REDLINE COMMENTS VERSION
BY DARRYL COTTON & WOLF SEGAL
February 7, 2023

Department of Cannabis Control
CALIFORNIA

Gavin Newsom
Governor

Nicole Elliott
Director

January 27, 2023

Mollie Lee
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Via electronic mail

Dear Ms. Lee:

Pursuant to Section 12519 of the Government Code, I write on behalf of the Department of Cannabis Control and its Director, Nicole Elliott, to request a written opinion from the Attorney General addressing the following question:

> Whether state law authorization, under an agreement pursuant to Chapter 25 of Division 10 of the B usiness and Profession Code, for medicinal or adult-use commercial cannabis activity, or both, between out-of-state licensees and California licensees, will result in significant legal risk to the State of California under. the federal Controlled Substances Act.

We ask this question against the backdrop of historic legislation recently signed into law by the Governor. Until now (in the absence of that legislation), California state law has flatly prohibited state-licensed cannabis businesses from exporting cannabis outside the state. *See* Bus. & Prof. Code,§ 26080, subd. (a). Now, however, new legislation-Senate Bill 1326 (Caballero, Chapter 396, Statutes of 2022), which took effect on January I, 2023-has created a pathway to allow California cannabis licensees to engage, for the first time, in commercial cannabis activity with cannabis businesses licensed in other states. Under SB 1326 (codified in relevant part at Chapter 25 of Division 10 of the Business and Professions Code), California may work with other states to negotiate agreements allowing, as a matter of state law, for commercial cannabis activity between California cannabis licensees and licensees in those other states. *See* Bus. & Prof. Code,§§ 26300-26308. Such agreements would represent an important step to expand and strengthen California's state-licensed cannabis market.

Importantly, however, SB 1326 limits the circumstances under which such an agreement may take effect. In particular, SB 1326 provides that an agreement may not take effect unless at least one of four specified conditions is satisfied._ *See* Bus. & Prof. Code,§ 26308, subd. (a). One of those conditions is as follows:

> The Attorney General issues a written opinion, through the process established pursuant to Section 12519 of the Government Code, that state law authorization, under an agreement pursuant to this chapter, for medicinal or adult-use commercial cannabis activity, or both, between

> foreign licensees and state licensees will not result in significant legal risk to the State of California under the federal Controlled Substances Act, based on review of applicable law, including federal judicial decisions and administrative actions.
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> Bus. & Prof. Code,§ 26308, subd. (a)(4)[1]

Accordingly, we request that the Attorney General issue a written opinion addressing this question-that is, whether state-law authorization for medicinal or adult-use commercial cannabis activity, or both, between out-of-state licensees and California licensees, under an agreement pursuant to SB 1326, will result in significant legal risk to the State of California under the federal Controlled Substances Act. SB 1326 § 26308 states that at least one of four conditions is satisfied. The problem with that is to unlawfully enter into an agreement to allow interstate commerce in non-medicinal cannabis, is to conspire to commit a federal felony thus negating the CSA's immunity clauses as applies to individual state actors. Conspiracy to violate a federal law is a felony and the commission is, itself, a felony and the commission of a federally prohibited interstate felony, per AB 1159 removes state attorneys' immunity as no exception is made for attorneys' employed by the State DOJ.

Another area of concern with the language in AB 1326 consists of how the DCC impose their state cannabis regulations on other states seeking to do business with CA licensees. *"The bill would require the agreement to require that the other state or states impose requirements on its licensees with regard to cannabis and cannabis products to be sold or otherwise distributed within this state that meet or exceed the requirements applicable to MAUCRSA licensees, as specified."* This clearly is not in keeping with a normal state to state regulatory language much less what these types of agreements would have when it comes to the CSA. It is plainly an overreaching attempt to usurp federal preeminence.

"The bill would require the agreement to include provisions for collection of applicable taxes. The bill would specify that the agreement does not constitute a project for purposes of the California Environmental Quality Act. The bill would prohibit an agreement, as defined, from taking effect unless, among other things, federal law is amended to allow for, or the United States Department of Justice issues an opinion or memorandum allowing or tolerating, interstate transfer of cannabis or cannabis products between authorized commercial cannabis businesses." For the DCC to determine that the interstate sale of cannabis products is supported by SB 1326, without the amendment of current federal laws, would be moving forward with this activity after having been expressly prohibited under SB 1326. The mere fact that DCC would, with this letter, argue for a legal interpretation that *infra* supports their belief they can do so, without there having been that federal amendment, proves they are unfit to administer the Control, Tax and Regulation of cannabis *within* our state.

[1] As used here, "foreign licensee" means the holder of "a commercial cannabis license issued under the laws of another state that has entered into an agreement" under SB 1326. See Bus. & Prof. Code, § 26300, subd. (c). For clarity, we use the term "out-of-state licensee."

