

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CITY OF OAKLAND,

Appellant,

vs.

ERIC HOLDER, Attorney General of the United States; MELINDA HAAG, U.S. Attorney for the Northern District of California,

Appellees.

Case No. 13-15391

**CITY OF OAKLAND'S RESPONSE  
TO APPELLEES' MOTION TO EXPEDITE APPEAL**

Appellant City of Oakland ("Oakland") hereby responds to the Motion to Expedite Appeal submitted by Appellees Eric Holder and Melinda Haag ("DOJ"). To put the DOJ's request in context, Oakland will provide information about the case, recent developments, and the issues on appeal. While Oakland takes no position on the motion and instead defers to the Court, it is apparent from the procedural posture of the case and recent developments that there is no real urgency demanding that the Court disregard its normal procedures and kick this matter to the front of the queue. Moreover, Oakland's appeal raises complex issues of first impression that merit the Court's unrushed consideration.

**I. Oakland Filed Suit Against the DOJ to Prevent It from Shutting Down Oakland's Permitted Medical Cannabis Dispensary**

In October 2012, Oakland brought suit under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (“APA”), to prevent the DOJ from shutting down Harborside Health Center (“Harborside”), a state-of-the-art regulated medical cannabis dispensary operating under a permit granted by Oakland in 2006 in accordance with California law and Oakland’s municipal code. *See* ER 1048 (Dkt. 21-6). The DOJ sought to shut down Harborside six years after Harborside commenced operations by pursuing a forfeiture action against the property on which Harborside conducts business, styled *United States v. Real Property and Improvements Located at 1840 Embarcadero, Oakland, California*, Northern District of California Case No. C 12-3567 MEJ.

The DOJ pursued the forfeiture action in July 2012 notwithstanding repeated avowals by President Obama and the DOJ, including in testimony before Congress by Attorney General Eric Holder in June 2012, that the federal government would not prosecute persons acting in compliance with state and local law concerning cannabis unless they implicate one of the enforcement priorities articulated by the DOJ. *See* Appellant’s Opening Brief at 14-17 (Dkt. 21-1).

Only two weeks ago, on August 29, 2013, in a memorandum from Deputy Attorney General James M. Cole (“Cole Memo”), the DOJ reiterated its position that federal resources will not be spent prosecuting persons acting in compliance

with state and local law concerning cannabis unless necessary to achieve one or more of the following goals:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

Declaration of Cedric C. Chao (“Chao Decl.”), Ex. 2. On September 10, 2013, the DOJ explained this position in testimony before the Senate Judiciary Committee in a hearing addressing the many and growing conflicts between state and federal law concerning cannabis. Chao Decl., Ex. 3. At that hearing, Senator Whitehouse of Rhode Island inquired:

As long as they are not the proper subjects of federal prosecution under the eight 2013 memo federal interests, a dispensary can do business as long as it is in clear and unambiguous compliance with state law, correct?

To which Deputy Attorney General Cole responded:

I think the proper way to phrase it, Senator Whitehouse, is as long as they are not violating any of the eight federal priorities in the course of what they're doing, that the federal government is not going to prosecute them and the state law is up to state law and up to state enforcement.

Chao Decl., Ex. 3, p. 16.

The DOJ has made no allegation that Harborside's permitted business operations implicate any of the DOJ's enforcement priorities under the Controlled Substances Act identified in the Cole Memo. Chao Decl., ¶ 3. Oakland's robust regulatory oversight ensures Harborside's compliance with state and local law, and yet the DOJ is actively trying to shut it down. The DOJ's action undermines Oakland's regulatory scheme and impedes Oakland's ability to protect the public health, safety and welfare of its citizens, and to obtain substantial tax revenues from regulated sales of medicinal cannabis to persons with a prescription. *See* Appellant's Opening Brief at 17-21 (Dkt. 21-1).

## **II. The District Court Granted the DOJ's Motion to Dismiss for Lack of Subject Matter Jurisdiction under the APA**

The DOJ challenged Oakland's right to have its grievances addressed under the APA by bringing a motion to dismiss under Rules 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a claim. The District Court granted the DOJ's motion to dismiss under Rule 12(b)(1), finding the APA did not provide subject matter jurisdiction for Oakland's suit because Oakland did not seek review of a "final agency action for which there is no other adequate remedy in a court."

