started to drop in 2006, marijuana arrests deviated from the general trend and instead remained at roughly the same level through 2010 (above 845,00 per year).[23]

Most marijuana arrests are not for sale or large-scale trafficking, but instead for low-level possession. In 2010, 784,021, or 88%, of marijuana arrests were for possession.[24]

2. *Racial disparities in marijuana possession arrests nationwide: Blacks are 3.73 times more likely than whites to be arrested for marijuana possession.*

Most disturbingly, the FBI/UCR Program data revealed that Blacks are disproportionately targeted for marijuana enforcement. In 2010, the Black arrest rate for marijuana possession was 716 per 100,000, while the white arrest rate was 192 per 100,000.[25] In other words, nationally Blacks are 3.73 times more likely than whites to be arrested for marijuana possession.

Furthermore, racial disparities exist in every part of the country: Blacks are over four times more likely to be arrested for marijuana possession than whites in

the Northeast and Midwest; in the South, Blacks are over three times more likely, and in the West, they are twice as likely to be arrested.[26] In over one-third of the states, Blacks are more than four times likelier to be arrested for marijuana possession than whites.[27] In Iowa, Minnesota, Illinois and the District of Columbia, Blacks are 8 times more likely to be arrested.[28]

3. *Racial disparities in marijuana arrests have grown worse over the past decade.*

As marijuana arrests increased over the past decade, so did the disparity between Black and white arrest rates — by 32.7% between 2001 and 2010.[29] The white arrest rate remained constant at around 192 per 100,000, while the Black arrest rate rose from 537 per 100,000 in 2001 (and 521 per 100,000 in 2002) to 716 per 100,000 in 2010.[30]

Additionally, the increase in racial disparities in marijuana possession arrests has been a nationwide trend: disparities increased in 38 of the 50 states (and in the District of Columbia) from 2001 to 2010. For example, in Alaska, racial disparities increased by 384%, in Minnesota by 231%, in Wisconsin by 153%, and in Michigan by 149%.[31]

4. *Blacks and whites use marijuana at similar rates.*

The 2010 NSDUH survey data found that Blacks and whites use marijuana at roughly similar rates. In 2010, 34% of whites and 27% of Blacks reported having last used marijuana more than one year ago — a constant trend over the past decade.[32] In the same year, 59% of Blacks and 54% of whites reported having never used marijuana.[33] Each year over the past decade more Blacks than whites reported that they had never used marijuana. Thus, while both groups use marijuana at comparable rates, the arrest disparities suggest that law enforcement agencies have seemingly turned a blind eye to this conduct among white communities while aggressively enforcing marijuana laws in Black communities.

Further, marijuana arrests have not reduced usage rates. In 2002, 14.5 million people aged 12 or older (6.2% of the total population) had used marijuana in the previous month. By 2011, that number had increased to 18.1 million (7.0% of the total population).[34] According to 2008 findings from World Health Organization surveys of 17 countries, 42.2% of Americans have tried marijuana in their lifetime.[35] The researchers noted the failure of the United States' punitive marijuana policy: "The Netherlands, with a less criminally punitive approach to cannabis use than the US, has experienced lower levels of use, particularly among

younger adults. Clearly, by itself, a punitive policy towards possession and use accounts for limited variation in nation level rates of illegal drug use."[36] The 2010 NSDUH survey reported similar numbers: 39.26% of Americans surveyed reported having used marijuana in their lifetimes and over 17.4 million Americans had used marijuana in the past month.[37]

5. *States spent over $3.6 billion on marijuana possession enforcement in 2010.*

The Report estimates the total national expenditure of enforcing marijuana possession laws in 2010 at approximately $3.6 billion.[38] Broken down, states spent an estimated $1,747,157,206 policing marijuana possession arrests, $1,371,200,815 adjudicating marijuana possession cases, and $495,611,826 incarcerating individuals for marijuana possession.[39] During a time of devastating budget shortfalls, it is simply irresponsible to continue wasting such vast sums of money arresting people for nonviolent, low-level marijuana offenses—particularly when this approach has not even met its purported goal of reducing marijuana usage.

iii. Marijuana Legalization Would Eliminate Racial Disparities in Arrests And Allow Marijuana Use to Be Treated as a Public Health Issue

The human and financial costs of marijuana arrests, prosecutions, and convictions – borne disproportionately by Blacks – cannot be overstated. The collateral consequences of an arrest or conviction can affect eligibility for public housing and student financial aid, employment opportunities, child custody determinations, and immigration status. Marijuana convictions can also lead to more severe charges and sentences if a given individual is ever arrested for or convicted of another crime.[40] In addition, the targeted enforcement of marijuana laws against Blacks deteriorates critical relationships between police and communities, creating mistrust and ultimately reducing public safety. The most effective way to eliminate marijuana arrests and the attendant racial disparities is to legalize marijuana.

Washington and Colorado have taken this step and stand to reduce the disparate impact that marijuana enforcement has on Black communities. In doing so, they are leading the way toward a safe and sensible drug policy that will begin to decrease the number of nonviolent drug offenders in the criminal justice system. Furthermore, by regulating and taxing marijuana like alcohol, and treating its use

as a public health issue rather than a criminal justice issue, these states and others that follow their lead will generate revenues that can be invested in public education, drug treatment, improving infrastructure, and an array of law enforcement priorities and community initiatives.

To the extent that this Committee shares the ACLU's concern about the criminalization of marijuana, and in particular the racial disparities in marijuana possession arrests, it should consider calling upon Congress to end federal marijuana prohibition, which would undoubtedly encourage repeal of prohibition at the state level as well.[41]

iv. Byrne JAG Grant Funding May Be Promoting Racial Disparities and Skewing Law Enforcement Priorities Toward Low-Level Arrests

Congress is currently authorized to spend $1.095 billion per year on the Byrne JAG ("JAG") grant program.[42] Funding for the JAG program has hovered around $500 million per year since 2006, with the exception of a one-time funding boost of $2 billion through the American Recovery and Reinvestment Act of 2009.[43] The ACLU is extremely concerned that the JAG program may be unintentionally incentivizing local law enforcement agencies to make an unnecessarily high number of drug arrests, which could be one reason for the increase of racially biased marijuana possession arrests over the past decade.

One reason for this concern is that some State Administering Agencies ("SAAs") that distribute JAG funds to law enforcement agencies use language in their grant administration materials that explicitly encourages using increased arrest numbers to project performance (and for subsequent measurement of performance). This, in turn, may incentivize low-level marijuana arrests, since low-level drug arrests are less resource intensive and time consuming than investigations and arrests for serious or violent crime. If the incentives to focus on low-level drug arrests were eliminated, police departments across the country could divert the time and money currently spent on making such arrests toward fostering collaborative police-community relations and fighting more serious, violent crime – much of which goes unsolved. The ACLU has documented examples of SAAs using grant materials that explicitly encourage law enforcement agencies to increase their drug arrest numbers.[44]

The Bureau of Justice Assistance ("BJA") has improved its capacity to collect and analyze data documenting local law enforcement use of JAG funding.

Today, BJA requires local law enforcement agencies that receive JAG funding (agencies that receive funding directly from BJA as well as agencies that receive funding through an SAA) to report on arrest numbers, including low-level drug arrests for marijuana possession, on quarterly and annual bases. But BJA could continue to improve its data-collection and analysis capacity.

Congress should investigate the potential for the JAG program to skew police priorities, in particular toward increasing low-level drug arrests. In addition, Congress should encourage DOJ, and specifically BJA, to issue clear guidance to SAAs and local law enforcement agencies affirming that JAG priorities include eliminating unnecessary incarceration while promoting public safety and reducing unwarranted racial disparities in arrest rates. Congress should also encourage BJA to require that grantees and sub-grantees (agencies that receive funding directly from BJA and agencies that receive funding through an SAA, respectively) include the following data in their quarterly and annual reports:

a. Demographic data, specifically, race, age, gender, and ethnicity for all arrests reported. Race data should include the following categories: white, Black or African American, American Indian and Alaska Native, Asian, and Native Hawaiian and other Pacific Islander. Ethnicity data should indicate whether or not the arrestee was Hispanic/Latino.

b. The address/location of all arrests reported.

c. The total number of individuals who reside in the area over which the sub-grantee exercises jurisdiction, as well as the racial demographics of this population.

d. Offense category for drug arrests, specifically, to differentiate drug sale or trafficking arrests from drug possession arrests. Type of drug should also be reported (e.g., X cocaine sale arrests or X marijuana possession arrests).

B. Marijuana's Classification as a Schedule I Drug Is Without Empirical Basis and Detrimental to Public Health Because it Obstructs Medical Research and Patients' Access to an Effective Treatment.

According to federal law, marijuana is classified as a Schedule I drug and "has no currently accepted medical use in treatment in the United States" and "a high potential for abuse."[45] As such, the federal government places marijuana in the same Schedule as heroin and LSD, and treats it as more serious than cocaine, methamphetamine, and methadone. And yet to date, 20 states and the District of Columbia have recognized marijuana's medicinal benefits and allow their residents to use marijuana to treat or alleviate symptoms caused by serious ailments such as chemotherapy treatment for cancer, AIDS/HIV wasting syndrome, glaucoma, epilepsy, Alzheimer's disease, and Crohn's disease. Many patients with such debilitating conditions report that marijuana is both more effective than any other medicine they have tried and burdens them with far fewer side effects than traditional treatments. Doctors also understand the benefits of medical marijuana: 76% of doctors recently surveyed by the New England Journal of Medicine said they would approve the use of marijuana to help ease a woman's pain from breast cancer.[46]

Just last month, Dr. Sanjay Gupta—whom President Obama considered for the position of U.S. Surgeon General in 2009—wrote in reference to medical marijuana that "[w]e have been terribly and systematically misled for nearly 70 years in the United States, and I apologize for my own role in that."[47] Dr. Gupta has explained that in the past, "I had steadily reviewed the scientific literature on medical marijuana from the United States and thought it was fairly unimpressive."[48] But now, after a year of intensive research, Dr. Gupta confesses:

> I apologize because I didn't look hard enough, until now. I didn't look far enough. I didn't review papers from smaller labs in other countries doing some remarkable research, and I was too dismissive of the loud chorus of legitimate patients whose symptoms improved on cannabis. Instead, I lumped them with the high-visibility malingerers, just looking to get high. I mistakenly believed the Drug Enforcement Agency listed marijuana as a schedule 1 substance because of sound scientific proof. Surely, they must have quality reasoning as to why marijuana is in the category of the most dangerous drugs that have "no accepted medicinal use and a high potential for abuse." They didn't have the science to support that claim, and I now

> know that when it comes to marijuana neither of those things are true. It doesn't have a high potential for abuse, and there are very legitimate medical applications.[49]

Indeed, Dr. Gupta concluded that "sometimes marijuana is the only thing that works."[50] That was Joseph Casias' experience when he started using medical marijuana.[51] Joseph is 33 years old. Since he was 14 years old, Joseph has lived in Battle Creek, Michigan, where he met his wife, Angela. Joseph and Angela have been married for over ten years and have two young children. At age 17, Joseph was diagnosed with sinus cancer and a brain tumor. His brain tumor is located at the back of his head near his spinal column. When diagnosed, it was the size of a softball. Joseph's cancer is inoperable. He underwent extensive radiation and chemotherapy immediately after he was diagnosed, and his treatments kept him in the hospital for a year and in a nursing home for six months. As a result of his treatment, he lost all his teeth and now wears false teeth. He suffered, and continues to suffer, severe pain in his face, head, and neck. Joseph used to play football and weigh 210 pounds, but over the course of his treatment he lost over 50 pounds and became too weak to walk. Nonetheless, Joseph persevered in rehabilitation and was eventually able to leave the nursing home. After he left the nursing home, and despite being in constant pain, Joseph went out and found a job. His first job was at Burger King.