For the reasons that follow, we submit that it will not.

I. The Controlled Substances Act could not constitutionally prohibit California from legalizing and regulating commercial cannabis activity with out-of-state licensees.

The Controlled Substances Act could not constitutionally prohibit California from legalizing and regulating commercial cannabis activity as a matter of state law, including commercial cannabis activity involving out-of-state licensees. (True, but only for as long as that activity takes place entirely within the borders of the state.) This is contrary to the "Commerce,"[2] and "Supremacy Clauses"[3] of the Constitution of the United States of America, the Tenth Amendment [4], and 21 USC§903;[5] which prohibits the states, as regards non-medicinal cannabis, from enacting regulations which "cannot consistently stand together with" federal cannabis regulations. Even the effort to do so, absent the immunity provisions of the Controlled Substances Act, would, in this instance, constitute a conspiracy to commit a felony which is, itself, a felony carrying a penalty of up to five years in prison and/or a fine of $250,000. (U.S.C. § 371)

The Controlled Substances Act could not constitutionally prohibit California from legalizing and regulating commercial cannabis activity as a matter of California state law. This is simply not true when doing so creates an irreconcilable "positive conflict" between State and Federal law such that they, "cannot stand consistently together." In such irreconcilable *positive conflicts,* federal law is preeminent. "In the absence of irreconcilability" between state and federal law, "there is no conflict preemption." (United States v. California, (2019) 921 F.3d 865, 882.) The opposite is also, by necessary inference, true. Under the U.S. Constitution's anti-commandeering principle, federal statutes may not "command[] state legislatures to enact or refrain from enacting state law." *Murphy v. Nat'/ Collegiate Athletic Ass'n,* 138 S.Ct. 1461, 1478 (2018). "[E]ven 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." *New York v. United States,* 505 U.S. 144, 166 (1992). This means that "the federal government lacks the power to compel [states] ... to criminalize possession and use of marijuana under state law." *In re State Question No. 807,468* PJd 383, 391 (Okla. 2020); *accord Conant v. Walters,* 309

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[2] " [Congress shall have the power] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes…" (Article I, Section 8, Clause 3, U.S. Constitution)

[3] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
(Article VI, Clause 2, U.S. Constitution)

[4] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States…"
(Amendment 10, US Constitution)

[5] "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.
(21 USC, Section 903, Pub. L. 91–513, title II, § 708, Oct. 27, 1970, 84 Stat. 1284)

F.3d 629, 645-46 (9th Cir. 2002) (Kozinski, J., concurring). All of the above is moot. The matter at hand differs from these in that there has been no attempt on the part of the federal government to compel the states to authorize, nor to forbid, activities within their own jurisdictions. Those jurisdictions end inside the states' borders. Nor, by the same token, could the federal government prohibit states from affirmatively legalizing certain commercial cannabis activity. In *Murphy,* the Supreme Court expressly rejected any distinction, for anti-commandeering purposes, between federal laws that compel states to prohibit activity and those that prohibit states from authorizing them: "[t]he basic principle-that Congress cannot issue direct orders to state legislatures-.applies in either event." 138 S.Ct. at 1478 In short, the U.S. Constitutions anti-commandeering rule protects California from liability, under federal law, for choosing to legalize and regulate commercial cannabis activity as a matter of its own state laws. In short, the U.S. Constitution's anti-commandeering rule protects California from liability, under federal law, for choosing to legalize and regulate commercial cannabis activity as a matter of its own state laws. State regulated medicinal cannabis is enabled to "consistently stand together with" federal cannabis regulation thanks to the current iteration of what is still commonly referred to as the "Rohrabacher Amendment,[6]" even though it is correctly titled *Section 531* in the 2022 federal budget.

This remains true where, as here, the activity to be authorized under state law involves interstate commerce-such as commerce between in-state and out-of-state cannabis licensees. The anti-commandeering rule does not rise or fall based on the strength of any underlying federal interest: on the contrary, the anti-commandeering rule means that, "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Murphy,* 138 S.Ct. at 1477 (quoting *New York,* 505 U.S. at 178). There has been no attempt by the federal government to "conscript state governments as its agents." This argument is in direct contradiction of 21 USC, Section 903[7], and SCOTUS' findings in *Murphy* as there is a direct, irreconcilable, contradiction between state and federal cannabis regulation of NON-MEDICINAL cannabis such that they "cannot consistently stand together." contrary to the *Supremacy Clause* of the Constitution. The U.S. Supreme Court has expressly

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[6] "None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." (SEC. 531, Consolidated Appropriations ACT 2022) See Full Text of H.R. 2471

