DRUG POLICY ALLIANCE

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MEDICAL MARIJUANA LAW AND LEGISLATION: THE ROLE OF STATE LAW ENFORCEMENT

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For the Honorable Members of the Alameda County Board of Supervisors

Parameters of State Regulation and Enforcement

States, not the federal government, are the principal purveyors of criminal codes. Congress' authority to enact criminal laws is greatly circumscribed by the Constitution.

Only when federal and state laws directly conflict is federal law supreme. When there is no direct conflict, states retain the authority to legislate as they see fit.

States retain full authority to de-criminalize or de-penalize conduct as they see fit. The refusal of a state to criminalize or penalize conduct is fully consistent with principles of Federalism and does not conflict with federal law even when federal law criminalizes or penalizes the very same conduct.

- This authority extends to States' ability to de-criminalize or de-penalize conduct related to the possession and use of marijuana, including medical marijuana. See generally *Illicit Drug Policies: Selected Laws from the 50 States*, available at www.andrews.edu/BHSC/impacteen-illicitdrugteam (noting that states have a history of drug policy experimentation that has often differed from federal policy and comparing states' various de-penalization approaches with respect to marijuana).

It is the duty of sheriffs, as well as the district attorney to enforce *state* laws. The Alameda county sheriff has a statutory duty to enforce the laws of the state and maintain public order and safety. Los Angeles Free Press, Inc. v. City of Los Angeles, 88 Cal.Rptr. 605, 611 (1970). The Attorney General is mandated by the California constitution to "see that the laws of the State are uniformly and adequately enforced," and to oversee the offices of the district attorneys and sheriffs towards this ends. Cal. Const., Article V, §13. That local law enforcement may enter into cooperative agreements with Federal enforcement agencies in no way abrogates their obligation to enforce state law.

The federal government may not compel state law enforcement agents to enforce federal regulations. *"[T]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the State's officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."* In Printz v. United States,

521 U.S. 898, 935 (1997), a Montana Sheriff Jay Printz challenged the constitutionality of a federal handgun control scheme that required him and other local law enforcement officers to conduct background checks on prospective handgun buyers, ensuring that no handguns were illegally purchased. In invalidating the law, the Supreme Court stated that Congress cannot require state officers to enforce federal laws. Asserting that it was discovered early on by the framers of the Constitution that "using the states as the instruments of federal governance was both ineffectual and provocative of federal-state conflict," the Court said that "the Constitution [] contemplates that a State's government will represent and remain accountable to its own citizens."

- State (and local) governments also have the right to be free from unwanted regulation imposed at the federal level. In New York v. United States, 505 U.S. 144, 166 (1992), the Court noted "*we have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts*."

The states, not the federal government, regulate medical practice and establish standards of medical care.

- An attempt by the executive branch to assert federal authority over the practice of medicine in Oregon in order to halt application of that state's so-called physician-assisted suicide law was recently rebuffed by a federal court. Oregon v. Ashcroft, 192 F. Supp. 2d 1077 (D. Or., 2002) ("The determination of what constitutes a legitimate medical practice or purpose traditionally has been left to the individual states" and Congress has "never authorized" nor "establish[ed] a national medical practice or [] national medical board.).

- The federal government is prohibited from sanctioning physicians who recommend medical marijuana to patients. Conant v. McCaffrey, 2000 U.S. Dist. LEXIS 13024 (N.D. Cal., 2000) (awaiting decision on appeal in the U.S. Court of Appeals for the Ninth Circuit, renamed Conant v. Walters).

Medical Marijuana – Recent Legal History

Since 1996, seven states have enacted laws that confer various *state* legal protections on persons who need medical marijuana, and the people who provide care to them (including physicians and caregivers). The states are California, Oregon, Washington, Maine, Colorado, Nevada, and Hawaii.

The stated purposed of the Compassionate Use Act, passed in 1996 by the California electorate, is to "ensure that persons who use marijuana for medical purposes upon recommendation of a physician are not subject to criminal prosecution or sanction."

None of these medical marijuana laws have been challenged in court by the federal government, and no facial challenge to these laws by the federal government would succeed. While these laws differ from federal marijuana laws and are at odds with the federal rejection of "medical marijuana", these laws do not directly "conflict" with federal law so as to trigger a Supremacy Clause claim by the federal government.

- The Oakland Cannabis Buyers' Cooperative Case decided by the U.S. Supreme Court in 2001 does *not* affect states' authority to legislate in the area of medical marijuana. The OCBC case simply held that federal law did not recognize a medical necessity defense when asserted by an organization that distributes marijuana to individuals. The Court did *not* strike down any state medical marijuana laws. Nor did the Court declare that such a defense was unavailable to individual patients who might assert such a defense in the face of federal prosecution. See Memorandum of Legislative Counsel, State of Nevada, to Assemblywoman Giunchigliani (May 17, 2001) (describing the very narrow holding of the Oakland Cannabis Buyers' Cooperative case). Thus, states remain free to enact legislation de-criminalizing or de-penalizing medical marijuana.

The federal government remains free to enforce federal marijuana laws, even in jurisdictions that have enacted medical marijuana laws. (The federal government, however, cannot force state officials to assist in these enforcement efforts). Accordingly, the federal government can arrest medical marijuana patients or caregivers for federal marijuana offenses. Similarly, federal officials can confiscate any marijuana they come across. To date, the federal government has yet to arrest or prosecute any individual patients for possession or use of medical marijuana. The federal government has prosecuted a handful of medical marijuana users who cultivated a substantial number of plants (typically over 1000) or distributed a substantial amount of marijuana. The federal government also has confiscated small amounts of marijuana seized and provided by state law enforcement officials who oppose medical marijuana.

The California Supreme Court recently recognized that "*as a result of the enactment of [Prop 215], the possession and cultivation [of medical cannabis] is no more criminal—so long as its conditions are satisfied—than the possession and acquisition of any prescription drug with a physician's prescription.*" In People v. Mower, 122 Cal.Rptr.2d 326 Cal. (2002), the California Supreme Court held that the statutory medical-marijuana defense grants a defendant a limited immunity from prosecution, which not only allows a defense at trial, but also permits a motion to set aside an indictment or information prior to trial, by rendering possession and cultivation of marijuana noncriminal for a qualified patient or primary caregiver.