5 U.S.C. § 704. *See* ER 4-10 (Dkt. 21-1). The District Court's Order is the subject of Oakland's pending appeal.

### **III. The District Court Granted Oakland's Motion to Stay Forfeiture Proceedings Pending Appeal**

Promptly after filing its notice of appeal, Oakland moved to stay the Harborside forfeiture action pending the outcome of the appeal. ER 1086, 1066 (Dkt. 21-6). Without a stay, Oakland's appeal would become moot and Oakland would have no opportunity to protect its and its 400,000 citizens' considerable public health and safety interests. As the District Court recognized, "at the heart of Oakland's appeal is its right to access the federal court to assert its claims – a right of paramount importance" (ER 1072), and "the question regarding Oakland's standing to assert claims on behalf of its citizens in federal court is a matter of significant public interest" (ER 1076).

Oakland also argued that the DOJ would suffer no hardship from a stay because Harborside operated openly and transparently in the public domain for six years before the DOJ initiated the forfeiture action. The DOJ opposed the motion. A hearing took place on June 20, 2013, and on July 3, 2013, the Court entered an order staying the Harborside forfeiture action until this appeal is resolved. ER 1066-78 (Dkt. 21-6).

In granting the stay, the District Court stated that it "does not see any appreciable harm to the Government if the forfeiture proceeding is stayed during

Oakland's appeal. There is no risk the defendant property will be lost or damaged or that evidence relevant to the forfeiture proceeding will become stale during a temporary stay of the action." ER 1074-75 (Dkt. 21-6). The same reasoning applies to the DOJ's request to expedite the appeal.

On March 19, 2013, Oakland inquired whether the DOJ would join in seeking expedited review of the appeal. Chao Decl., Ex. 4. The DOJ declined to do so. Chao Decl., ¶ 5. When the District Court granted the stay, Oakland's need for expedited consideration of the appeal disappeared.

#### **IV. The DOJ Notified Oakland of Its Intent to Expedite the Appeal but Provided No Explanation of Its Position, Which Contradicts the DOJ's Policy Set Forth in the Recent Cole Memo**

Nearly six months after declining Oakland's request to expedite the appeal, DOJ attorney Adam Jed emailed Oakland's attorney Cedric Chao in the evening on Saturday, September 7, 2013, informing him of the DOJ's intent to move for expedited consideration of the appeal and inquiring whether Oakland will join or consent in the motion. Chao Decl., Ex. 1. Mr. Jed identified no urgency in his email. On Tuesday evening, September 10, 2013, Mr. Jed inquired by email again. *Id.* Mr. Chao responded on Wednesday afternoon, September 11, requesting clarification of several items, including an explanation of the DOJ's change in position regarding expediting the appeal. Chao Decl., ¶ 2, Ex. 1. The DOJ filed its

motion the same afternoon and has not responded to Mr. Chao's questions. Chao Decl., ¶ 2.

In its motion, the DOJ offers no justification for expediting consideration of the appeal. It provides no support from any of the claimants in the forfeiture action. In fact, Harborside and the owner and landlord of the 1840 Embarcadero property that is the subject of the forfeiture action both joined Oakland's motion to stay. ER 1068-77 (Dkt. 21-6). The DOJ's request is particularly confounding in light of DOJ policy reaffirmed and refined in the recent Cole Memo and in Deputy Attorney General Cole's testimony before the Senate Judiciary Committee this week. The Cole Memo directly contradicts the DOJ's purported urgency in having the appeal considered on an expedited basis. The DOJ's motion highlights the perplexing and glaring inconsistencies between the Cole Memo and the DOJ's testimony before the U.S. Senate Judiciary Committee, on the one hand, and the DOJ's actions in the field, on the other.