Joseph experiences pain in his head and neck twenty-four hours per day. He describes his pain, when it is untreated, as a 10 on the scale of 10. Joseph's oncologist prescribed Lorcet, a narcotic-based pain reliever, for Joseph, but this medication only lowers his pain to an 8 or 9 out of 10 and it has a side effect of nausea. After the people of Michigan enacted the Michigan Medical Marihuana Act by voter initiative in 2008, Joseph's oncologist recommended that he try marijuana as permitted by state law. Joseph obtained the appropriate registry card from the state. The results were immediate and profound: Joseph's pain decreased dramatically, the new medicine did not induce nausea, and Joseph was able to gain back some of the weight he had lost during his treatment. Of his experience with medical marijuana, Joseph has said:

> I think medical marijuana has helped me become a better person overall. A better individual. It's changed my life. When I first thought I was sick I was – I lost all my energy. I would cough up blood, and I would bleed out of my sinus, my nose, constantly. It wouldn't stop. And they just—they couldn't figure out what was wrong with me. One day I went into the emergency room, and a doctor told me that I had a form of sinus cancer with a brain

> tumor. I weighed 210 pounds in high school, and I went down to nothing. I went down to nothing but skin and bones. My pain is in the back of my neck, because the tumor has eaten through my bone marrow. I don't wish it on anybody. It's something that you just pray that it'll just go away. I've tried liquid morphine, vicodins to lortabs. I had to take pills round the clock, every four hours, and they didn't always help. Me and my oncologist talked about it, and he felt that medical marijuana would help me, which it has. I felt less pain, for sure. The pain went immediately, just disintegrated. [My kids] love to play with their dad, play board games and things like that, and they love it. Where I didn't have that relationship with them before.[52]

Yet the legal fiction in federal law that marijuana has no medicinal value persists, and its Schedule I classification erects nearly insurmountable hurdles preventing scientists in the United States from legally conducting standardized research.[53] The 91st Congress, which enacted the Controlled Substances Act (CSA) in 1970 and assigned marijuana to Schedule I, did not intend for marijuana to stay in Schedule I for over 40 years. When that Congress initially assigned drugs to the various CSA schedules, it noted a lack of scientific study on marijuana and claimed that further research was necessary to determine its health effects—marijuana's placement in Schedule I was meant to be temporary. In the CSA, Congress also established the National Commission on Marijuana and Drug Abuse to assess the medical and addictive effects of marijuana. The Commission's First Report to Congress, published in 1972, "Marihuana: A Signal of Misunderstanding," recommended that marijuana no longer be classified as a narcotic, since that definition associated marijuana with more addictive drugs such as heroin and misled the public by exaggerating marijuana's harms.[54] The report further recommended decriminalization of marijuana in small amounts for personal use.[55] A second report the following year, "Drug Use in America: Problem in Perspective," reaffirmed the findings of the first report and again recommended decriminalization."[56] While the reports and their recommendation to decriminalize marijuana had gained widespread support, the Nixon administration ignored the Commission's findings.[57]

In 1975, the Ford administration's White Paper on Drug Abuse identified marijuana as a low-priority drug, and recommended that treatment and law enforcement efforts instead prioritize drugs that pose the greatest health risks, such as heroin and amphetamines.[58] In 1976, Jimmy Carter, whose own drug czar did not view marijuana as a serious public health threat, was elected President while campaigning on a platform supporting the decriminalization of marijuana. Since

then, no President, and no Congress, has taken on the long overdue task of removing marijuana from Schedule I.

Notably, we have not always treated marijuana with such reckless disregard for the truth. Indeed, until 1943, marijuana was part of the United States drug pharmacopeia.[59] As Dr. Gupta has explained:

> One of the conditions for which [marijuana] was prescribed was neuropathic pain. It is a miserable pain that's tough to treat. My own patients have described it as "lancinating, burning and a barrage of pins and needles." While marijuana has long been documented to be effective for this awful pain, the most common medications prescribed today come from the poppy plant, including morphine, oxycodone and dilaudid. Here is the problem. Most of these medications don't work very well for this kind of pain, and tolerance is a real problem. Most frightening to me is that someone dies in the United States every 19 minutes from a prescription drug overdose, mostly accidental. Every 19 minutes. It is a horrifying statistic. As much as I searched, I could not find a documented case of death from marijuana overdose.[60]

For too long, medical marijuana patients—and patients who might benefit from medical marijuana but are deterred by federal prohibition—have been waiting for "[t]he continuing conflict between scientific evidence and political ideology … [to] be reconciled in a judicious manner."[61] Marijuana simply does not belong in Schedule I and its continued misplacement, in the face of robust evidence that it can provide great relief to the suffering among us, harms sick people, obstructs scientific progress, and sows disrespect for federal law. In Joseph Casias' words, "it's not right to take sick people's medicine away from them. I want to ask the government to please, have some compassion and respect for the sick individuals who are using this as a medication."[62]

In 1972, two years after Congress temporarily put marijuana in Schedule I and established the National Commission on Marijuana and Drug Abuse, the Commission told Congress and the President that marijuana should no longer be classified as a narcotic.[63] Over 40 years later, when we have significantly more research of its medicinal value, it is long past time for Congress to follow this evidence-based guidance.

III. What Congress Can Do to Advance Sensible Marijuana Reform.

A. Statutory Changes to Ensure that Washington and Colorado's Marijuana Legalization Laws Can be Fully and Successfully Implemented.

There are a number of pending bills in the House that would improve current federal marijuana policy and contribute to successful implementation of state level reform. For example, **H.R. 1523, Respect State Marijuana Laws Act of 2013** – introduced by Representative Rohrabacher (R-CA) has the highest level of bipartisan support of any marijuana bills introduced this Congress. It provides a clean fix for potential state/federal marijuana conflicts by exempting people in compliance with their states' marijuana laws from prosecution under the Controlled Substances Act. Indeed, H.R. 1523 strikes the right balance between states that have adopted new approaches to marijuana and those that have not. Similarly to the repeal of alcohol Prohibition, H.R. 1523 allows each state to chart its own course regarding marijuana but maintains the federal government's authority to enforce federal laws against individuals violating any individual state's laws. This type of pragmatic legislation provides clarity to the law enforcement, businesses, states, and the nation.

We urge the Committee's members to introduce a companion Senate bill to H.R. 1523 and to consider the other pending marijuana bills in the House. We also encourage Committee members to work with your colleagues in the House to end the War on Drugs and institute sensible, humane, and evidence-based policies.

B. Remove Marijuana From Schedule I.

Marijuana's classification under federal law should reflect the fact that evidence shows that marijuana can have tremendous and often unique medical benefits. Federal law should allow and enable qualified patients access to this medicine and should incentivize rather than hinder scientific research.

Conclusion

States are taking the lead in recognizing the harms associated with the War on Drugs and, in particular, the harms caused by the criminalization of marijuana. We urge the Committee and Congress to join in the trend toward decriminalization and, at least, to craft laws allowing states to lead us out of this country's failed marijuana policies.

ENDNOTES

[1] James M. Cole August 29, 2013 Memorandum (hereinafter Cole Memorandum), *available at*: http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.
[2] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (J. Brandeis, dissenting).
[3] *New York v. United States*, 505 U.S. 144, 168 (1992).
[4] *New York v. United States*, 505 U.S. 144, 162 (1992).
[5] *Printz v. United States*, 521 U.S. 898, 925 (1997) (holding that Congress cannot circumvent the prohibition established in *New York* by conscripting a State's officers directly).
[6] *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring).
[7] For example, the number of sentenced prisoners under state jurisdiction for drug offenses increased 52% between 1990 and 2010. *See* ALLEN J. BECK & PAIGE M. HARRISON, U.S., DEP'T OF JUST., BUREAU OF JUST. STATISTICS, PRISONERS IN 2000 1 & 12 (Aug. 2001), *available at* http://bjs.gov/content/pub/pdf/p00.pdf (reporting the state prison population at 708,370 in 1990 and that 22% of that population, or 155,843 people, were incarcerated for drug offenses); E. ANN CARSON & WILLIAM J. SABOL, U.S, DEP'T OF JUST., BUREAU OF JUST. STATISTICS, PRISONERS IN 2011 9 (Dec. 2012), *available at* http://www.bjs.gov/content/pub/pdf/p11.pdf. (Dec. 2011), *available at* http://bjs.gov/content/pub/pdf/p10.pdf (reporting the state prison population sentenced for drug offenses at 237,000 in 2010). Despite the increase of people incarcerated for drug offenses, drug use not only failed to declined, but instead increased. In 2011, an estimated 22.5 million Americans aged 12 or older—8.7% of the population—reported using drugs in the past month. *Drug Facts: Nationwide Trends*, NAT'L INST. ON DRUG ABUSE (Dec. 2012), http://www.drugabuse.gov/publications/drugfacts/nationwide-trends. This is an 8.3% increase from 2002. *Id*.

On the 40th anniversary on the drug war, President Jimmy Carter called for an end to the global drug war, noting that global drug consumption and the prison population explosion have increased since it started. Jimmy Carter, Op-Ed., *Call Off the Global Drug War*, N.Y. TIMES**,** June 16, 2011, *available at* http://www.nytimes.com/2011/06/17/opinion/17carter.html. President Carter called for the United States to adopt the reforms laid out by the Global Commission on Drug Policy, which recommends substituting treatment for imprisonment for nonviolent drug offenders, and a shift toward combating violent criminal organizations rather than going after nonviolent, low-level drug offenders. *Id*.
[8] The ACLU estimates that states spent $3.6 billion enforcing marijuana possession laws in 2010 alone. *See* ACLU, *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests* 75 fig.24 (2013) (hereinafter ACLU, *The War on Marijuana*), *available at* https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf.

Meanwhile, there are dire collateral consequences that accompany a marijuana arrest and conviction, both for society and the individual. For example, public safety is affected: studies have shown that "marijuana arrests in particular, do not lower criminal activity, and may actually increase crime." *See* KATHERINE BECKETT & STEVE HERBERT, ACLU OF WASH., THE CONSEQUENCES AND COSTS OF MARIJUANA PROHIBITION, 31 (2008), *available at* http://www.aclu-wa.org/library_files/BeckettandHerbert.pdf. at 31 (citing Bernard E. Harcourt &

Jens Ludwig, *Reefer Madness: Broken Windows Policing and Misdemeanor Marijuana Arrests in New York City*, 1989-2000 173 **(**U. OF CHI. L. & ECON**.,** Working Paper No. 317, 2007), *available at* http://www.econ.brown.edu/fac/glenn_loury/louryhomepage/teaching/Ec%20222/marijuana-arrests-Ludwig.pdf). In addition, the financial costs to the individual can include lawyer's fees, missed or lost work, and bail, fines or court costs. *Id*. at 33-34. Perhaps, most serious are the costs that are impossible to quantify such as emotional stress, familial tensions and disruptions, and loss of faith in the legal system. *See id*. at 32.

[9] Blacks, on average, are 3.7 times more likely than whites to be arrested for marijuana possession despite using marijuana at comparable rates. *See* ACLU, *The War on Marijuana*, *supra* note 8, at 47 fig.9.

[10] Cole Memorandum, *supra* note 1, at 3.

[11] *Id*.

[12] *Id*. at 3-4.

[13] *See* ACLU, *The War on Marijuana*, *supra* note 8.

[14] *Id*. at 47.

[15] *Id*. at 75 fig.24.

[16] *About the Uniform Crime Reporting (UCR) Program*, FED. BUREAU OF INVESTIGATION**,** http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/aboutucrmain

Illinois, Florida, the District of Columbia, and the five counties of New York City do not report arrest data to the FBI/UCR Program. The ACLU obtained data for these jurisdictions by filing public records requests with the Illinois Department of State Police (ISP), the Florida Department of Law Enforcement (FDLE), D.C. Metropolitan Police Department (MPD), and the New York State Division of Criminal Justice Services (DCJS).

[17] The report looked at counties with a population of at least 30,000 people and a Black population of at least 2%. The 945 counties that met these criteria represent 78% of the United States population.

[18] *Nat'l Survey on Drug Use and Health (NSDUH)***,** SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN.**,** http://www.samhsa.gov/data/NSDUH.aspx.

[19] ACLU, *The War on Marijuana*, *supra* note 8, at 36 fig.1 & 37 fig.2.

[20] *Id*. at 9.

[21] *Id.* at 8 & 9.

[22] *Id*.

[23] *Id*. at 36 fig.1 & 37 fig.2.

[24] *Id*. at 8 & 9.

[25] *Id*. at 48.

[26] *Id*. at 50 fig.11.

[27] *Id*. at 49 tbl.6.

[28] *Id*.

[29] *Id*. at 48 fig.10.