[7] "The United States Supreme Court has construed §903 as 'explicitly contemplating a role for the states in regulating controlled substances," (Gonzales v. Oregon, 546 U.S. 243, 251 (2006)…Under this construction States may pass laws related to controlled Substances (including marijuana) as long as they do not create a 'positive conflict' such that state law and federal law '…cannot consistently stand together." ("*Is the Department of Justice Adequately Protecting the Public From the Impact of State Recreational Marijuana Legalization?: Hearing Before the Senate Caucus on International Narcotics Control,* 114th Cong. (Apr. 5, 2016) (Testimony of Douglas J. Peterson, Attorney General, State of Nebraska)

invoked the rule in the context of interstate commerce, observing that the Commerce Clause "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York,* 505 U.S. at 166. While the Commerce Clause might, arguably, not preclude such state regulation, the Supremacy Clause in combination with the Tenth Amendment, uncontrovertibly, does. Indeed, the cases in which the Court has articulated the anti-commandeering rule have all concerned invocations of Congress's power over interstate commerce. *See Murphy,* 138 S.Ct. at 1485 (Thomas, J., concurring); *Printz v. United States,* 521 U.S. 898,923 (1997); *New York,* 505 U.S. at 159-60; *accord Nat'! Collegiate Athletic Ass'n v. Governor of New Jersey,* 730 F.3d 208, 224-26 (3d Cir. 2013) (confirming that the federal statute at issue in *Murphy* invoked Congress's power to regulate interstate commerce).[8] As these cases make clear, nothing about the interstate commerce context diminishes the anti-commandeering rule-and so that rule continues to protect California's authority to legalize and regulate commercial cannabis activity as a matter of state law, whether or not that activity involves out-of-state licensees.[9]

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[8] (DCC-FN2) "This is unsurprising: most federal regulatory statutes, including the Controlled Substances Act, are rooted in Congress's power to regulate interstate commerce. For this reason, as discussed below (see Section II, infra), the Controlled Substances Act does not distinguish between cannabis activity involving multiple states and wholly intrastate activity. As far as the Act is concerned, all cannabis activity reached by the Act must fall under the rubric of interstate commerce otherwise, Congress could not reach that activity in the first place.

[9] (DCC-FN3)"If anything, the U.S. Constitution's Commerce Clause underscores the importance of proceeding with caution when considering whether federal law could be understood to require a state to prohibit interstate commerce. The dormant aspect of the Commerce Clause generally bars states from discriminating against interstate·commerce at all. *Dep't of Revenue v. Davis,* 553 U.S. 328,338 (2008). And while Congress can exercise its own Commerce Clause powers to authorize such discrimination, this generally requires an "unmistakably clear," "unambiguous" display of Congressional intent to do so. *Maine v. Taylor,* 477 U.S. 131, 139 (1986). Congress has made no such clear statement as to cannabis. *Ne. Patients Group v. United Cannabis Patients & Caregivers of Maine,* 45 F.4th 542,554 (1st Cir. 2022).

This context helps explain the Court's reference, in *Murphy,* to states' "regulation of the conduct of activities occurring within their borders." 1 3 8 S , Ct. at 1479. Beyond their borders, states generally have no regulatory authority in the first place: in the absence of affirmative Congressional authorization, "the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders." *Sam Francis Found. v. Christies, Inc.,* 784 F.3d 1320, 1324-25 (9th Cir. 2015) (en bane) (quoting *Healy v. Beer Inst., Inc.,* 491 U.S. 324,336 (1989)). And *Murphy* itself cited dormant-'Commerce-Clause caselaw in describing constitutional limitations on state sovereignty. 138 S. Ct. at 1475-76 (citing *Dep't of Revenue v. Davis).*

Of course, resolution of the question presented does not require determining whether and how the dormant Commerce Clause applies to interstate commerce in cannabis: even if states were *authorized* to discriminate against interstate cannabis commerce (which is the relevant question for purposes of the dormant Commerce Clause), it would not follow that states are *required* to do so. Thus, we see no need for the Attorney General's opinion to address the dormant Commerce Clause. Consistent with the relevant provision of SB 1326 *(see* Bus. & Prof. Code,§ 26308, subd. (a)(4)), we ask only about legal risk under the Controlled Substances Act, and not about any other aspect of federal law.