While Oakland takes no position as to whether the Court should expedite resolution of its appeal but instead defers to the Court's judgment, it does question the DOJ's newfound urgency and questions whether it merits impinging on the Court of Appeals' workload. As the District Court recognized, the property that is the subject of the forfeiture action is not going anywhere, and as Harborside has made clear, it intends to continue its medical cannabis dispensary business. ER

1066-78 (Dkt. 21-6). Accordingly, the DOJ has not demonstrated any prejudice if the Court of Appeals considers Oakland's appeal in its normal time frame.

Dated: September 12, 2013

Respectfully submitted,

DLA PIPER LLP (US)

By: s/ Cedric C. Chao  
Cedric C. Chao

Attorneys for Appellant City of Oakland



**CERTIFICATE OF SERVICE**

**Case No. 13-15391**

I hereby certify that on September 12, 2013, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*s/ Cedric C. Chao*

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Cedric C. Chao

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**DECLARATION OF CEDRIC C. CHAO IN SUPPORT OF  
CITY OF OAKLAND'S RESPONSE  
TO APPELLEES' MOTION TO EXPEDITE APPEAL**

I, Cedric C. Chao, declare as follows:

1. I am a partner at the law firm of DLA Piper LLP (US), counsel of record for plaintiff City of Oakland ("Oakland") in this action. I am duly licensed to practice law before the courts in the State of California and before this Court. I make this declaration in support of Oakland's Response to Appellees' Motion to Expedite Appeal. Unless otherwise stated, I have personal knowledge of the facts set forth herein, and if called upon to do so, could and would competently testify thereto.

2. On Saturday evening, September 7, 2013, I received an email from U.S. Department of Justice (“DOJ”) attorney Adam Jed, informing me of the DOJ’s intent to move for expedited consideration of the appeal and inquiring whether Oakland will join or consent in the motion. On Tuesday evening, September 10, 2013, Mr. Jed inquired by email again. I responded on Wednesday afternoon, September 11, 2013, requesting clarification of several items. The DOJ filed its motion the same afternoon and has not responded to my questions. A true and correct copy of Mr. Jed’s emails to me and my response thereto is attached hereto as **Exhibit 1**.

3. On August 29, 2013, the U.S. Department of Justice issued a memorandum from Deputy Attorney General James M. Cole (“Cole Memo”), in which the DOJ reiterated its position that federal resources will not be spent prosecuting persons acting in compliance with state and local law concerning cannabis unless necessary to achieve one or more of the goals set forth in the Cole Memo. The DOJ has made no allegation that Harborside’s permitted business operations implicate any of the DOJ’s enforcement priorities under the Controlled Substances Act identified in the Cole Memo. A true and correct copy of the Cole Memo is attached hereto as **Exhibit 2**.

4. On September 10, 2013, the Senate Judiciary Committee held a hearing that addressed the conflicts between state and federal law concerning

cannabis and the DOJ's policy as set forth in the Cole Memo. Deputy Attorney General Cole and others testified at that hearing. A true and correct copy of the transcript of the hearing is attached hereto as **Exhibit 3**.

5. On March 19, 2013, I wrote to DOJ attorney Kathryn Wyer inquiring whether the DOJ would join Oakland in seeking expedited review of Oakland's appeal. The DOJ declined to do so. A true and correct copy of my letter to Ms. Wyer is attached hereto as **Exhibit 4**.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 12, 2013, in Coral Gables, Florida.

*s/ Cedric C. Chao*

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Cedric C. Chao

**CERTIFICATE OF SERVICE**

**Case No. 13-15391**

I hereby certify that on September 12, 2013, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*s/ Cedric C. Chao*

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Cedric C. Chao

# **EXHIBIT 1**

**From:** Chao, Cedric  
**Sent:** Wednesday, September 11, 2013 2:20 PM  
**To:** 'Jed, Adam C. (CIV)'  
**Cc:** Chao, Cedric  
**Subject:** Oakland v. Holder, No. 13-15391 (9th Cir.)

Dear Adam –

I have been traveling and apologize for not responding earlier.

In order to respond intelligently, it would be helpful if you would clarify several items.

1. We are perplexed by your assertion of urgency. You previously did not perceive any reason to accelerate the processing of the City of Oakland's appeal. And equally important, the Department of Justice (DOJ) did not enforce the CSA or forfeiture laws as to Harborside Wellness Center for nearly six years, or as to other Oakland dispensaries that complied with Oakland's detailed regulatory scheme and with California law governing medical cannabis. What is the basis of the DOJ's sudden sense of urgency?