[30] *See id*., at 47 fig.9 & 48.

[31] *Id*. at 21.

[32] *Id*.

[33] *Id*.

[34] *See Drug Facts: Nationwide Trends*, NAT'L INST. ON DRUG ABUSE, (Dec. 2012), http://www.drugabuse.gov/publications/drugfacts/nationwide-trends.
[35] *See* Louisa Degenhardt et al., *Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys*, 5 PLOS MEDICINE 1053, 1061 & 1065 (2008), *available at* http://www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050141 (follow "download" hyperlink).
[36] *See id*. at 1062.
[37] U.S. DEP'T OF HEALTH & HUMAN SERV., SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS (2011), *available at* http://www.samhsa.gov/data/NSDUH/2k10NSDUH/2k10Results.htm.
[38] *See* ACLU, *The War on Marijuana*, *supra* note 8, at 75-77.
[39] *Id*. at 22.
[40] Habitual offender laws, which result in increased sentences based on prior convictions, are especially troubling when they are applied to people whose prior convictions are low-level nonviolent marijuana offenses. See Appendix for examples of state life without parole sentences for low-level marijuana convictions under habitual offender laws.
[41] Under federal marijuana prohibition as it currently exists, nonviolent marijuana offenders can receive life without parole sentences. See Appendix for examples of federal life without parole sentences for marijuana convictions.
[42] *History of Byrne JAG Funding*, NAT'L CRIMINAL JUSTICE ASS'N, http://www.ncja.org/history-of-byrne-jag-funding.
[43] NAT'L CRIM. JUST. ASS'N BUREAU OF JUST. ASSISTANCE, CORNERSTONE FOR JUSTICE: BYRNE JAG AND ITS IMPACT ON THE CRIMINAL JUSTICE SYSTEM 2 (2011), *available at* https://www.bja.gov/Publications/NCJA_JAGReport.pdf. In FY11 and FY 12, funding for JAG has been somewhat lower, as Congress has sought to reduce the federal deficit through cuts in non-defense discretionary spending. *See History of Byrne JAG Funding*, *supra* note 43. Byrne JAG was funded at $424 million in FY11 and $352 million in FY12. *Id*. The final FY13 appropriations bill increased funding for the program by 5%, from $352 million to $371 million, which was subsequently reduced by the sequester to $352 million. *Id*. Final FY13 funding for Byrne JAG was, therefor funded at the prior FY12 level. *Id*.
[44] For example, one state Attorney General explained to prospective grantees, "objectives must be clearly expressed and in measurable terms. … Example: Increase the number of drug-related arrests by 10 percent. … [An example of] Performance Measures [are]: Number of drug-related arrests [for a given year]." Office of Att'y General of North Dakota, Edward Byrne Memorial State and Local Law Enforcement Assistance Program for Drug and Violent Crime Control Initiatives: Program Guidelines and Application Kit 14 (2004), *available at* www.ag.state.nd.us/bci/grants/byrne/Application.pdf. (emphasis omitted). Similarly, the application instructions for Byrne grant funding from the State of Louisiana Commission on Law Enforcement and the Administration of Criminal Justice states that "[m]easurable objectives use the words 'to increase,' 'to decrease,' or 'to maintain.' … These are activity statements. Once the objectives are written, ask, 'Does the statement allow you to measure something?' The number that will be increased, decreased or maintained directly relates to the baseline statistics." The Commission

gives the following example: "To increase the number of drug arrests from 300 to 350 within the twelve month period. Regarding "Prior Results" for continuing projects, the Commission notes: "Applications for continuation funding must describe the program's activities and accomplishments to date. This should include a summary of the previous funding project's activities such as, the number of arrests, drugs seized, the recidivism rate, policies and/or products developed, and data concerning the project's progress up to the time of application in meeting its goals." LOUISIANA COMM'N ON LAW ENFORCEMENT & THE ADMIN. OF CRIMINAL JUST. EDWARD BYRNE MEMORIAL/JUSTICE ASSISTANCE GRANT (JAG) PROGRAM, APPLICATION INSTRUCTIONS 13-14 (July 2010), *available at* http://www.lcle.la.gov/programs%5Cuploads%5CByrne%5CByrne_JAG_App_Instruct_rev_072010.pdf.

[45] 21 U.S.C. § 812(b)(1).

[46] Jonathan N. Adler, M.D., and James A. Colbert, M.D., *Medicinal Use of Marijuana — Polling Results*, N. ENGL. J. MED. 2013; 368:e30, May 30, 2013, *available at* http://www.nejm.org/doi/full/10.1056/NEJMclde1305159.

[47] Dr. Sanjay Gupta, *Why I changed my mind on weed*, CNN.COM, Aug. 8, 2013, http://www.cnn.com/2013/08/08/health/gupta-changed-mind-marijuana.

[48] *Id*.

[49] *Id*.

[50] *Id*.

[51] *See Complaint from Casias v. Walmart*, *available at* https://www.aclu.org/files/assets/2010-6-29-CasiasvWalMart-Complaint.pdf.

[52] ACLU Interview with Joseph Casias: https://www.aclu.org/drug-law-reform/casias-v-wal-mart, *video available at* http://www.youtube.com/watch?v=_eAXRLty5e4.

[53] Researchers must obtain a special license from the DEA to conduct research and gain access to supply, which is controlled by the National Institutes of Drug Abuse (NIDA). Rep. Earl Blumenauer & Rep. Jared Polis, The Path Forward: *Rethinking Federal Marijuana Policy* 12 (2013), *available at* http://polis.house.gov/uploadedfiles/the_path_forward.pdf

There have been, however, numerous studies that have shown marijuana does in fact have significant medical uses, including stopping the spread of aggressive forms of cancer. *See, e.g.*, Sean D. McAllister et al., *Cannabidiol as a Novel Inhibitor of Id-1 Gene Expression in Aggressive Breast Cancer Cells*, MOLECULAR CANCER THERAPEUTICS 2921 (2007), *available at* http://mct.aacrjournals.org/content/6/11/2921.full.pdf+html (follow "Show PDF in full window" hyperlink) (researchers found cannabidiol, a non-toxic, non-psychoactive chemical compound found in cannabis stopped the spread of breast cancer cells); Manuel Guzman et al., *A Pilot Clinical Study of Delta-9-tetrahydrocannabinol in Patients with Recurrent Glioblastoma* Multiforme, 95 BRITISH J. OF CANCER 197 (2006), *available at* http://www.nature.com/bjc/journal/v95/n2/pdf/6603236a.pdf (researchers found that delta 9-tetrahydrocannabinol (" THC") significantly reduced tumor proliferation in human subjects); Paola Massi et al., *Antitumor Effects of Cannabidiol, a Nonpsychoactive Cannabinoid, on Human Glioma Cell Lines*, 308 J. OF PHARMACOLOGY & EXPERIMENTAL THERAPEUTICS 838 (2003), *available at* http://jpet.aspetjournals.org/content/308/3/838.full.pdf (researchers at the University of Milan found that cannabidiol produced significant antitumor activity, both in vitro and in vivo, thus suggesting its use as an antineoplastic agent); C. Sánchez et al., *Delta-9-tetrahydrocannabinol Induces Apoptosis in C6 Glioma Cells*, FEBS LETTERS 436 (1998), *available at* http://scholar.qsensei.com/content/y05d9 (researchers found delta9-

Tetrahydrocannabinol (THC), the major active component of marijuana, induced the apoptosis (i.e., stopped the spread) in C6.9 glioma cells, an aggressive form of brain cancer).

[54] NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 223 (1972).

[55] *Id*. at 191.

[56] *See* NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE, Second Report at 224 n.5 (1973). The first report recommended that federal and state governments decriminalize marijuana possession for personal use. *Id.* at 458-59.

[57] ERNESTO ZEDILLO & HAYNIE WHEELER, EDS., YALE CTR. FOR THE STUDY OF GLOBALIZATION, RETHINKING THE "WAR ON DRUGS" THROUGH THE US-MEXICO PRISM 10 (2012) (citing David F. Musto, *Drugs in America: A Documentary History* 460 (N.Y.U. Press 2002)), *available at* http://www.ycsg.yale.edu/center/forms/rethinking-war-on-drugs.pdf ; Eric Blumenson & Eva Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 VA. J. SOC. POL'Y & L. 43, 55-56 (2009) (citing Rudolph J. Gerber, Legalizing Marijuana, Drug Policy Reform and Prohibition Politics 25 (2004)) ("the 'Shafer Commission' . . . unequivocally recommended marijuana decriminalization . . . [and] urged more attention to scientific findings. . . . [However,] the President disowned the report out of hand, stating that although marijuana was no more dangerous than the drink then in his hand, following his commission's view would send the wrong message.").

[58] *See DEA History 25*, DRUG ENFORCEMENT ADMIN., *available at* http://www.justice.gov/dea/about/history.shtml (follow "1975-1980" hyperlink); Office of The White House Press Sec'y, Fact Sheet: White Paper on Drug Abuse (1975), *available at* http://www.fordlibrarymuseum.gov/library/document/0248/whpr19751014-009.pdf

[59] Gupta, *Why I changed my mind on weed*, *supra* note 47.

[60] *Id*.

[61] Igor Grant et al., *Medical Marijuana: Clearing Away the Smoke*, 6 THE OPEN NEUROLOGY J. 18, 24 (2012), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3358713/pdf/TONEUJ-6-18.pdf.

[62] ACLU Interview with Joseph Casias: https://www.aclu.org/drug-law-reform/casias-v-wal-mart, *video available at* http://www.youtube.com/watch?v=_eAXRLty5e4.

[63] NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 223 (1972).

APPENDIX

Stories below from forthcoming ACLU Report
A Living Death: Life Without Parole for Nonviolent Offenses (Fall 2013).

Examples of State Life Without Parole Sentences for Low-Level Marijuana Convictions Under Habitual Offender Laws.

- Dale Wayne Green is serving LWOP for his role as middleman in a sale of $20 worth of marijuana to an undercover deputy. In September 1999, an undercover agent for the narcotics division of the Caddo Parish Sheriff's Office was driving around near Keithville, Louisiana, when he saw Green on the side of the road and stopped. *State v. Green*, 839 So.2d 970 (La. App. 2d Cir. 2003). Green reportedly asked the undercover agent if he was looking for anything, and when the agent responded that he was looking for weed, Green agreed to take him where he could buy some. *Id.* Green eventually found a young man to sell the agent a bag of marijuana worth $20. The agent paid Green $10 for his assistance. The agent's vehicle was equipped with surveillance equipment, but the sound was not functioning and the surveillance video tape was of poor quality, and the video does not capture the purchase of the marijuana. *Id.* The agent identified Green a day later, and Green was arrested in November 1999, after the undercover operation was completed.

  Green was convicted of distribution of marijuana and sentenced to a mandatory life-without-parole sentence because he was a third-time offender and his case was adjudicated under Louisiana's multiple offender law. He had two prior convictions: he had pled guilty to attempted possession of cocaine in 1990 and to simple robbery in 1991. *Id.* According to Green, when he pled guilty to these prior charges he was never informed of the nature or elements of the crimes, or that these convictions could be used to enhance his sentence under the multiple offender law if he committed subsequent offenses. *Id.* Green had no lawyer to represent him on appeal, and he unsuccessfully tried to raise the claims that he had been entrapped and that there was insufficient evidence to convict him. Green, who is Black, is 54 years old and has served 13 years in prison.

- Fate Vincent Winslow was homeless when he acted as a go-between in the sale of two small bags of marijuana to an undercover police officer, worth $10 in total. *State v. Winslow*, No. 29888-Ka (La. App. 2d Cir., Oct. 17, 1997). During an undercover investigation in Shreveport in September 2008, an undercover officer approached a white man named Mr. Perdue and Winslow, who is Black. The officer asked Winslow for two dime bags of marijuana worth $10 each and promised a $5 commission for Winslow, who accepted the offer in order to earn some money to get something to eat. Letter to the ACLU from Fate Vincent Winslow, Louisiana State Penitentiary, Angola, Louisiana, May 16, 2013. Winslow says he bought two $5 bags of marijuana from Perdue and sold them to the undercover officer as dime bags worth $10 each. *Id.* The undercover officer testified he witnessed a hand-to-hand transaction between Winslow and Perdue, and he paid Winslow with a $20 bill and a $5 bill. Transcript, State v. Winslow, page 181. When officers arrested Winslow, he only had the $5 bill on him. Officers found the marked $20 bill on the white supplier (Perdue), but did not arrest him. *State v. Winslow*, No. 45,414 (La. App. 2d Cir. Dec. 15, 2010), 55 So.3d 910, *writ denied* 11-0192 (La. June 17, 2011), 63 So. 3d 1033.