To be clear, none of the foregoing affects the federal government's own authority to enact and enforce federal law-including federal laws prohibiting commercial cannabis activity, whether or not that same activity is legal as a matter of state law. Just as federal law could not (and, as discussed below, does *not-see* Section II, *infra)* purport to compel states to prohibit commercial cannabis activity as a matter of their own state laws, California law could not and does not purport to shield state cannabis licensees from federal enforcement of federal law. The Supreme Court's anti-commandeering cases have emphasized that, while Congress may not commandeer state lawmaking, Congress remains free to legislate directly. *Murphy,* 138 S.Ct. at 1477 (quoting *New York,* 505 U.S. at 178). Such direct federal legislation-for example, the Controlled Substances Act's direct, federal-law prohibition on individual use, possession, and distribution of Schedule I controlled substances like cannabis-is consistent with the rule that Congress has "the power to regulate individuals; not States, *Murphy,* 138 S.Ct. at 1476 (quoting *New York,* 505 U.S. at 166). Murphy is irrelevant as Congress did, in fact, "legislate," with the language of 21 USC Section 903, requiring that any state regulation be able to ***consistently stand together*** with federal cannabis regulation; and with the language of the Rohrabacher-Farr/ Blumenauer Amendment (Rohrabacher).

There is a bright line of cases beginning with *U.S. v. Marin Alliance for Medical Marijuana* ("MAMM") 139 F. Supp 3d 1039 (N.D. Cal.2015) running through *U.S. v McIntosh* ("McIntosh") 883 F. 3d. 1163 (9th Cir. 2016) and resting currently at *U.S. v Bilodeau* ("Bilodeau") 2002 U.S. App. LEXIS 2383 (1st Cir. 2022) from numerous Federal District Courts which have found, and two different Federal Circuit Courts of Appeal (1st and 9th) which have upheld, that (per the sworn testimony of numerous members of the U.S House of Representatives, they were aware and intended for it to be a *necessary inference*) of the language of the "Rohrabacher-Blumenauer/Farr" (Rohrabacher) Amendment's prohibition on spending federal funds to prevent states from implementing their medical marijuana regimes; that Section 531 would protect substantively compliant state medical cannabis program participants immunity from federal prosecution for possession, cultivation, processing, sales and/or distribution of cannabis which has been identified as part of their medical marijuana regimes. Until such time as its language is no longer the law, it carries the weight of federal law.

This is what allows substantively compliant state cannabis medical regime participants and the programs they are participating in to "consistently stand together" with federal regulation of cannabis by statutorily creating a "***carve out***" from the CSA's absolute prohibition of cannabis for anything but research. ***FOR MEDICINAL CANNABIS***. It has been renewed, for the eighth time, until September 2023. That it remains is a clear demonstration of the will of Congress in this matter.

There is no such federal statutory protection of non-medicinal cannabis. In fact, the Federal Appeals Court for the 1st Circuit, in US v Bilodeau was explicit that Rohrabacher's protection applies ***ONLY TO MEDICINAL*** cannabis.[10]

Providing such protection would require only amending the language of Section 531 to omit the word "medical." This was proposed by the 40+ member, bi-partisan, Congressional Cannabis Caucus in a letter to the Chairperson of the House Sub-Committee Commerce, Justice, Science, and Related Agencies (CJS). The proposed revision died in committee. That it failed is

[10] "Congress surely did not intend for the rider to provide a safe harbor to all caregivers with facially valid documents without regard for blatantly illegitimate activity in which those caregivers may be engaged **and which the state has itself identified as falling outside its medical marijuana regime."** (emphasis added) (US v Bilodeau, U.S. App. LEXIS 2283,*14-19 (1st CIR.2022)

also a clear demonstration of the will of Congress in this matter. But precisely because federal laws like the Controlled Substances Act must act upon "individuals, not States," the Act poses no legal risk to the State of California itself (as opposed to private individuals). Here, consistent with the relevant provision of SB 1326 *(see* Bus. & Prof. Code, § 26308, subd. (a)(4)), we ask only about legal risk to the State, and not about any legal risk to private individuals.[11]

In sum, under the U.S. Constitution's anti-commandeering principle, the Controlled Substances Act could not criminalize California's legalization and regulation (as a matter of state law) of commercial cannabis activity-including commercial cannabis activity involving out-of-state licensees. This is disproven, in depth, with appropriate citations, *supra*.

II. The Controlled Substances Act does not, in fact, criminalize California's legalization and regulation of commercial cannabis activity with out-of-state licensees.

Consistent with the constitutional limits just [inaccurately] discussed, the Controlled Substances Act does not, in fact, purport to criminalize a state's legalization and regulation of commercial [medical] cannabis activity under state law-including commercial [medical] cannabis activity involving out-of-state licensees.