2. The DOJ last week issued the Cole Memorandum, and Deputy Attorney General Cole testified before the Senate Judiciary Committee yesterday. The gist of the Cole Memorandum was that the DOJ would not use its resources to pursue entities such as Oakland's licensed dispensaries which are in compliance with state and local law and which do not run afoul of the priorities set out in the Cole Memorandum. The DOJ's continued pursuit of Harborside, and the DOJ's actions that cast a chill upon and call into question the continuation of Oakland's regulatory scheme is inconsistent with the DOJ's own recent guidance and with Deputy Attorney General Cole's testimony of yesterday.

3. Although we must perform due diligence, it has been reported to us that the DOJ has caused Harborside's armored car service to cease transporting cash to and from Harborside. This is an invitation to robbery and personal injury, and endangerment of patients, service providers, Harborside employees, Oakland's citizenry, and the public at large. This in our view is a violation of the District Court's order staying the forfeiture proceedings pending appeal. I understand that this very issue was raised by the Senate Judiciary Committee yesterday (in general terms and not as to Harborside specifically), and that Deputy Attorney General Cole acknowledged concern regarding the public safety issues if armored car service is discontinued. Again, I have not had an opportunity to study the transcript. Is the DOJ really going to cut off armored car services, after forcing the dispensaries to operate on an all cash basis? Will the DOJ agree to observe the District Court's stay order voluntarily?

If you can provide clarification of the above, then I will confer with my client and revert to you with Oakland's position on the DOJ's motion to expedite the appeal.

Best regards,

**Cedric Chao**

Partner

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**From:** Jed, Adam C. (CIV) [<mailto:Adam.C.Jed@usdoj.gov>]  
**Sent:** Tuesday, September 10, 2013 6:18 PM  
**To:** Chao, Cedric  
**Subject:** RE: Oakland v. Holder, No. 13-15391 (9th Cir.)

Hi Cedric,

I'm just following up. I'm heading off on vacation and need to file the motion to expedite by mid-day tomorrow (Wednesday).

Thanks,  
Adam

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**From:** Jed, Adam C. (CIV)  
**Sent:** Saturday, September 07, 2013 6:58 PM  
**To:** 'cedric.chao@dlapiper.com'  
**Subject:** Oakland v. Holder, No. 13-15391 (9th Cir.)

Hi Cedric,

I hope that your move to the new firm is going well. I'm writing about our pending appeal, *Oakland v. Holder*, No. 13-15391 (9th Cir.).

Because the district court's stay orders / injunction halts two pending cases and leaves a number of parties uncertain about how things will progress, we are going to file a motion to expedite consideration of the appeal. Will you join and/or consent?

Thanks,  
Adam

Adam Jed  
U.S. Department of Justice  
Appellate Staff, Civil Division  
950 Pennsylvania Ave., NW, Rm. 7240  
Washington, DC 20530  
Ph: 202-514-8280



# **EXHIBIT 2**




## Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 29, 2013

## MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole   
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

Memorandum for All United States Attorneys  
Subject: Guidance Regarding Marijuana Enforcement

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- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. Thus, this memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.<sup>1</sup>

Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. 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. Jurisdictions that have implemented systems that provide for regulation of marijuana activity

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<sup>1</sup> These enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA. By way of example only, the Department's interest in preventing the distribution of marijuana to minors would call for enforcement not just when an individual or entity sells or transfers marijuana to a minor, but also when marijuana trafficking takes place near an area associated with minors; when marijuana or marijuana-infused products are marketed in a manner to appeal to minors; or when marijuana is being diverted, directly or indirectly, and purposefully or otherwise, to minors.

Memorandum for All United States Attorneys  
Subject: Guidance Regarding Marijuana Enforcement

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must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those 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 regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

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. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.