  According to Winslow, at trial, the 10 white jurors found him guilty of marijuana distribution, while the two Black jurors found him not guilty (the state of Louisiana does not require a unanimous jury to convict, and instead allows convictions by 10 out of 12 jurors). He was sentenced to mandatory life without parole as a fourth-time offender. His prior convictions were for a simple burglary committed in 1984, when he was 17 years old; simple burglary in 1994, when he was 27 years old (he was accused and convicted of opening an unlocked car door and rummaged inside, without taking anything), *State v. Winslow*, No. 29888-Ka (La. App. 2d Cir., Oct. 17, 1997); and possession of cocaine in 2000, when he was 37 years old (an undercover officer tried to sell Winslow cocaine, which he says he did not purchase).

  Winslow is now 46 years old. He cannot afford an attorney and has filed his unsuccessful post-conviction appeals himself, written in pencil. His mother died six months ago and he has no friends or family outside prison with who he is in contact. He spends time in the law library daily, "try[ing] to learn how to get out" and prays "every day all day…just living day by day waiting

to die in prison." Letter to the ACLU from Fate Vincent Winslow, Louisiana State Penitentiary, Angola, Louisiana, May 16, 2013.

Examples of Federal Life Without Parole Sentences for Marijuana Convictions.

- Larry Ronald Duke, 66, has served 24 years of his two life-without-parole sentences for a marijuana-only conspiracy. Duke was convicted of conspiring to possess with the intent to distribute in excess of 1,000 kilograms of marijuana and attempted possession with the intent to distribute in excess of 1,000 kilograms of marijuana. In late 1989, Duke attempted to purchase, with coconspirators, a large quantity of marijuana from a government informant who had a prior marijuana arrest. *United States v. Duke*, 954 F.2d 668 (11th Cir. 1992). Undercover officers set up the sale, and arrested Duke and his coconspirators immediately after delivering 4,800 pounds of marijuana to them. *Id.*

  Duke is a decorated Vietnam combat veteran who served two tours of duty in Vietnam with Delta Company 1st Battalion, 7th Marine Regiment. He has been diagnosed with post-traumatic stress disorder due to his military service in Vietnam. Duke told the ACLU, "[W]hile I was there, I often thought I would probably die in a firefight in Viet Nam, and then later, I thought maybe I'd catch a streamer while sky-diving and crash and burn. Or perhaps, lose control of a car at a very high rate of speed, but never in my wildest dreams have I ever imagined I'd die in prison." E-mail communication from Larry Ronald Duke, Jesup Federal Correctional Institution, Jesup, Georgia, April 27, 2013.

  Duke has been a model prisoner since his incarceration in 1989. A carpenter and inventor who continues to work on engineering problems in prison, Duke obtained a federal patent for a clean water-delivery system while serving his life sentence. He has a wife, two children, two grandsons, and a large extended family who want him home. Duke says that he fervently wishes that Congress will "opt to give some degree of hope of our having one more shot of Tequila, and one more slow dance with Sheila before we go." E-mail communication from Larry Ronald Duke, Jesup Federal Correctional Institution, Jesup, Georgia, April 27, 2013.

- Charles Frederick "Fred" Cundiff, 66, is serving LWOP for importing marijuana. Prior to his incarceration, Cundiff worked at a plant nursery, in construction, as a mortgage solicitor, and as a stereo store manager. He was sentenced to life without parole for conspiracy to import and distribute over 1,000 kilos of marijuana and has been incarcerated since 1991. *United States v. Cundiff et al.*, No. 91-03069-06/RV (N.D. Fl.), *affirmed* 16 F.3d 1231 (11th Cir. 1994). At sentencing, the trial judge stated that he would sentence Cundiff to 15 to 20 years, but such a sentence would be reversed on appeal. Cundiff has served 22 years in prison and worked steadily for 12 years of his imprisonment, but had to stop working due to his declining health. He now is seriously ill and requires a walker. He suffers from skin cancer, a dropped foot and shrunken leg due to severe arthritis and spinal surgery, disintegration of orbital bone due to chronic infection, and vision problems.

  Cundiff has three children, nine grandchildren and six great-grandchildren. He is regularly visited by two friends from his youth. Of prison, Cundiff says, "If I should die and go to hell, it could be no worse." Letter to the ACLU from Charles Cundiff, Coleman Medium Federal Correctional Institution, Coleman, Florida, March 26, 2013.

- Craig Cesal is a first-time felony offender serving LWOP for conspiracy to possess with intent to distribute marijuana. His only prior conviction was a misdemeanor when he was a college student in 1981, for carrying a bottle of beer into a Bennigan's bar, for which he paid a $150 fine.

  For over 23 years Cesal owned and operated a towing and truck repair business that provided services to police departments and sheriffs, car and truck rental companies, and trucking companies. His company retrieved trucks throughout the Midwest. Cesal's clients also included a trucking company whose drivers trafficked marijuana.
  Cesal's Chicago, Illinois, company retrieved and repaired trucks operated by the Florida- based Sun Hill Trucking Company, whose drivers transported and distributed marijuana in addition to carrying the usual freight. Over the span of many years, drivers employed by Sun Hill would drop off semi-trailers at his shop for needed repairs after they were torn apart from smuggling contraband, then his company would return the truck to the rental company; sometimes the drivers would pay his company to retrieve the truck or trailer before repairing and returning it. For instance, on one occasion, his

company retrieved a semi leased by Sun Hill that had been impounded at the U.S.-Mexico border, secured the truck's release from DEA custody, made repairs to panels DEA agents ripped from the trailer in order to extract marijuana encased in the trailer's roof and walls, and returned the trailer to the leasing company. At no time did Cesal think he was breaking the law. Letter to the ACLU from Craig Cesal, Greenville Federal Correctional Institution, Greenville, Illinois, April 3, 2013.

Cesal was arrested in 2002 when he traveled to Georgia to retrieve a rented semi discarded at a recycling center by Sun Hill workers who had transported, offloaded, and departed with 2,667 pounds of marijuana from Mexico. Cesal was accused of conspiring with over 20 coconspirators, including the Sun Hill employees. Those who provided, received, bought, and sold the marijuana were arrested and prosecuted in Texas, Florida, North Carolina, and elsewhere. "I was never accused of buying, selling, possessing, or using marijuana—and I didn't," he says. E-mail communication from Craig Cesal, Greenville Federal Correctional Institution, Greenville, Illinois, April 27, 2013. "I never had a stake in the success of any marijuana venture—my repairs were required whether or not the driver was busted." Letter to the ACLU from Craig Cesal, Greenville Federal Correctional Institution, Greenville, Illinois, April 3, 2013.

On the advice of his attorney, who advised him he would get a sentence of seven years, Cesal pled guilty. Cesal subsequently learned that under the terms of the plea agreement, he would have to testify in any grand jury, deposition, or trial requested by prosecutors, including by testifying against a number of people he did not know, including two people he was certain were innocent of the charges against them. Letter to the ACLU from Craig Cesal, Greenville Federal Correctional Institution, Greenville, Illinois, April 3, 2013. According to Cesal, he was told that he would receive a life sentence if he refused to provide the expected testimony, and that he could only reduce the life sentence through a series of incremental reductions by providing substantial assistance in the prosecution of others. *Id.*

Having discovered the terms were not what he expected, Cesal announced he wanted to withdraw the plea agreement. The judge denied withdrawal. *See United States v. Cesal*, 391 F.3d 1173 (11th Cir. 2004). Because Cesal breached the plea agreement by refusing to testify falsely against others, he was sentenced to a mandatory LWOP sentence under the federal sentencing

guidelines for his first felony conviction. He says, "I voted my conscience and breached the plea agreement. I do not believe my sentence should have been inextricably intertwined with my ability or inability to provide substantial assistance in the prosecution of others." Letter to the ACLU from Craig Cesal, Greenville Federal Correctional Institution, Greenville, Illinois, April 3, 2013.

Because Cesal's plea agreement included a waiver of any appeal of his sentence, Cesal has been unable to challenge his sentence. *United States v. Cesal*, 391 F.3d 1173 (11th Cir. 2004). All of Cesal's eight codefendants pleaded guilty in exchange for sentences ranging from 50 to 130 months. He says, "In my case, those who did traffic marijuana received little or no prison sentences and resumed their activities. They patronize a different repair station now." Letter to the ACLU from Craig Cesal, Greenville Federal Correctional Institution, Greenville, Illinois, April 3, 2013.

Cesal was 42 years old when he was arrested. He was married with two children, had held the same job for over 20 years, and had owned his home since 1983. Now 54 years old, Cesal has been incarcerated for 11 years. While in prison, Cesal has earned his paralegal certificate through a correspondence course and tirelessly works as a jailhouse lawyer assisting other prisoners with their cases. ACLU telephone interview with Craig Cesal, Greenville Federal Correctional Institution, Greenville, Illinois, May 9, 2013. He speaks weekly with his daughter, Lauren, and son, Curtis, who were 14 and 10 years old when he was incarcerated. Cesal is devastated that he has to "forever endure [his] life in prison," and says, "I hope to die, sooner rather than later." Letter to the ACLU from Craig Cesal, Greenville Federal Correctional Institution, Greenville, Illinois, April 3, 2013.

City and County of Denver

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Dennis J. Gallagher
Auditor

RECEIVED SEP 16 2013

September 5, 2013

Honorable Patrick Leahy, Chairman
Committee on the Judiciary
437 Russell Senate Building
United States Senate
Washington, DC 20510

Dear Senator Leahy:

Businesses which can only operate on a cash basis are not only a magnet for crime and criminal activity - a serious threat to public safety - but are virtually unaccountable from a regulatory or taxation standpoint. As the Auditor for the City and County of Denver I am aware, first-hand, of this serious problem for that is exactly the situation we face in Denver and throughout Colorado. We have businesses growing, producing and selling marijuana and marijuana products for medical purposes and soon businesses that will also grow, produce and sell what is termed 'recreational' or 'retail' marijuana for non-medical reasons to individuals over the age of 21. Because these duly licensed businesses cannot establish a banking relationship, they are forced to do all their financial transactions on a cash basis. In Denver, those transactions have amounted to millions of dollars annually for medical marijuana alone. Those amounts are likely to increase exponentially next year when non-medical retail sales begin.

Something must be done to alleviate this situation; something must be done to allow duly licensed businesses in Denver (and the rest of the State of Colorado) to establish banking relationships and eliminate this dangerous and unaccountable cash process.

I understand that you will be conducting hearings soon related to marijuana issues and I am hopeful that a solution to this problem might be found as a result. A model for possible legislation might be a bill introduced in the House of Representatives by Representative Ed Perlmutter from the 7th District Colorado. H.R.2652 Marijuana Businesses Access to Banking would directly address the problem. Similar legislation introduced in the Senate might expedite the process and improve the chances of solving this problem sooner, rather than later. As a Shakespeare scholar, the words of Macbeth come to mind: "If 'twere done, then 'twere well it were done quickly."

I appreciate that Attorney General Eric Holder has informed Colorado Governor John Hickenlooper as well as Governor Jay Inslee of Washington State that the Department of Justice will allow the states to create a regime that will regulate and implement ballot initiatives that legalized, at the state level, the use of marijuana by adults. However, while that is helpful, it does not directly address the banking problem.

A memo from the Justice Department to the U.S Attorney in Colorado (and Washington state), related to this, states in part: "The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice."

The very regulatory framework the memo espouses is negated by the inability of transactions to be tracked and money accounted for because of the inability of businesses to operate in anyway other than cash. As Denver's Auditor I find this contradiction troubling.

It is critical that federal agencies including Justice, the Federal Deposit Insurance Corporation and the Comptroller of the Currency move expeditiously to revise appropriate regulations and allow both federally-chartered as well as state-chartered financial institutions to enter into banking relationships with duly licensed and regulated marijuana businesses and to be able to enter into such relationships without fear of negative consequences by federal action.