By its terms, the Controlled Substances Act shields state officials from liability in connection with their enforcement of state law. The Act expressly confers immunity upon (as relevant here) "any duly authorized officer of any State ... who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." (21 U.S.C. § 885(d). Other than with a DEA 225 or as a substantively compliant participant in a state's purely medical regulatory regime, there is no such thing in federal law as "lawfully engaged" in trafficking in non-medicinal cannabis. Is **wholesale entrapment** of people who, probably, would never have committed the federal crime of manufacturing a controlled substance, "lawfully engaging?" This provision is broad and unqualified. on its face, it would seem to encompass all state laws relating to federal controlled substances, including state laws legalizing and regulating

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[11] (DCC-FN4) For similar reasons, the Attorney General's opinion need not address federal preemption. "[E]very form of preemption is based on a federal law that regulates the conduct of private actors, not the States." Murphy, 138 S.Ct. at 1481. In other words, federal preemption concerns whether and how state law and federal law may "impose[] restrictions or confer[] rights on private actors." Id. at 1480. We thus are not concerned with federal preemption, because we are not concerned with restrictions imposed upon private actors: consistent with the relevant provision of SB 1326, we ask only about legal risk to the State of California itself.

In any event there is no federal preemption here. The Controlled Substances Act expressly disavows any preemption of state law except to the extent of "a positive conflict between state law and the Act. 21 U.S.C. § 903. As the California Court of Appeal has repeatedly recognized, there is no such conflict between the Controlled Substances Act (which classifies controlled substances like cannabis as a matter of federal law) and state laws that legalize and regulate cannabis as a matter of state law (without purporting to affect the operation of federal law)-and, therefore, no preemption by the former of the latter. See City of Palm Springs v. Luna Crest Inc., 245 Cal.App.4th 879, 884-86 (2016); Kirby v. Cty. of Fresno, 242 Cal.App.4th 940, 962-63 (2015); Qualified Patients Ass'n v. City of Anaheim, 187 Cal.App.4th 734, 756-63 (201O); Cty. of San Diego v. San Diego NORML, 165 Cal.App.4th 798, 818-28 (2008); City of Garden Grove v. Superior Court, 157 Cal.App.4th 355, 380-86 (2007); accord City of San Jose v. MediMarts, Inc., 1 Cal.App.5th 842, 849 (2016).

those controlled substances as a matter of state law. And courts have confirmed this straightforward reading, concluding (for example) that this immunity even protects covered officials from liability for conduct (the return of cannabis to an individual allowed to possess it under state law, but not federal law) that could otherwise constitute criminal distribution under the Controlled Substances Act. *City of Garden Grove v. Superior Court,* 157 Cal.App.4th 355, 368-69, 390 (2007); *cf* 21 U.S.C. § 802(11). More relevant here, courts have confirmed that this immunity protects officials responsible for administering state laws legalizing and regulating cannabis-that is, officials who are engaged in regulatory activities like "processing applications" and "promulgating reasonable regulations." *(White Mountain Health Ctr., Inc. v. Maricopa Cty.,* 386 P.3d 416,432 (Ariz. Ct. App. 2016)), or who are responsible for collecting cannabis taxes *(Tay* v: *Green,* 509 P.3d 615, 621 (Okla. 2022). Looking at what kind of stewardship DCC and its predecessor agencies has shown *"We thus are not concerned with federal preemption, because we are not concerned with restrictions imposed upon private* actors*: consistent with the relevant provision of SB 1326, we ask only about legal risk to the State of California itself"* toward the will of the voters is deeply disturbing.

Current California cannabis regulation, of NON-MEDICINAL cannabis, is **all** *pendant* on Prop 64; as subsequently amalgamated with MCRSA in MAUCRSA (SB94).

Prop 64, at Division 10, Chapter 1, General Provisions: ***used mandatory, rather than permissive language.*** This means that, lawfully, neither the Legislature nor DCC or its predecessor agencies had the option to do otherwise. Yet they did; which means that the regulations were not "lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." As is required by (21 U.S.C. § 885(d) for the immunity it grants to apply.

"Regulations issued under *this division shall…[not]* ***make compliance unreasonably impracticable*** [emphasis added]." (Prop 64 § 26013(c))

"Unreasonably impracticable' means that the measures to comply with the regulations require such a high investment of risk, money, time or any other resource or asset, ***that the operation of a marijuana establishment is not worthy of being carried out in practice by a reasonably prudent businessperson*** [emphasis added]." (Prop 64 § 26001(2) (dd))

Would a *"****reasonably prudent businessperson****,"* enter into a business where the most important contracts were unenforceable and in which they were constantly at risk of federal prosecution for a felony? How do you think "the person in the street" would answer this?

How is "reasonable" defined in law? **Reasonable:** Just, rational, appropriate, ordinary, or usual in the circumstances. (https://www.law.cornell.edu/wex/reasonable).