Memorandum for All United States Attorneys  
Subject: Guidance Regarding Marijuana Enforcement

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As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

cc: Mythili Raman  
Acting Assistant Attorney General, Criminal Division

Loretta E. Lynch  
United States Attorney  
Eastern District of New York  
Chair, Attorney General's Advisory Committee

Michele M. Leonhart  
Administrator  
Drug Enforcement Administration

H. Marshall Jarrett  
Director  
Executive Office for United States Attorneys

Ronald T. Hosko  
Assistant Director  
Criminal Investigative Division  
Federal Bureau of Investigation

# **EXHIBIT 3**

.CQ CONGRESSIONAL TRANSCRIPTS

Congressional Hearings

Sept. 10, 2013 - Final

Senate Judiciary Committee Holds Hearing on State and Federal Marijuana Laws

LIST OF PANEL MEMBERS AND WITNESSES

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LEAHY:

(inaudible) the witnesses by the delay because (inaudible) Senator Grassley, who's going to be joining us shortly. He's in a very important meeting with the president on the situation in Syria. It's one that the -- the president's met with Senate Democrats, earlier met with the Senate -- right now meeting with Senate Republicans. It's a gravely serious matter, as I'm sure all of you know. And I mentioned this to Deputy Attorney General Cole also earlier.

Today's hearing also deals with a serious issue. And I trust that members of the public here will act accordingly. I want to note at the outset that the rules of the Senate prohibit outbursts, clapping or demonstrations of any kind either for or against any position I might take or anybody else might take. That includes blocking the view of people around you.

I'm glad to have this hearing room where we can accommodate as many as we possibly can. We have overflow rooms with a television. But please be mindful of the rules we conduct -- these hearings. And, of course, the Capitol police will be authorized to remove anyone who does not follow it.

Now, last November, the people of Colorado and Washington voted to legalize the possession use (ph) of small amounts of marijuana and to regulate how marijuana is produced and distributed in their states.

And these new laws are just the latest examples of the growing tension between federal and state marijuana laws. And they underscore the persistent uncertainty about how such conflicts are gonna be resolved.

Should the federal government arrest and prosecute marijuana users in states where they might be in full compliance with state law. Or should the federal government take a completely hands-off approach and let drug laws and policy develop on a state by state basis? Or is there some middle ground approach that considers both the national interests and the fundamental principles of federalism, including the rights of voters, to decide what's best for it their own individual states?

So the committee's gonna hold the first congressional hearings on the issues since the new laws passed in Colorado and Washington. It presents an important opportunity here for some of the people directly involved in grappling with these complex questions. (inaudible) the focus of

today's hearing's is gonna be on what's happening in Colorado and Washington. But the questions and answers we have today are gonna have implication for the rest of the country.

Marijuana use in this country is nothing new, but the way in which individual states deal with marijuana usage continues to evolve. Some states, like my own state of Vermont, have decided to allow the use of marijuana by patients with debilitating medical conditions.

As a result, for mortors (ph) who suffer from diseases like multiple sclerosis, cancer and AIDS, are now able to use medical marijuana to at least treat the symptoms of their conditions. In addition, some states, including Vermont, have simply decriminalized marijuana, imposing civil fines on marijuana users, rather than criminal penalties.

Today -- show -- we have a map, I believe. This map. Thank you. As shown on this map, we have a total of 21 states that have legalized marijuana for medical purposes. Sixteen of the states have decriminalized the possession of small amounts of marijuana.

But every one of these changes in state marijuana laws have taken place against the same background. Possession of any amount of marijuana is still a criminal penalty under federal law.

LEAHY:

Now, the question I have is, what role should the federal government play in those states where marijuana use is legal? I think it's important first to identify the areas in which there's broad agreement and common ground.

For example, the federal government in those states that have legalized marijuana in some way all agree on the necessity of preventing the distribution of marijuana to minors.

Likewise, there's agreement about the need to prevent criminal enterprises from profiting for marijuana sales, and the goal of reducing violent crime, the dangers associated with drugged driving.

These are important safety concerns, and I appreciate everybody is acting to address those from the federal to the state and to the local law enforcement.

Now, I hope, though, there we might be agreement on the fact we can't be satisfied with the status quo. We know the black market for illegal marijuana in this country endangers public safety. The black market continues to contribute to violence along the southwest border. It continues to thrive despite the billions of dollars that have already been spent on enforcement efforts at the federal, state, local levels.