This is not about the efficacy of the Controlled Substance Act or the War on Drugs; it is about facing the reality of our current situation and creating a level of accountability where today it is virtually non-existent.

I urge you to act as quickly as possible to give us at the state and local level the ability to effectively license, regulate and ensure an acceptable level of accountability in this business that is not going away.

Sincerely,

Dennis J. Gallagher

Dennis J. Gallagher,
City Auditor

cc: John Hickenlooper, Governor
Michael Bennett, Senator
Mark Udall, Senator
Diana DeGette, Congresswoman
Ed Perlmutter, Congressman
Michael Hancock, Mayor
Charlie Brown, City Councilman

"Conflicts Between State and Federal Marijuana Laws"
Senate Judiciary Committee Hearing

September 2013

Testimony of Tamar Todd, Senior Staff Attorney, Drug Policy Alliance, Office of Legal Affairs

The Drug Policy Alliance (DPA) is the nation's leading organization working to promote alternatives to punitive drug laws. DPA advocates for new drug policies that are grounded in science, compassion, health and human rights, and we applaud Chairman Leahy for arranging this hearing to address the important issue of marijuana regulation.

On behalf of DPA, I submit the following testimony on the intersection between state and federal marijuana policy. I assisted in the drafting of Amendment 64 in Colorado and have helped craft numerous marijuana legalization and regulatory proposals in other states. I have also drafted legislation, helped litigate cases involving cutting-edge legal issues regarding medical marijuana in courts around the country, and have testified in various state legislatures on the issues of medical marijuana, marijuana legalization and regulation, and the intersection of state and federal law. In addition, I advised the government of Uruguay on its proposal to legalize the production and distribution of marijuana.

I will focus my remarks on five key points:

First, nothing—not federal law, nor federal or state constitutions—prevents a state from removing all state law penalties with respect to conduct involving marijuana, or requires that a state punish marijuana offenses in any particular way, or at all. Indeed, states are free to repeal state law penalties if they so choose. Many states wish to follow in Colorado's and Washington's footsteps by repealing state criminal penalties and putting responsible regulatory controls in place. Responsible state control of marijuana, however, is made vastly more difficult with the cloud of federal enforcement of federal law obstructing the state's ability to regulate. Though the Department of Justice (DOJ), under the leadership of Attorney General Eric Holder, has recently taken important steps to disperse this cloud by issuing the "Cole memo," uncertainty remains and additional steps must be taken to remove this cloud completely.

Second, both state and federal interests are best promoted when state level marijuana programs are allowed to be implemented as intended absent federal threats and other interference (as distinguished from federal consultation, cooperation, and collaboration).

We are the Drug Policy Alliance.

Third, despite the extensive efforts of states to regulate marijuana responsibly, these states have had their hands tied by federal tax policies that restrict business owners from deducting business expenses and by banking policies that prevent businesses from utilizing banking institutions.

Fourth, it is possible to craft policies that address concerns over advertising, marketing, and the creation of large-scale commercial operations, as well as metrics that assess whether the eight enforcement priorities recently outlined by the DOJ are being met by states that have undertaken to regulate marijuana.

Fifth, allowing states to experiment with regulating marijuana is an opportunity to develop outcome measures of success that include lower rates of incarceration and violence that can be applied to other aspects of drug policy beyond marijuana prohibition.

1. The States are Free to Change State Law

As was confirmed by the recent guidance issued by the DOJ, it is perfectly legal, and contemplated by our federalist constitutional structure, for states to explore a different marijuana policy than the one currently in place, or than the one set out by federal law. Indeed, there is nothing in the United States Constitution that requires a state to criminalize *anything* under state law. If a state chooses to lessen or remove its penalties for marijuana possession, or to legalize marijuana under state law, or to legalize it just for patients, it is free to do so.

The Constitution establishes a system of dual sovereignty whereby the federal government creates and enforces federal law in the areas expressly granted to it by the Constitution, and the state governments create and enforce state law. Under the Commerce Clause, the federal government may enact federal laws to criminalize the possession, cultivation, and sale of marijuana within the United States, even if those activities are legal under state law. The federal government does this through the Controlled Substances Act (CSA). The CSA, however, contains an anti-preemption provision by which Congress explicitly left the states with wide discretion to legislate independently in the area of drug control and policy. Federal preemption of state drug laws is accordingly limited to the narrow set of circumstances where there is a *positive* conflict between state and federal law so that the two cannot consistently stand together. In other words, preemption only occurs when a person is unable to abide by both state and federal law simultaneously—a situation not presented by dual regulation of marijuana under both state and federal law.

Moreover, the Supreme Court has clearly established that under the Tenth Amendment the federal government may not compel state law enforcement agents to enforce federal laws or issue directives requiring states to address particular problems.

Thus, states have the authority under the Constitution and the CSA to design their own drug policies—even if those policies do not track federal law or policy. States do not

have to march in lockstep with the federal government, and, indeed, a number of states have already chosen not to do so by reducing criminal penalties for minor marijuana offenses, enacting medical marijuana laws and programs, and, most recently, by legalizing, taxing, and regulating marijuana like alcohol.

Seventeen states[1] have enacted various forms of marijuana decriminalization, reducing or eliminating penalties for minor marijuana offenders. Many of these states have replaced criminal sanctions with the imposition of civil, fine-only penalties[2] or no penalty at all;[3] others have reduced marijuana possession from a felony to a misdemeanor.[4]

Twenty states[5] and the District of Columbia currently provide legal protection under state law for seriously ill patients whose doctors recommend the medical use of marijuana. While these state programs differ from each other in significant ways, most have tightly controlled programs regulated by the state department of public health. Nineteen of these states and the District of Columbia issue identification cards to patients who provide their doctors' recommendations to a state or county agency.[6] Moreover, fourteen of these states and the District of Columbia have state regulated and licensed centers that produce and dispense medical marijuana to patients.[7]

Last year the people of Washington and Colorado voted (by decisive margins) to end the criminalization of marijuana in those states and to regulate its production and distribution like they do alcohol and tobacco instead. Other states are sure to follow in 2014 and beyond through legislative measures and ballot initiatives

It is important that the federal government recognize the authority of these states, and others in the future, to regulate marijuana as they choose and to meet such authority with cooperation, rather than threats of federal enforcement of federal law, or, worse, conduct aimed at undermining responsible state marijuana regulation.

2. Allowing States to Regulate Marijuana Without Interference Advances Both State and Federal Interests

Despite state variances in drug laws and penalties, there are a number of common goals associated with state-level marijuana reform, including:

[1] Alaska, California, Colorado, Connecticut, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Rhode Island, Vermont, and Washington.
[2] Alaska, California, Colorado, Maine, Massachusetts, Nebraska, New York, Vermont, Rhode Island, and Ohio.
[3] Colorado and Washington.
[4] Nevada, North Carolina, Minnesota, Mississippi, and Oregon.
[5] Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Washington, and Vermont.
[6] Washington does not have an identification card program.
[7] Arizona, Colorado, Connecticut, Delaware, Illinois, Oregon, New Mexico, Nevada, Rhode Island, Maine, Massachusetts, New Hampshire, New Jersey, the District of Columbia, and Vermont all have licensed centers to produce and distribute marijuana. California has collectives and cooperatives for patients who grow and dispense together but they are not licensed by the state.

- Further reducing law enforcement, court, and correctional resources spent on marijuana law enforcement;[8]

- Reducing violent crime associated with the illicit market for marijuana by replacing the illicit market with a legal, regulated, and tightly-controlled market;

- Reducing access by minors who can buy marijuana easily from the illicit market, where they are not asked to show identification;[9]

- Raising revenue and earmarking funds for enforcement, treatment, and education.[10]

These state-level goals dovetail with the eight federal guidelines outlined recently by the DOJ. Moreover, as noted above, the states that have repealed state law marijuana penalties have also, generally, adopted systems to control and regulate marijuana. Allowing states the freedom to implement these systems of control with minimal federal interference advances both state and federal interests. The consequence of the federal government seeking to prevent regulation or enforcing federal law against state law compliant actors will be states removing state law penalties without regulation or control.

Colorado and Washington are illustrative of how state-level marijuana reform and responsible regulation can actually advance federal drug control interests. Indeed, these two states did not choose to repeal all state marijuana laws. Instead, they took much more modest steps—steps that advanced, not hindered, the core federal interests outlined by the DOJ guidelines and found in the CSA.

These states still aim to control marijuana, restrict youth access, and protect communities—but they chose to do so in a manner that also conserves state law enforcement resources rather than pursuing the expensive, failed approaches of the past.

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[8] The Obama Administration has spent nearly $300 million dollars on the enforcement efforts in medical marijuana states. In 2011 and 2012, the DEA spent 4% of their budget on medical cannabis according to a 2013 report by Americans for Safe Access, *What is the Cost.* Furthermore, it is estimated that the legalization of marijuana in Washington will provide annual state and county law-enforcement savings of approximately $22 million according to an analysis by the Office of Financial Management.

[9] Marijuana prohibition has done nothing to reduce youth access. The national *Monitoring the Future* survey found that marijuana use, which has been rising among teens for the past two years, continued to rise in 2010 in all prevalence periods for all grades surveyed. In fact, teen marijuana use has risen back to the record level set in 1979. Nearly a third of U.S. high school seniors have used marijuana in the past year (as compared to only one in five who have used illegal drugs other than marijuana), and four out of five say that it is either "fairly easy" or "very easy" to obtain. *See Monitoring the Future, Overview of Key Findings, 2010, available at* http://monitoringthefuture.org/pubs/monographs/mtf-overview2010.pdf.

[10] The November 2012 initiative passed in Washington establishes a "dedicated marijuana fund" for all revenue received by the Washington State Liquor Control Board, and explicitly earmarks any surplus from this new revenue for health care (55%), drug abuse treatment and education (25%), marijuana-related research at University of Washington and Washington State University (1%), and with most of the remainder going to the state general fund. A March 2012 analysis by the state Office of Financial Management estimated annual revenues above $560 million for the first full year, rising thereafter.

Further, in response to the federal government's newly announced policy of "trust and verify," these states, and others that will follow, stand prepared to demonstrate that the federal interests in safety and health are advanced by these new state paradigms.

Congress can and should take steps to ensure that these state laws, and those that follow, are fully and properly implemented so that comprehensive marijuana regulation, consistent with the newly-issued federal guidelines, can take place in the states. This includes providing additional guidance as necessary to assure state legislators, employees, and residents that their efforts to advance public safety and health by responsibly regulating marijuana will not be undermined by federal government threats or conduct. By using the carrot of not interfering, the federal government can force states to regulate marijuana and cooperate on federal interests, perhaps even assisting with them. Congress should also remove federal criminal penalties for marijuana possession, or, at the very least, remove federal criminal penalties for persons and business entities in compliance with their state laws.

Critical federal legislation has already been introduced in the U.S. House of Representatives that recognizes the ability of the state to regulate marijuana and the importance of federal support and noninterference in advancing both state and federal interests:

- *H.R. 499 – Ending Federal Marijuana Prohibition Act of 2013*: This bipartisan legislation, introduced by Rep. Jared Polis (D-CO), decriminalizes marijuana at the federal level, leaving individual states free to either prohibit or tax and regulate it according to their own policies. The federal government would still prosecute people for transporting marijuana from states where it is legal to states where it is illegal. The bill would require marijuana producers to purchase permits, similar to those obtained by commercial alcohol producers, to offset the cost of establishing and maintaining a federal regulatory system. It would also transfer jurisdiction of marijuana regulation from the Drug Enforcement Administration to a newly-renamed Bureau of Alcohol, Tobacco, Marijuana, Firearms, and Explosives.

- *H.R. 689 – States' Medical Marijuana Patient Protection Act of 2013*: Introduced by Rep. Earl Blumenauer (D-OR), this bipartisan bill would reschedule marijuana below Schedule II, recognizing the plant's accepted medical use. The issue of regulating medical marijuana would be returned to the states, ensuring that neither the CSA nor the Federal Food, Drug, and Cosmetic Act would restrict individuals or entities operating in compliance with state or local laws. The legislation would also require that access to marijuana for medical research be expanded and overseen by a government agency not focused on investigating the addictive properties of substances.