*"The bureau shall…****not impose such unreasonably impracticable barriers so as to perpetuate, rather than reduce and eliminate, the illicit market for marijuana****.* [emphasis added]." (Prop 64 § 26014(a))

One has only to pay attention to the media, left, right and center, to see that this has not been accomplished. The legal barriers erected, which hold cannabis to far more draconian regulation than is warranted; and exorbitant and exempt-from-auditing taxes imposed which have frustrated most of the legacy farmers who made financially devastating efforts to come into the light. More than a few of them have been driven to suicide. This broad immunity protects California and its officials from liability under the Controlled Substances Act for administering

state laws related to the legalization and regulation of [medical] cannabis.

Even in the absence of such immunity, it is doubtful that the Controlled Substances Act would impose liability on state officials for administering state cannabis laws. Here again the DCC's concern is of state officials liability not the "private actors" risks or liabilities. At least in the absence of activities that could constitute outright possession or distribution, any such liability would presumably be incurred under conspiracy or aiding-and-abetting theories. But even a doctor's recommendation that a patient use medicinal cannabis-a necessary precondition for that patient's use of medicinal cannabis under state law-does not, without more, "translate into aiding and abetting, or conspiracy." *Conant v. Walters,* 309 F.3d 629, 635-36 (9th Cir. 2002). In this light, it is perhaps unsurprising that courts have concluded that "governmental entities do not incur aider and abettor liability by complying with their obligations under" state laws legalizing and regulating cannabis. *City. of San Diego v. San Diego NORML,* 165 Cal.App.4th 798, 825 n.13 (2008); *see also Qualified Patients Ass'n v. City of Anaheim,* 187 Cal.App.4th 734, 759-60 (2010); *City of Garden Grove,* 157 Cal.App.4th at 368; *White Mountain Health Ctr.,* 386 P.3d at 432. Indeed, at least one respected federal jurist has found it trivially obvious, in the context of a local government's state-law permitting scheme regulating cannabis activity, that "the permit scheme *itself* does not violate the Controlled Substances Act but rather regulates certain entities that do." *Joe Hemp's First Hemp Bank v. City of Oakland,* No. 15-cv-5053, 2016 WL 375082, at *3 (N.D. Cal. Feb. l, 2016) (Alsup, J.) (emphasis in original). Consistent with these cases, the Controlled Substances Act should not be read to criminalize state officials' enforcement of state cannabis laws-even before considering the fact that; as discussed above, the Act's immunity provision removes any doubt on this point[12].

And once again, this conclusion holds whether or not the state cannabis laws at issue authorize commercial activity with licensees in other states. The operative provisions of the Controlled Substances Act make no distinction between activity involving multiple states and

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[12] (DCC FN5) This reading of the Controlled Substances Act is further bolstered by the rule (sometimes called the "federalism canon") that "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute." Bond v. United States, 572 U.S. 844, 859 (2014). "[B]efore construing a federal statute in a way that 'would upset the usual constitutional balance of federal and state powers,' courts must search for a clear statement indicating that such a result represents Congress's intent." Ryan v. U.S. Immigration and Customs Enforcement, 974 F.3d 9, 29 (1st Cir. 2020) (quoting Gregory v. Ashcroft, 501 U.S. 452,460 (1991)).

Thus, even if the Controlled Substances Act otherwise remained ambiguous as to whether it reached state officials' administration of state law, it would be appropriate to conclude that it does not. Of course, as discussed above, the Act does not remain ambiguous on this point. On the contrary, the Act itself--consistent with the concerns that animate the federalism canon-repeatedly evinces a concern for the preservation of state sovereignty. See 21 U.S.C. § 885(d) (conferring immunity upon state officials, as discussed); id. § 903 (disavowing preemption of state law except to the extent of "a positive conflict"). The "constitutional balance of federal and state powers," as applies here, is clearly set forth in the Supremacy Clause, id.; the Interstate Commerce Clause, id.; The Tenth Amendment and 21 USC § 903, id.