It's also clear that the absolute criminalization of personal marijuana use has contributed to our nation's soaring prison population. It's disproportionately affected people of color.

And, in this context, there's no surprise that states are considering new, calibrated solutions that reach beyond the traditional laws.



And I -- anybody who -- two who right here have been prosecutors, know that you can't begin to prosecute all the laws that are on the books. You don't have the resources. The question is what resources should we use and where.

I asked the administration last December for its responses to the measures, especially Colorado and Washington. It took some time, but I'm encouraged by the policy guides the deputy attorney general recently provided to federal prosecutors.

Federal agents and prosecutors have scarce investigative resources. I really don't think they should be devoting them to pursuing low-level users of marijuana who are complying with the laws of their states. As the president said last year, there are bigger fish to fry.

I'm glad the Justice Department plans to commit its limited resources to addressing more significant threats. And I appreciate that Deputy Attorney General Cole, who's no stranger to this committee, is here to answer questions.

But I also look forward to hearing from the witnesses from Colorado and Washington. They see it not in the abstract, but day by day in their state. I want them to explain the decision in their states and the implementation of those decision.

So I hope today's hearing will also shine light on how a series of federal laws posed significant obstacles to effective state implementation and regulation of marijuana, including the existing federal laws and regulations in areas such as banking and taxation.

We have to have a smarter approach to marijuana policy. And that can only be achieved through close cooperation and mutual respect between the federal government and the states.

Senator Whitehouse, did you wish to,,,

WHITEHOUSE:

Let me thank the chairman for holding this important hearing.

We have states that the chairman's map of the country's quilt of different approaches demonstrated have taken very different ways of dealing with marijuana use, particularly for minor, very small amount individual users and for those for whom it's adjudged to be medically necessary.

Rhode Island permits medical marijuana and recently decriminalized the possession of small amounts of marijuana. Our governor, Governor Chaffee, has asked the Drug Enforcement Administration to declassify marijuana as a Schedule 2 substance, which would allow it to be prescribed.

It strikes me that the areas in which the states are loosening up restrictions on the use of marijuana are virtually entirely also areas in which the need for federal prosecution and the rationale for the use of scares law enforcement and prosecutive resources is extremely low.

So there does not seem to be an underlying need for conflict between federal prosecution policies and state marijuana policies. And yet, I believe that in the past, largely due to uncertain and often inconsistent policies from the Department of Justice, there has been created an artificial conflict.

And I think the new memo helps clarify that, and I look forward to this hearing help to clarify it further.

And I thank the deputy attorney general, who I respect very much, for coming here to discuss this issue with us.

And I think the chairman for holding this important hearing.

LEAHY:  
Senator Grassley?

GRASSLEY:  
Mr. Chairman, I'd like to give my opening statement.

LEAHY:  
Certainly. Go ahead.

GRASSLEY:  
Thank you.

Of course, I thank you very much for holding today's hearing about the conflict between federal and state laws. Since Congress passed the Controlled Substance Act, the cultivation, trafficking, sale and use of marijuana have been illegal under federal law.

Marijuana's continued presence on this statute's list of illegal substances isn't based on whim. It's based on what science tells us about this dangerous and addictive drug.

There's a process that exists to move drugs on and off the list. But the scientific standard to do that hasn't yet been met for marijuana.

Marijuana isn't only illegal under laws passed by Congress. It's illegal under international law as well. The United States and 180 nations have signed the Single Convention on Narcotics (sic) Drugs. This treaty requires the United States to limit the distribution and use of certain drugs including marijuana for exclusively scientific and medical use.

It's something this country gave its word to do, and it's a commitment that our country and many others have benefited from through improved public health.

Yet in 2012, Colorado and Washington decided to be the first jurisdiction in the world to legalize the cultivation, trafficking, sale, and recreational use of marijuana.

These laws flatly contradict our federal law. Moreover these laws have nothing to do with the controversy about whether marijuana has an appropriate medical use.

Some experts fear they will create a big marijuana industry, including a "Starbucks of marijuana" that will damage public health.