- *H.R. 784 – The States' Medical Marijuana Property Rights Protection Act*: Introduced by Rep. Barbara Lee (D-CA), this legislation would prevent the Department of Justice from initiating civil asset forfeiture proceedings against

property owners of state-sanctioned medical marijuana businesses based solely on marijuana-related activity. The bill does not legalize marijuana or restrict the broader use of civil asset forfeiture, but protects the rights of landlords who lease to permitted dispensaries that are compliant with state law.

- *H.R. 1523 – Respect State Marijuana Laws Act of 2013*: This bipartisan bill, introduced by Rep. Dana Rohrabacher (R-CA), provides a resolution to the conflict between state and federal marijuana laws by exempting individuals operating in compliance with state law from the CSA.

3. Removing Tax Policy and Banking Barriers

In addition to the steps outlined above, Congress should also remove barriers in banking and tax law that make it difficult for marijuana-related business entities permitted by state law to operate safely and responsibly, without having to resort to gray-market, cash-only operations that invite danger and graft. Fortunately, work is already being done on this front as well. The following legislation has been introduced in the U.S. House of Representatives to protect compliant actors, ensure access to banking institutions, and permit tax deductions:

- *H.R. 2440 – Small Business Tax Equity Act of 2013*: This bipartisan legislation, introduced by Rep. Earl Blumenauer (D-OR), would provide standard tax benefits for legal marijuana businesses in states that have passed laws to allow the medical or non-medical use of marijuana. This bill amends the Internal Revenue Code to allow businesses operating in compliance with state law to take business-related deductions associated with the sale of marijuana—just like any other legal business.

- *H.R. 2652 – Marijuana Business Access to Banking Act of 2013*: Introduced by Rep. Ed Perlmutter (D-CO) and Denny Heck (R-WA), this bipartisan bill would resolve conflicts between state and federal banking laws to extend Federal banking protections to marijuana-related businesses. The bill explicitly prevents Federal banking regulators from prohibiting, penalizing, or otherwise discouraging banks from providing financial services to marijuana-related businesses. The bill also stipulates that the banks cannot be held liable under Federal law for providing financial services to a marijuana-related business.

4. Addressing Concerns and Measuring Outcomes

Two common concerns raised during the Senate hearing were how to restrict advertising and prevent commercialization of the marijuana industry, and how to design metrics to assess whether states regulating marijuana are meeting the eight enforcement priorities outlined by the DOJ.

Advertising and Marketing

Given the fact that the heaviest consumers of a substance make up the largest market share, the concern over the marijuana industry marketing to heavy users is real. However, heavy users already buy marijuana illegally off the streets, and legalization and regulation gives policymakers the ability to place restrictions on where, when, and if marijuana can be sold and advertised, and to whom (subject, of course, to First Amendment protections). A variety of policies, from taxation to marketing restrictions, have led to historically low tobacco use rates for both youth and adults—without the need for mass incarceration. Colorado and Washington have already developed restrictions on the marijuana trade designed to protect public health and safety. To the extent Congress is interested in the issue, members should support efforts to regulate marijuana nationally. Indeed, prohibition is the absence of control.

Measuring Outcomes

Key to the DOJ's "trust and verify" protocol is the development of metrics and outcome measures to determine whether state programs are advancing federal interests of health and safety or whether further changes are needed. Measuring the instances of marijuana-related driving under the influence charges, auto accidents, youth use, diversion, market-related violence, and cartel involvement are all important aspects of responsible state-level regulation of marijuana. Fortunately, these types of metrics for other regulated commodities already exist, as do researchers with experience assessing such outcomes. The Alcohol Research Group (ARG) has been studying similar outcomes in relation to alcohol use. Funded by the National Institute on Alcohol Abuse and Alcoholism (NIAAA), ARG administers the National Alcohol Survey to assess the country's drinking patters, and conducts public health, substance dependence, and economic research on alcohol use, community outcomes, and economic and taxation issues.

In developing metrics for marijuana use, a newly-formed institute at Humboldt State University, the Institute for Interdisciplinary Marijuana Research (HIIMR), could be of assistance. The Institute is comprised of researchers from across many disciplines, including public health, agriculture, public policy, medicine, and economics, and its purpose is to study many of the interrelated aspects of marijuana use and policy.

And, ultimately, broader metrics need to be developed to measure the success or failure of federal drug policy, in addition to state drug policy.

5. Beyond Marijuana: Rethinking the War on Drugs

The public overwhelmingly regards the war on drugs as a failed endeavor. Increasingly, individuals, families, communities, government agencies, chambers of commerce, religious leaders, elected officials, and others consider marijuana policy reform to be an important first step in developing a new paradigm for drug control.

The costs of the war on drugs are substantial. Individual liberties and constitutional safeguards have been unquestionably weakened, and, in some cases, ignored altogether. Millions of persons have been incarcerated under our drug laws—particularly young persons of color—and millions more live with the crippling stigma of a drug conviction on their records. Tens of thousands have died from unnecessary disease and overdose exacerbated by punitive drug policies, and much of the population has woefully inadequate access to quality drug treatment. The *status quo* is untenable. State regulation of marijuana is a harbinger of the type of change that is needed. The idea that we should measure the effectiveness and value of a policy based on evidence and an objective assessment of its outcomes is a crucial first step and must be applied to all drug policies, including current federal policies, not just state policies that legalize marijuana. Congress has an important role to play in helping our country develop drug laws and policies, beginning with marijuana, that promote safety and health.

PREVENTION WORKS! VT

September 12, 2013

Dear Senator Leahy and Senate Judiciary Committee Members:

Prevention Works! VT (PW!VT) is a network of 28 community based coalitions in the state of Vermont that are working with thousands of health care providers, educators, law enforcement, youth, community volunteers and others to prevent substance abuse and support health and wellness in their local communities. PW!VT is also the lead organization of the Vermont affiliate of SAM, Smart Approaches to Marijuana.

The Vermont prevention community is greatly concerned about the recent response by the Department of Justice to states that legalize marijuana use. While we are concerned that laws legalizing cannabis use are in conflict with federal law and international treaties, we are most troubled by the harms associated with liberalized cannabis laws, especially among young people.

The costs of marijuana use nationally already includes 400,000 emergency room visits a year, increased incidence of mental illness, car crashes, and learning problems for kids. These costs will only increase as legalization creates easier access, reduces perception of harm and creates avenues for businesses to heavily promote and provide cheap marijuana in a permissive environment.

We know that on the heels of legalized marijuana follows commercialization of this new commodity. Already, talk of creating the "Starbucks" equivalent of marijuana and pop-star promotion of the drug has begun. Big Tobacco representatives seem to have interest in supporting a marijuana industry if it is legal. As shown by Altria's (the parent company of Philip Morris) purchase of the web domain names altriacannabis.com and altriamarijuana.com. A commercial marijuana industry will certainly act just as the tobacco industry behaves, with the same or more freedom to market products to kids and the community, if careful consideration is not given by policy makers now.
(Please see the following link to "As marijuana goes legit, investors rush in" from USA Today.
http://www.usatoday.com/story/money/business/2013/04/07/medical-marijuana-industry-growing-billion-dollar-business/2018759/)

We also know that when a substance is legal, powerful business interests have an incentive to encourage use by keeping prices low. Heavier use, in turn, means heavier social costs. Alcohol taxes, on the other hand — kept outrageously low by a powerful lobby — generate revenue amounting to less than a tenth of these costs.

Tobacco companies lied to America for more than a century about the dangers of smoking. They deliberately targeted kids. They had doctors promote cigarettes as medicine. And today, after decades of lawsuits and strategies to prevent tobacco use, we continue to pay a high price. Tobacco use costs our country at least $200 billion annually — which is about 10 times the amount of money our state and federal governments collect from today's taxes on cigarettes and other tobacco products.

If our experience with alcohol and tobacco provides any lessons for drug policy, it is this: **We have little reason to believe that the benefits of drug legalization would outweigh its costs.**

What about the kids? A recent review of research found that the permanent IQ loss associated with childhood lead exposure is similar to the permanent IQ loss associated with childhood marijuana exposure. Shouldn't our response to protect children from marijuana exposure be as serious as our response to protect them from lead exposure?

Research clearly tells us that by allowing states to violate the current federal marijuana laws we reduce the perception of harm of using which in turn increases the number of young people trying and using marijuana.

This is evidenced by two independent, peer-reviewed studies looking at medical marijuana states in the 2000s that concluded: **States with medical marijuana programs had an increase in marijuana use not seen in other states** [1] In those states where marijuana has been equated with medicine, the perception of harm relating to that drug has been drastically reduced, social norms to reinforce "no use" messages have been undermined and youth use and addiction has increased.

And to make matters worse, it is estimated that about 1 in 6 people who start using marijuana young (in their teens or earlier) will become dependent on it. To demonstrate, a study of over 300 fraternal and identical twin pairs found that the twin who had used marijuana before the age of 17 had elevated rates of other drug use and drug problems later on, compared with their twin who did not use before age 17. [2]

We plan to hold officials accountable according to the 8 points DOJ laid out in their decision. In addition, we ask the Senate Judiciary Committee to consider the following recommendations as you further consider the federal response to states that liberalize marijuana laws:

1. Science-based drug education and prevention strategies need to become a top national priority. Community coalitions that engage multiple community sectors must be supported and expanded to meet the ever growing need for prevention information, education and services.

2. We would like to see the committee recommend that a surveillance methodology be established to monitor the public health consequences of marijuana legalization in Colorado and Washington and report findings, to help both federal and state governments make more informed decisions regarding this issue.
3. Be knowledgeable of how corporate interests plan to capitalize on this new industry and recommend protective measures to minimize the harm created by these interests (i.e. marketing to youth, advertising in public places, locations of marijuana-related businesses and effective, research-based efforts)

We agree that the country's drug policy must be reconsidered, however responsible drug policy must focus on effective research based efforts to both prevent and treat drug use. . These are highly complex problems, and it is short sighted and too simplistic to say that the only alternative to current policy is legalization. I thank you for your consideration of our concerns. I am happy to provide you with additional information or discuss this issue further with you.

Most Sincerely,

Lori Augustyniak for Prevention Works! VT
and
Black River Area Community Coalition
Brattleboro Area Prevention Coalition
The Burlington Partnership for a Healthy Community
CY - Connecting Youth
Franklin County Caring Communities
Winooski Coalition for a Safe and Peaceful Community

[1] *Substance Abuse and Mental Health Services Administration (SAMHSA), State Estimates from the 2008- 2009 National Surveys on Drug Use and Health, 2011*

[2] *http://www.drugabuse.gov/publications/marijuana-abuse/marijuana-addictive*

Prevention Works! VT *is a statewide coalition of community prevention coalitions.*

Our mission is to create and lead advocates to work collaboratively on policy, practice and attitudes that promote prevention, health and wellness with one voice.

73 Main Street, #33 Montpelier, VT 05602 802-223-4949 ext. 4
preventionworks@fairpoint.net

AmericansFor SafeAccess
Advancing Legal Medical Marijuana Therapeutics and Research

Three Areas of Inquiry for "Conflicts between State and Federal Marijuana Laws"

U.S. Senate Judiciary Committee
Hon. Patrick Leahy (D-VT), Chair
Full Committee
DATE: September 10, 2013
TIME: 02:30 PM
ROOM: Hart 216

I. **Clarification on Department of Justice Policies and U.S. Attorney Actions: The Obama Administration's policy toward state medical marijuana laws has been incoherent and inconsistent. On the one hand, the October 19, 2009 memorandum, "Investigations and Prosecutions in States: Authorizing the Medical Use of Marijuana," (the "Ogden memo") and the August 29, 2013 memorandum "Guidance Regarding Marijuana Enforcement," (the "2013 Cole memo"), have created a perception of tolerance for states to implement their medical marijuana laws. On the other hand, the Obama Administration has spent more money than both of the two previous administrations combined interfering with state medical marijuana laws, including such tactics as paramilitary raids on medical marijuana patients and providers, asset forfeiture proceedings against landlords, and letters to state and local government officials threatening criminal prosecution for implementing state law.**

Background:

When California passed Proposition 215 in 1996 to authorize the use of marijuana for medicinal purposes, it ushered in an era of conflict between state and federal law concerning marijuana. The federal reaction was not to try to resolve this conflict through the courts or legislation but rather to criminally and civilly prosecute individuals protected by state law: qualified patients and their providers (those who cultivate, process, and sell medical marijuana). As more states passed medical marijuana laws during the Bush Administration, the federal crackdown escalated significantly, with over 200 medical marijuana dispensaries raided between 2001 and the end of 2008.[1]

The rhetoric of the Obama White House on state medical marijuana laws has been more conciliatory than previous administrations. The supportive words Obama spoke on the 2008 campaign trail towards medical marijuana were followed by affirming comments from Administration spokespersons and then seemingly formalized by the Department of Justice (referred to herein as "the Department" or "DOJ") in October 2009 via a memo issued to several U.S. Attorneys by then-Deputy Attorney General David Ogden (the "Odgen memo") that stated:

[1] ASA maintains a database of known medical marijuana raids, available upon request.