wholly intrastate activity: under the Controlled Substances Act, both kinds of activity are equally illegal. *See, e.g.,* 21 U.S.C. § 841; *Standing Akimbo, LLC v. United States,* 141 S.Ct. 2236, 2237 (2021) (Thomas, J., respecting the denial of certiorari) (noting that the Controlled Substances Act "flatly forbids the intrastate possession, cultivation, or distribution of marijuana"). Indeed, the Act's findings take pains to reject the feasibility of a distinction between interstate and intrastate commerce in controlled substances. 21 U.S.C. § 801(5), (6). After all, the entire Controlled Substances Act is an exercise of Congress's power under the Commerce Clause-which is to say that the entire Act is, at minimum, an exercise of Congress's "power to regulate activities that substantially affect interstate commerce." Gonzales v. Raich, 545 U.S. 1, 17 (2005). Simply put, the Controlled Substances Act does not distinguish between interstate and wholly intrastate activity. There is, therefore, no reason to conclude that the Act subjects a state to greater liability for legalizing and regulating commercial cannabis activity involving out-of-state licensees, as compared to legalizing and regulating wholly intrastate activity: under the Controlled Substances Act, both kinds of activity are equally illegal. *See, e.g.,* 21 U.S.C. § 841; *Standing Akimbo, LLC v. United States,* 141 S.Ct. 2236, 2237 (2021) (Thomas, J., respecting the denial of certiorari) (noting that the Controlled Substances Act "flatly forbids the intrastate possession, cultivation, or distribution of marijuana"). The latter, however, requires conspiring to aid and abet the commission of a federal felony that has NO federal law protecting it when the proposed commerce is in ***non-medicinal*** cannabis. Indeed, the Act's findings take pains to reject the feasibility of a distinction between interstate and intrastate commerce in controlled substances. 21 U.S.C. § 801(5), (6). After all, the entire Controlled Substances Act is an exercise of Congress's power under the Commerce Clause-which is to say that the entire Act is, at minimum, an exercise of Congress's "power to regulate activities that substantially affect interstate commerce." *Gonzales v. Raich,* 545 U.S. 1, 17 (2005). Simply put, the Controlled Substances Act does not distinguish between interstate and wholly intrastate activity. There is, therefore, no reason to conclude that the Act subjects a state to greater liability for legalizing and regulating commercial cannabis activity involving out-of-state licensees, as compared to legalizing and regulating wholly in-state commercial [medical] cannabis activity.

In sum, by its terms, the Controlled Substances Act does not criminalize a state's legalization and regulation of commercial cannabis activity under state law-including commercial cannabis activity involving out-of-state licensees. In sum, is true that §903 of the CSA does not criminalize ALL state legalizations and regulation of commercial cannabis activity. However, to attempt to legalize any non-medicinal cannabis activity is to create a positive conflict such that state law and federal law "cannot consistently stand together." It DOES, however, continue to criminalize all NON-MEDICAL cannabis activity **except research**.

As the DCC has pointed out herein, this is federal law. In point of fact, the State of California has, by amalgamating its federally protected MEDICINAL cannabis program with its federally-prohibited NON-MEDICINAL cannabis program, removed the protections of Rohrabacher as it applies to California's medicinal licensees.

III. The Controlled Substances Act does not, in fact, criminalize California's legalization and regulation of commercial cannabis activity with out-of-state licensees. Yes, it does.

Although it is unnecessary to reach this issue (because either or both of the reasons set' forth in Section I and Section II of this letter are sufficient to establish that the answer to the

question presented is "no" as to both medicinal and adult-use cannabis), federal law further insulates California from "significant" risk as to agreements concerning medicinal cannabis. The statement that it is unnecessary to reach this issue is ingenuous at best. As set forth *(supra*), the *plain language* of 21 USC 903 leaves it completely unambiguous that it forbids the states from enacting regulations regarding controlled substances which create irreconcilable *positive conflict* with federal regulations regarding controlled substances, such "that the two cannot consistently stand together." It is Rohrabacher which creates the "carve out" from the CSA, SOLELY for state MEDICINAL Cannabis programs and their substantively compliant participants. As the DCC has pointed out herein, this is federal law. In point of fact, the State of California has, by amalgamating its federally-***protected*** MEDICINAL cannabis program with its federally-***prohibited*** NON-MEDICINAL cannabis program, removed the Rohrabacher protection from its medicinal program and patients. In doing so it violated their 14th Amendment guarantee of equal protection of the law, as those patients whose states still are purely medicinal, and therefore protected by Rohracher.

The COA in *US v Bilodeau* made it explicit that this protection does not apply to any activity which the states themselves have identified as being outside of their medical cannabis regimes. **California has so identified adult-use as being "NON-MEDICINAL." Further as stated, supra, The House of Representatives declined to extend Rohrabacher to cover non-medical cannabis activities.**

Federal [law, therefore subject to 14th Amendment guarantees]-in the form of an appropriations rider attached to federal spending bills since December 2014-expressly forbids the U.S. Department of Justice from expending funds to interfere with states' implementation of their ***[medical]***-cannabis laws. *See United States v. Bilodeau,* 24 F.4th 705, 709 (1st Cir. 2022); *United States v. McIntosh,* 833 F.3d 1163, 1169 70 (9th Cir. 2016). That rider (often called the "Rohrabacher-Farr Amendment" or the "Rohrabacher-Blumenauer Amendment," *see Bilodeau,* 24 F.4th at 709) "prohibits [the U.S. Department of Justice] from spending money on actions that prevent [states'] giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *McIntosh,* 833 F.3d at 1176. This protection extends even to private parties using, distributing, possessing, or cultivating medicinal cannabis in compliance with state law (though courts disagree as to how strictly private parties must comply with state law to avail themselves of that protection). As the U.S. DOJ chose to not appeal Bilodeau, **it is the current legal status quo**. *See Bilodeau,* 24 F.4th at 713-15; *McIntosh,* 833 F.3d at 1176-78. It is undisputed that, at its core, the rider prevents the U.S. Department of Justice from "taking legal action against the state." *McIntosh,* 833 F.3d at 1176. Thus, the Rohrabacher-Farr/Blumenauer Amendment further insulates the State of California from "significant" legal risk as to agreements concerning medicinal cannabis. Again, this is true ONLY of medicinal cannabis and California has specifically identified "adult-use" as being "non-medicinal."[13]