And it seems unlikely that we'll be able to confine that industry's affect to adults and those within the states of Colorado and Washington.

And the response of the Department of Justice isn't to sue to strike down the laws or to prosecute illegal drug traffickers, but just to let these states do it.

These policies do not seem to be compatible with the responsibility of (sic) our Justice Department has to faithfully discharge their duties. And they may be a violation of our treaty obligations.

Prosecutorial discretion is one thing, but giving the green light to an entire industry predicated on breaking federal law is quite another.

These policies are another example of this administration ignoring laws that it views as inconvenient or that it doesn't like. Whether it's immigration laws or Obama deadlines, the list is long and it hardly needs repeating.

But what's really striking in this case is that the Department of Justice is so quick to challenge state laws when it doesn't like or want to enforce them. States that change their voting laws to require an ID, well, we'll see you in court. States that try to secure their borders when the federal government won't, expect a lawsuit.

But if some folks want to start an industry dedicating to breaking federal law, well, then the department's position is to wait and see how it works out.

But we already have a pretty good idea how it works out. And the answer is badly.

Take Colorado, example, since it's legalized and attempted to regulate medical marijuana, what have we seen? From 2006 to '07, to -- from 2006 to 2011, 114 percent increase in driving fatalities involving drivers testing positive for marijuana.

GRASSLEY:

Comparing 2007 through 2009 with 2010 through 2012, a 37 percent increase in drug-related suspensions and expulsions from Colorado schools, a sharp increase in marijuana exposure to young children, many resulting in trips to poison control centers or hospitals. And in the words of Colorado's attorney general, the state is becoming, quote, "a significant exporter of marijuana to the rest of the country."

The statistics on this point are shocking, but not surprising, given the simple economics. From 2005 to 2012, there was a 407 percent in Colorado marijuana interdiction seizures that were

destined for other states. In 2012 alone, there were interdictions in Colorado bound for 37 different states. One of those states was my home state of Iowa. In 2010, Colorado was the source state for 10 percent of all marijuana interdictions in Iowa. That number grew to 25 percent in 2011 and to 36 percent in 2012.

Now, this was all before full legalization in Colorado. What do you think this number will be next year? Is the federal government prepared to pay for law enforcement costs it is imposing on states like Iowa because it refuses to enforce federal law? In 2012, the proportion of Iowa juveniles entering substance treatment primarily due to marijuana reached its highest point in 20 years. How many more of Iowa's daughters and sons will go into treatment next year because the department won't enforce federal law? There's no amount of money that can make Iowa whole for that.

I have a letter from the director of the Iowa Office of Drug Control Policy to the attorney general that lays out some of these statistics. The director requested that the department consider (ph) this decision, and I ask that that be included in the record.

LEAHY:  
Without objection.

GRASSLEY:  
Of course, the department would have known many of these things had it consulted with the folks on the ground before making those decisions. These are people who see the effects of marijuana addiction and abuse every year -- every day. I also have here a letter to the attorney general from many of the major state and local law enforcement organizations in the United States, and likewise ask to put that in the record.

LEAHY:  
Without objection.

GRASSLEY:  
I understand representatives of many of these organizations had asked to be consulted in advance of the department's decision, but they were told -- and they were told that they would be. However, they wrote, quote, "it is unacceptable that the Department of Justice did not consult our organizations, whose members will be directly impacted, for meaningful input ahead of this decision -- important decision. Our organizations were given notice just 30 minutes before the official announcement was made public, and were not given the adequate forum ahead of time to express our concerns with the department's conclusion on this matter.

Simply checking the box by alerting law enforcement officials right before a decision is announced is not enough and certainly does not show an understanding of the value of -- of the federal, state and local tribal law enforcement partnerships bring to the Department of Justice and to public safety," end of quote. And I'll put the rest of my statement in the record.

LEAHY:  
Thank you very much.

And our first witness is James Cole, as I said, the deputy attorney general of the Department of Justice. In that capacity, he helped the department (inaudible) marijuana enforcement policies on the recent state level, a development we discussed earlier. He first joined the Department of Justice in 1979 and served for 13 years in the Criminal Division. He later became the deputy chief of the division's Public Integrity Section before entering private practice.

