Backgrounder

Federal Law: Preemption and Dual Sovereignty

Initiative 502 is not preempted by federal law. On the other hand, it does not create a legal defense to enforcement of federal marijuana laws. Rather, it represents a well-considered, responsible approach to marijuana regulation that deserves the same policy deference as state medical marijuana laws.

Washington is free to try a new approach to our marijuana laws.

- Our nation's structure, and the limits placed on federal power by the U.S. Constitution, "allow the States '"great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." '"[1]
- The powers reserved to the states by the U.S. Constitution include the power to decide what is criminal and what is not under state law.[2]
- The reservation of powers to the states can foster innovation and positive change: "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."[3]

"Federal preemption" is a legal doctrine that says that any state law that conflicts with a federal law is preempted, or "trumped" by the federal law.

- The Supremacy Clause of the U.S. Constitution[4] says, "This Constitution, and **the Laws 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.**"
- The "Laws of the United States" are federal laws, like the federal Controlled Substances Act (CSA) that prohibits marijuana.[5] The "Laws of any State" are state laws like Washington's Uniform Controlled Substances Act,[6] which I-502 amends.
- Sec. 903 of the federal CSA specifically provides that federal drug laws do not preempt state drug laws "unless there is a **positive conflict**" between the two. A "positive conflict" arises only if the state law **requires** someone to do something that violates federal law.[7]

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[1] *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (internal citations omitted) (striking down a federal rule aimed at undermining Oregon's Death with Dignity law).

[2] *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting).

[3] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[4] Article VI, Clause 2.

[5] 21 U.S.C. § 801 *et seq*.

[6] RCW 69.50.101 *et seq*.

[7] *Qualified Patients Ass'n v. City of Anaheim*, 187 Cal. App. 4th 734, 115 Cal. Rptr. 3d 89 (2010).

YES on I-502
A NEW APPROACH TO MARIJUANA

I-502 does not require anyone to do anything that violates federal law.

- I-502 removes state-law prohibitions against producing, processing, and selling marijuana, subject to licensing and regulation by the Liquor Control Board.[8] It also decriminalizes, under state law, possession of limited amounts of marijuana by persons aged twenty-one and over.[9] It does not attempt to change federal penalties that apply to marijuana.
- A state may adopt regulations relating to marijuana that define the parameters of conduct that is permissible under its own laws, and also create licensing systems that allow it to distinguish between people engaged in permissible conduct and those who are breaking the law.[10]
- I-502 does not **require** anyone to produce, process, sell, or possess marijuana – or engage in any other activity that is illegal under federal law. It simply removes **state** criminal and civil penalties for marijuana-related activities that are conducted in compliance with **state** law, should a person **choose** to engage in those activities.

"Dual sovereignty" is a legal principle that allows both the states and the federal government to adopt laws relating to marijuana. Each sovereign is free to enforce its own marijuana laws within the individual states – and also to exercise discretion as to how and whether to enforce those laws.

- Both Congress and Washington State have adopted laws regarding marijuana. Those laws are inconsistent in a number of areas, like sentencing and the medical use of marijuana. Someone who grows marijuana in Washington is breaking both state and federal law, but the response by law enforcement, and potential sentence one could face, are very different under the two sets of laws.
- The federal marijuana laws do not recognize medical use as a defense. However, in 1998, Washington voters passed a medical marijuana law with 59% of the vote. In 2009, the U.S. Department of Justice issued a memorandum to all U.S. Attorneys serving in medical marijuana states that said that, as a policy matter, federal resources should not be expended on the investigation and prosecution of individuals in "clear and unambiguous compliance" with state medical marijuana laws.
- Marijuana produced, sold, and taxed under a robust regulatory system would protect public health and safety much better than Washington's current unregulated medical marijuana market and the black market supplying recreational users. Washington voters' decision to move in this direction should receive the same deference as the medical marijuana laws already adopted by sixteen states and Washington, D.C.

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[8] Initiative Measure No. 502 Ballot Measure Summary; I-502, Sec. 19.

[9] I-502 Ballot Measure Summary; I-502, Sec. 20.

[10] *Qualified Patients Ass'n, supra,* n.5; *County of San Diego, et al., v. San Diego NORML, et al.*, 165 Cal. App. 4th 798, 81 Cal. Rptr. 3d 461, *review denied* (2008), *and cert. denied*, 556 U.S. ___, 129 S. Ct. 2380, 173 L. Ed. 2d 1293 (2009).