> *"As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."* [2]

With this legal guidance, patient advocates, community members, and officials spent thousands of hours drafting compassionate legislation and strict regulations in at least eleven states. But when legislators and other state and local officials came close to passing or implementing these laws, they received nearly identical threatening letters from U.S. Attorneys, containing language such as this:[3]

> *"The Washington legislative proposals will create a licensing scheme that permits large-scale marijuana cultivation and distribution. This would authorize conduct contrary to federal law and thus, would undermine the federal government's efforts to regulate possession, manufacturing, and trafficking of controlled substances. Accordingly, the Department could consider civil and criminal legal remedies regarding those who set up marijuana growing facilities and dispensaries, as they will be doing so in violation of federal law. Others who knowingly facilitate the actions of the licensees, including property owners, landlords, and financiers should also know that their conduct violates federal law. In addition, state employees who conducted activities mandated by the Washington legislative proposals would not be immune from liability under the [Controlled Substances Act]. Potential actions the Department could consider include injunctive actions to prevent cultivation and distribution of marijuana and other associated violations of the CSA; civil fines; criminal prosecution; and the forfeiture of any property used to facilitate a violation of the CSA."*
> -excerpt from letter to former Washington Governor Christine Gregoire from U.S. Attorney Durkan and Michael Ormsby, April 14, 2009

> *"If the City of Eureka were to proceed, this office would consider injunctive actions, civil fines, criminal prosecution, and the forfeiture of any property used to facilitate a violation of [federal law]."*
> -excerpt from letter to Eureka City Council from U.S. Attorney Melinda Haag on August 15, 2011.

The impact of threats made by U.S. Attorneys against public officials was the suspension or derailment of medical marijuana laws in the states of Arizona, California, Delaware, Hawaii, Montana, Rhode Island, and Washington, as well as municipalities across California. The letters were followed by an intense campaign of raids, threats to landlords, and asset forfeiture lawsuits. Since these actions contradicted the 2009 Ogden memo, the Department issued a memorandum on June 29, 2011 from Deputy Attorney General James Cole to authorize the raids and threat letters *after* the fact of their occurrence.[4] To date, not a single state or local government official has been indicted or prosecuted for attempting to implement a medical marijuana law, which raises the question of whether or not there is a

[2] Memorandum from Deputy Attorney General David Ogden to Selected U.S. Attorneys, "Investigations and Prosecutions in States: Authorizing the Medical Use of Marijuana," Oct. 19, 2009, (the "Ogden memo").
[3] Copies of U.S. Attorney threat letters to state and local officials can be found at http://safeaccessnow.org/downloads/DOJ_Threat_Letters.pdf
[4] Memorandum from Deputy Attorney General James Cole to U.S. Attorneys, "Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use," June 29, 2011, (the " 2011 Cole memo").

legal basis or seriousness of intent behind these threat letters. Regardless, the result has not been a resolution of the state-federal conflict but an exacerbation.

In addition to attempts at intimidating local officials, the U.S. Attorneys from California announced a campaign to undermine the state's production and distribution system, using raids, criminal prosecutions and asset forfeiture against state-compliant medical marijuana operations. As part of this ongoing campaign, U.S. Attorneys are currently threatening landlords of medical marijuana businesses with criminal and civil action if they do not evict their tenants.[5] U.S. Attorneys in California have also begun forfeiture proceedings against a handful of property owners.

Taken together, this attack on the medical cannabis community is unprecedented in its scope, undermining state laws and coercing local lawmakers. In less than four and a half years into President Obama's command, the federal crackdown on state medical marijuana programs has generated more raids than under eight years of President Bush. According to ASA's calculations, the Department's war on medical marijuana eclipsed **$500 million** dollars, with over **$300 million** being spent during the Obama Administration. Based on ASA's estimates, the Drug Enforcement Administration ("DEA") has spent approximately 4% of its budget in 2011 and 2012 on the medical marijuana crackdown.[6] These costly raids, the investigations that lead up to them, and the prosecutions and imprisonment that follow them have strained the limited resources of the Department and ripped families apart to fight a fruitless war that 70-85% of Americans have opposed for well over a decade.

When asked on June 7, 2012 by the House Judiciary Committee to explain the Administration's escalating enforcement activity, Attorney General Eric Holder testified:

> *" We limit our enforcement efforts… to those acting out of conformity with state law."*[7]

In the second memo by Deputy Attorney General Cole, issued on Thursday, August 28 2013, the Department seems to return to the spirit of the 2009 Ogden memo:

> *"As explained above, however, both the existence of a strong and effective state regulatory system and an operation's compliance with such a system may allay the threat that an operation's size poses to federal enforcement interests."*[8]

Yet, following the issuance of this memo, U.S. Attorney for Western Washington Jenny Durkan said in a statement that this new guidance changed nothing about her so-far aggressive response to medical marijuana in her state:

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[5] Partially redacted to medical marijuana dispensary landlord sent by Melinda Haag, U.S. Attorney for Northern California, September 28, 2011, available at http://americansforsafeaccess.org/downloads/US_Attorney_Landlord_Letter.pdf.
[6] Numbers are based upon the calculations in ASA's June 2013 report, *What's the Cost?*, plus the calculated average of $180,000 per day spent since the report was issued. Report available at http://americansforsafeaccess.org/downloads/WhatsTheCost.pdf, Cost estimates available at: http://www.americansforsafeaccess.org/whatsthecostreportestimates.
[7] *Oversight of the United States Department of Justice: Before the H. Comm. on the Judiciary*, 112th Congress (2012) (statement by Eric Holder, U.S. Attorney General).
[8] Memorandum from Deputy Attorney General David Ogden to U.S. Attorneys, "Guidance Regarding Marijuana Enforcement," Aug. 29, 2013, (the "2013 Cole memo").

> *"[C]ontinued operation and proliferation of unregulated, for-profit entities outside of the state's regulatory and licensing scheme is not tenable and violates both state and federal law."*[9]

Similarly, the Office of the Northern District of California U.S. Attorney responded:

> *"At this time the U.S. Attorney is not releasing any public statements. The office is evaluating the new guidelines and for the most part it appears that the cases that have been brought in this district are already in compliance with the guidelines. Therefore, we do not expect a significant change."*[10]

The gulf between the rhetoric and the actions of the Obama Administration's policy towards state medical marijuana laws is striking. Absent further concrete action, it seems likely that there will still be hostilities initiated by the Department against states with medical marijuana laws.

Questions:

1. Is the Department aware of the series of letters sent by U.S. Attorneys to elected officials between February 1, 2011 and May 16, 2011 designed to block the passage of state medical marijuana laws?
2. Is the sentiment in these threat letters still the opinion of the Department?
3. Given that U.S. Attorneys continued to block states from implementing medical marijuana legislation and regulation following the 2009 Odgen memo by sending threat letters to public officials, do you anticipate U.S. Attorneys to continue to do so?
4. If not, what will the Department of Justice do to communicate with policy makers threatened in this series of letters that they are free to pass laws that comply with the new DOJ policy?
5. Can you explain the constitutional basis for the Department to take legal action against state and local officials for passing or implementing their own marijuana laws? If such a basis can be articulated, will there be Departmental oversight to make sure that U.S. Attorneys are applying the CSA in a consistent fashion from state to state?
6. It has been estimated that the Department of Justice has now spent over half a billion dollars cracking down on medical marijuana patients and providers in states that have authorized medical use since 1996, and that more than $300 million has been spent by the current administration. Can the Department accurately account for how much it has spent investigating and prosecuting medical marijuana conduct in these states? If not, how can the Department explain whether or not it is using resources against these parties in a manner consistent with prosecutorial guidelines provided by the Department?

[9] *Prosecutor: Wash. medical pot system 'not tenable'*, San Francisco Chronicle, Aug 29, 2013, available at http://www.sfgate.com/news/article/Prosecutor-Wash-medical-pot-system-not-tenable-4771750.php

[10] *US Attorney Melinda Haag to Continue Crackdown Despite White House Directive*, East Bay Express, Aug. 30, 2013, available at, http://www.eastbayexpress.com/LegalizationNation/archives/2013/08/30/us-attorney-melinda-haag-to-continue-crackdown-despite-white-house-directive.

7. In jurisdictions where local public officials received threat letters and have been intimidated into not implementing their own laws, how does the Department justify U.S. Attorneys prosecuting current and future cases for conduct outside of the strict guidelines of the 2013 Cole memo? If the Department is sincere about not prosecuting conduct that is supposedly permissible by the new guidelines, will states such as California and Washington be allowed a period of time to bring their current laws into compliance with the Department guidelines?
8. How does the new Cole memo impact current federal cases such as the asset forfeiture proceedings on properties leased to regulated medical marijuana dispensaries in Northern California?
9. U.S. Attorneys shut down over 300 dispensaries in Colorado and over 200 in California which were following state law, citing 1,000 foot proximity to schools as a reason, despite the fact that states have the right to set these proximities for all other matters. Why does the 2013 Cole memo continue to include this is a basis for enforcement?
10. During the 2011 raid of the Oaksterdam facility in Oakland, California, the Department failed to coordinate in advance with local law enforcement, and as a result, local law enforcement were unable to rapidly respond to a mass shooting at a college campus that occurred nearby at the same time. More generally, by preventing medical marijuana businesses from being able to use bank and credit services, the Department forces these business to operate using cash, while simultaneously threatening armed guard services from providing service to these business, which makes potentially makes them targets of criminals. What steps does the Department take with respect to local public safety when enforcing the CSA in states that have authorized medical marijuana conduct?
11. The August 2013 Cole memo cites eights areas of enforcement priority. It appears federal banking and money laundering statutes could still be enforced against those who act in accordance with a state marijuana law that meets the new guidelines. Will the Department prosecute or send threat letters to banks or businesses that engage in medical marijuana conduct permitted in such states?
12. The memo seems to state that U.S. Attorneys will not go after businesses that are following state laws that meet the eight guidelines, yet in federal courts, juries are not allowed to see any evidence of a defendant's compliance with state medical marijuana laws. If U.S. Attorneys are now to be arbiters of state laws as well as federal law, why are defendants denied the right to present evidence of compliance with state law?
13. Although the 2013 Cole memo states that size alone will not be a determinative factor in whether or not to investigate or prosecute a marijuana business, what assurances can states and providers have that the Department will not go after such businesses in light of the fact that Department is still prosecuting the Harborside case?
14. Would the Department use resources to oppose Congressional legislation that allows states to fully implement their own medical marijuana laws?
15. Given that U.S. Attorneys currently have broad discretionary power to carry out or ignore the guidance offered in the 2013 Cole memo, what in your opinion would be the necessary Congressional action that would need to take place in order to make sure that U.S. Attorneys do not ignore the guidance?

Requests:

1. Have the Department instruct U.S. Attorneys to send retraction letters to legislative offices that received threat letters.
2. Have the Department instruct banking institutions that they will not be prosecuted for doing business with state-sanctioned medical marijuana businesses.
3. Provide communication between U.S. Attorneys and the DEA as it relates to medical marijuana enforcement starting January 2009.

II. Clarification on Department of Justice Compassionate Release and Mandatory Minimum Sentencing Guidelines as they relate to medical marijuana prisoners and defendants: In August 2013, the Department of Justice announced plans to expand its Compassionate Release program and ease rules concerning mandatory minimum sentences, yet it unclear if these reforms will allow for the release of any federal prisoners convicted of federal marijuana crimes who were acting in accordance with their state's medical marijuana laws.