[13] *"In 2016, the people of California, through the initiative process, voted to legalize and regulate the* ***adult-use*** *of cannabis through the passage of Proposition 64 (citations omitted) These sweeping changes were intended to 'establish a comprehensive system to* [directly contradictory to federal law on the same subject] *legalize, control and regulate the cultivation, processing, manufacture, distribution, testing and sale of* ***non-medical marijuana****. MCRSA and Proposition 64 were two separate regulatory schemes that were consolidated into the Medicinal and Adult-Use Cannabis Regulation and Safety Act [SB 94]. (citations omitted) SB 94 explicitly recognized that both medicinal [sic] and adult-use cannabis was illegal under federal law. 'Although California has chosen to legalize*

To be sure, the impact of the Rohrabacher-Farr/Blumenauer Amendment should not be overstated. The Amendment does not change the fact that cannabis remains a Schedule I controlled substance under the Controlled Substances Act. *See McIntosh,* 833 F.3d at 1179 & n.5. [see US v Bilodeau. It is the most recent case on point.] Nor, as the Ninth Circuit noted in *McIntosh,* is there any guarantee that Congress will continue to add the same appropriations rider to future federal spending bills-though Congress has, in fact, consistently attached the rider to federal spending bills in the six years since *McIntosh* was decided. [McIntosh is NOT on point, as it relates only to intra-state cannabis commerce.] We do not rely on the existence of the Rohrabacher-Farr/Blumenauer Amendment as dispositive: in our view, an agreement under SB 1326 would not result in significant legal risk to the State under the Controlled Substances Act even if the Amendment did not exist, for reasons we have already explained. Nevertheless, the existence of the Rohrabacher-Farr/Blumenauer Amendment further insulates the State from any hypothetical legal risk as to agreements involving medicinal cannabis, and **thus further supports the conclusion that such an agreement presents no "significant" risk to the State *(emphasis added)* [not so for the licensee].**

In what way does a federal law protecting ONLY MEDICINAL CANNABIS reduce the State's risk in unlawfully engaging in a conspiracy to commit a felony?

* * *

For the foregoing reasons, we submit that the answer to our question is "no": state law authorization, under an agreement pursuant to Chapter 25 of Division ·10 of the Business and Professions Code, for medicinal or adult-use commercial cannabis activity, or both, between out-of-state licensees and California licensees, will *not* result in significant legal risk to the State of California under the federal Controlled Substances Act. Under the U.S. Constitution's anti-commandeering principle, the Controlled Substances Act *could not* criminalize the State's legalization and regulation of commercial cannabis activity (as a matter of state law), including commercial cannabis activity with out-of-state licensees. By its terms, the Controlled Substances Act does not criminalize the State's legalization and regulation of commercial [medical] cannabis activity, including commercial [medical] cannabis activity with out-of-state licensees, **conducting business within the states borders**. And other federal law—the Rohrabacher-Farr/Blumenaur—amendment would only further insulate the state from (and thus only further reduces the significance of) any hypothetical risk under the Controlled Substances Act.

The Controlled Substances Act prohibits the states from legalizing and regulating ANY non-medicinal possession, cultivation, processing, and/or selling of cannabis they have identified as being outside of their medical cannabis regimes. NON-MEDICINAL cannabis, even intra-state, if/when doing so creates an irreconcilable *positive conflict*. **California has so identified adult-use.**

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the cultivation, distribution, and use of cannabis, it remains an illegal Schedule I controlled substance under federal law." (Cotton v. State of California, Rob Bonta, et al.) (Case No. 37-2021-00053551-CU-WM-CTL, Defendants and Respondents Notice of Demurrer, ROA-22, Pg. 11, ¶ 20-25.)

We thank you for considering our request for an opinion on the question presented above. We are happy to work with you as you further analyze the legal issues that question might raise, and we look forward to reading your response.

Sincerely,

Matthew Lee, General Counsel
Department of Cannabis Control

Opinion request approved by:

Nicole Elliott, Director
Department of Cannabis Control