Background

On August 12, 2013, Attorney General Eric Holder gave a speech to the American Bar Association in which he outlined reforms to the Department's policies on mandatory minimum sentencing and compassionate release. While the Attorney General never spoke directly about the state-federal conflict on medical marijuana, a number of his statements gave rise to questions about how the new sentencing and compassionate release guidelines pertain to those federal marijuana prisoners who were acting in accordance with their state laws, as well as those who are currently being prosecuted or under investigation. For example, when discussing the Department's limited financial resources, he said:

> *"This means that federal prosecutors cannot – and should not – bring every case or charge every defendant who stands accused of violating federal law. Some issues are best handled at the state or local level."*[11]

While the August 2013 memo from Deputy Attorney General Cole James Cole seems to set forth the guidelines on prosecuting marijuana violations, the memo does not resolve the state-federal conflict in a meaningful way because multiple U.S. Attorneys in medical marijuana states have announced they will continue efforts to shut down the state-approved programs in their states.

Mandatory Minimums

Federal medical marijuana defendants often receive harsh mandatory minimum sentences when they are convicted in federal court. Very few federal medical marijuana defendants take their cases to trial because they are not allowed to enter into evidence anything about their conduct being in compliance with state medical marijuana law, and prosecutors typically bring charges with long mandatory sentences to pressure defendants into accepting plea deals. Most take the deals to limit their sentences.

[11] *Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates*, Aug. 12, 2013, http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html

The announced reforms on mandatory minimum sentences are encouraging rhetoric, but unfortunately do not appear to bring relief to those federal marijuana prisoners who were acting in accordance with their states' laws. This is because the Attorney General limited the eligibility to "low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels."[12] Considering that many state-complaint medical marijuana providers are charged with amounts that are well above so-called "personal use" amounts, it would appear that these providers would be excluded from eligibility, even if the state permits conduct that is above what the Department deems as "low level." Moreover, because the Department has systematically prevented providers from being able to use secure financial services, such as credit and armored guards, they have senselessly forced providers to become cash-only companies who have little choice but to arm themselves, leading to enhanced sentencing upon conviction. The situation is even worse for providers when taking into account the 2013 Cole memo, which calls for federal prosecution for "the use of firearms in the cultivation and distribution of marijuana." [13]

Unless the Department explicitly expands the rules concerning mandatory minimums to those who were acting in conformity with their state's medical marijuana laws, they are unlikely to receive sentences that deviate from the mandatory minimums.

Compassionate Release

There are at least two dozen federal marijuana prisoners who were acting in accordance with their state's medical marijuana laws, many serving lengthy mandatory minimum sentences.[14] While Attorney General Holder's speech to the American Bar Association called for an expansion of eligibility for compassionate release, these patients and providers do not appear eligible to be released any sooner, as the expansion is limited to elderly (age 65 or older) who have served more 50-75% of their sentence (depending on their health), are terminally ill, or are confined to bed or wheelchair at least 50% of their waking hours. [15]

One federal medical marijuana prisoner with a serious medical condition who should be considered is Jerry Duval. At age 54, Mr. Duval began serving a 10-year mandatory minimum sentence for conduct allowed under the Michigan medical marijuana law. A dual kidney and pancreas transplant recipient, Mr. Duval also suffers from glaucoma and neuropathy. The Bureau of Prisons estimates that the average cost to incarcerate a patient at a Federal Medical Center is $51,430 annually.[16] However, in the case of Mr. Duval, it is likely double that amount, as the cost for his kidney and pancreas medicines alone is over $100,000 per year.[17] As a result, U.S. taxpayers will spend over $1.2 million to imprison Mr. Duval for acting in accordance with Michigan law. Because of Mr. Duval's age, he will be ineligible to

[12] Id.
[13] The 2013 Cole memo.
[14] A listing of currently incarcerated federal marijuana prisoners can be found at http://www.safeaccessnow.org/article.php?id=624.
[15] Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g), Federal Bureau of Prisons, Aug. 12, 2013, available at http://www.bop.gov/policy/progstat/5050_049.pdf.
[16] Federal Prison System, Cost Per Capita, Fiscal Year 2012, Federal Bureau of Prisons, available at http://www.bop.gov/foia/fy12_per_capita_costs.pdf.
[17] Letter for compassionate release from Gerald Lee Duval, Jr. to Warden J. Grondolsky, FMC Devens, May 28, 2013, available at http://safeaccessnow.org/downloads/Compassionate_Release_Request_Duval.pdf.

obtain compassionate release through the elderly criteria, and because he is ambulatory without a terminal diagnosis, he is too healthy to meet the other criteria, in spite of his severe medical condition. Without an expansion of the compassionate release program, Mr. Duval will likely serve his full mandatory minimum sentence.

One federal medical marijuana prisoner who may have been eligible under the new compassionate release rules was Richard Flor. At age 67, Mr. Flor was given a 5-year mandatory minimum sentence for conduct permitted under Montana's medical marijuana law. Mr Flor, who suffered from dementia, diabetes, hepatitis C, and osteoporosis, was incarcerated in a non-medical facility where a fall further injured his ribs and vertebrae. While at the awaiting transfer to a medical facility, Mr. Flor suffered two heart attacks experienced renal failure and kidney failure, and died shortly after. While the severity of Mr. Flor's conditions would have made him eligible for compassionate release, the new release criteria excludes "inmates who were age 60 or older at the time they were sentenced," for certain crimes, such as violations of the Controlled Substances Act.[18]

For the aforementioned reasons, it appears that the Department's revisions to mandatory minimums and compassionate release will not apply to any federal marijuana prisoners who acted in accordance with state law, regardless of their age or medical condition.

Questions:

1. During Attorney General Eric Holder's August 12, 2013 speech to the American Bar Association concerning mandatory minimums and compassionate release, he said, "certain low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels will no longer be charged with offenses that impose draconian mandatory minimum sentences." In light of the new Department prosecutorial guidelines, large-scale state-compliant medical marijuana providers are no longer to be considered enforcement priorities. Will the Department order the expansion of compassionate release to alleged "large-scale" federal inmates who were acting in accordance with their state's medical marijuana law?
2. Given that it costs significantly more to imprison a seriously ill person, does the Department consider it a good use of resources to impose a mandatory 10-year sentence on a seriously ill kidney transplant recipient who was acting in accordance with his state's medical marijuana law?

Request:

1. Revise compassionate release and mandatory minimums to include federal offenders who were in compliance with the medical marijuana laws of their states.

III. Inquiry about the Scheduling of Marijuana: Under the Controlled Substances Act, the U.S. Attorney General has the ability to initiate the rescheduling of substances, including the classification of marijuana as a Schedule I substance.

[18] Federal Bureau of Prisons, Program Statement, Categorization of Offenses, March 16, 2009, available at http://www.bop.gov/policy/progstat/5050_049.pdf.

Background:

According to the federal Controlled Substance Act (CSA), items placed in Schedule I, such as marijuana, have "no currently accepted medical use in treatment in the United States." Yet, 20 states and the District of Columbia have authorized marijuana as a therapeutic treatment option that physicians can recommend to their patients. The over one million medical marijuana patients who have received recommendations from their physicians to treat their conditions is a manifestation of the fact that marijuana has true accepted use in the medical community. These doctors are not recommending the medical use of marijuana without any scientific basis. To date, there have been over 300 scientific studies on marijuana's therapeutic value.[19] In fact, one of President Obama's original choices for US Surgeon General, Dr. Sanjay Gupta, a former opponent of medical marijuana, recently issued a public apology in which he said he now believes there is great medicinal value to marijuana.

Many have sought to reclassify marijuana under the CSA through the petition process, but thus far, none of these efforts have been successful. One such attempt has been undertaken by Americans for Safe Access, resulting in the case of ASA vs. DEA. The petition charges that the DEA position on marijuana's accepted medical use has been "arbitrary and capricious as a matter of law, as it conflicts with the language and legislative history of the CSA."[20] More recently, the governors of the states of Washington, Rhode Island and Vermont filed their own rescheduling petition, while Governor Hickenlooper of Colorado filed a separate rescheduling petition on behalf of his state.

Regardless of the specific merits of each of these rescheduling efforts, the CSA authorizes the Attorney General to reschedule any substance through an internal review process. This process is described in detail in 21 USC § 811. The Attorney General "may by rule" transfer a drug or other substance between schedules if he finds that such drug or other substance has a potential for abuse, and may then make a decision under the rules subsection (b) of Section 812 as to the schedule in which such substance is to be placed. The criteria for how to evaluate a substance's placement is in section (c) of Section 811.

Among the eight listed criteria is § 811(c)(3), which includes a review of the "state of current scientific knowledge regarding the drug or other substance." The Department's current evaluation process is a five-prong test; however, the Department has employed narrow reasoning that makes it impossible for marijuana to be rescheduled. The test requires that there be large-scale FDA studies (Phase 2 and 3 trials) affirming the medical efficacy of a substance. Yet the Department systematically works to block any and all attempts at Phase 2 and 3 trials through its rules concerning the National Institute on Drug Abuse's ("NIDA") monopoly on the marijuana available for such studies. The Department has even rejected a 2007 DEA administrative law ruling that found the licensing of more production of marijuana for research is in the public interest.[21]

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[19] A database of over 300 scientific studies on the medical value of marijuana with brief descriptions of each study can be found at http://www.cannabis-med.org/studies/study.php.
[20] Petition for Review of a final order of the Drug Enforcement Administration, *Americans for Safe Access vs. Drug Enforcement Administration*, available at http://safeaccessnow.org/downloads/ASA_v_DEA_Reply_Brief.pdf
[21] In the Matter of Lyle Craker-Opinion and Recommended Ruling. DEA Administrative Law Judge Mary Ellen Bittner, February 12, 2007. https://www.aclu.org/files/images/asset_upload_file116_28341.pdf.

Moreover, the federal government's own National Cancer Institute ("NCI") has a Physician Data Query ("PDQ") on the medical value of marijuana. The PDQ acknowledges that "that physicians caring for cancer patients in the United States who recommend medicinal *Cannabis* predominantly do so for symptom management."[22] The original version of the PDQ contained passages affirming the tumor-fighting properties of marijuana, though the NCI removed that information from its website shortly after it was posted. Emails between the parties involved obtained via the Freedom of Information Act make clear the information was removed for political rather than scientific reasons.[23]

U.S. Attorney for Western Washington, Jenny Durkin, recently said that her state's medical marijuana program was "untenable." If there is anything untenable about medical marijuana in the United States, it is its placement as Schedule I substance with "no accepted medical use." Maintaining the placement of marijuana in Schedule I undermines the scientific integrity of the entire CSA.

Questions:

1. The Controlled Substances Act grants the Attorney General the authority to reschedule marijuana or any substance if certain determinations are made. Given the growing body of evidence that demonstrates marijuana has at least some medical value, including the National Cancer Institute's Physician Data Query, marijuana's placement in Schedule I is increasingly suspect. What steps is the Department taking with respect to examining marijuana's placement in the schedule under the authority granted by 21 USC § 811?
2. More specifically, 21 USC § 811(c)(3) calls for a review of "the state of current scientific knowledge regarding the drug or other substance." How does the Department evaluate the scientific knowledge concerning marijuana, and:
   a. What studies have been reviewed?
   b. Does the Department examine scientific knowledge that has been gained from studies conducted outside of approval by the National Institute on Drug Abuse?
   c. What is the Department's current opinion of the current scientific knowledge?
   d. Will the Department direct the DEA to eliminate rules that inhibit research into the medicinal value of marijuana so that more studies can be conducted using marijuana grown from state-approved sources?

Request:

1. Provide resources for a comprehensive Department review of the current scientific knowledge, including studies about the medical benefit of marijuana and not merely those confined by NIDA's mission to explore substance abuse and addiction.

[22] National Cancer Institute, Physcian Data Quiery, Cannabis and Cannabinoids, last updated August 2, 2013, available at, http://www.cancer.gov/cancertopics/pdq/cam/cannabis/healthprofessional/page2
[23] Freedom of Information Act Request, National Cancer Institute's Cannabis and Cannabinoids PDQ, available at: https://www.muckrock.com/foi/united-states-of-america-10/national-cancer-institutes-cannabis-and-cannabinoids-pdq-502/