Mr. Cole, it's always good to have you here. Please go ahead, sir.

COLE:

Thank you, Chairman Leahy, Ranking Member Grassley, Senator Whitehouse. I'm pleased to speak with you about the guidance that the department recently issued to all United States attorneys regarding marijuana enforcement efforts.

That guidance instructs our prosecutors to continue to enforce federal priorities such as preventing sales of marijuana by criminal enterprises; preventing violence and the use of firearms in the cultivation and distribution of marijuana; preventing distribution to minors; and preventing the cultivation of marijuana on public lands -- priorities that we historically have focused on for many years.

And it also notes that we will continue to rely on state and local authorities to effectively enforce their own drug laws as we work together to protect our communities.

As you know, the relevant federal statute, the Controlled Substances Act of 1970, among other prohibitions, makes it a federal crime to possess, grow, or distribute marijuana and to open, rent or maintain a place of business for any of these purposes. For many years, all 50 states have enacted uniform drug control laws or similar provisions that mirrored the CSA with respect to their treatment of marijuana and made the possession, cultivation and distribution of marijuana a state criminal offense.

With such overlapping statutory authorities, the federal government and the states traditionally worked as partners in the field of drug enforcement. Federal law enforcement historically has targeted sophisticated drug traffickers and organizations, while state and local authorities generally have focused their enforcement efforts under their state laws on more localized and lower-level drug activity.

Starting with California in 1996, several states authorized the cultivation, distribution, possession and use of marijuana for medical purposes under state law. Today, 21 states and the District of Columbia legalize marijuana for medical purposes under state law, including six states that enacted medical marijuana legislation this year. Throughout this time period, the Department of Justice has continued to work with its state and local partners, but focused its own efforts and resources on priorities that are particularly important to the federal government.

The priorities that have guided our efforts are as follows: preventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels; preventing the diversion of marijuana from states where it is legal under state

law in some form to other states; preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; preventing violence and the use of firearms in the cultivation and distribution of marijuana; preventing drug-to-driving and the exacerbation of other public health consequences associated with marijuana use; preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and preventing marijuana possession or use on federal property.

Examples of our efforts have included cases against individuals and organizations who were using the state laws as a pretext to engage in large-scale trafficking of marijuana to other states; enforcement against those who were operating marijuana businesses near schools, parks and playgrounds; and enforcement against those who were wreaking environmental damage by growing marijuana on our public lands.

On the other hand, the department has not historically devoted our finite resources to prosecuting individuals whose conduct is limited to the possession of marijuana for personal use on private property. In November of 2012, voters in Colorado and Washington state passed ballot initiatives that legalized under state law the possession of small amounts of marijuana and made Colorado and Washington the first states to provide for the regulation of marijuana production, processing and sale for recreational purposes.

The Department of Justice has reviewed these ballot initiatives in the context of our enforcement priorities. On August 19th, 2013, the department notified the governors of Colorado and Washington that we were not at this time seeking to preempt their state ballot initiatives. We advised the governors that we expected their states to implement strong and effective regulatory and enforcement systems, to fully protect against the public health and safety harms that are the focus of our marijuana enforcement priorities, and that the department would continue to investigate and prosecute cases in Washington and in Colorado in which the underlying conduct implicated our federal interests.

The department reserved its right to challenge the state laws at a later time. And in the event of any of the stated harms materializing either in spite of strict regulatory scheme or because of the lack of one, we reserved that right to preempt.

COLE:

That same day, the department issued a guidance memorandum to all United States attorneys directing our prosecutors to continue to fully investigate and prosecute marijuana cases that implicated any one of our eight federal enforcement priorities. This memorandum applies to all of our prosecutors in all 50 states and guides the exercise of prosecutorial discretion against individuals and organizations who violate any of our stated federal interests no matter where they live or what the laws in their states may permit.

Outside of these enforcement priorities, however, the department will continue to rely on state and local authorities to address marijuana activity through the enforcement of their own drug laws. This updated guidance is consistent with our efforts to maximize our investigative and prosecutorial resources in this time of budget challenges and with the more general message the

attorney general delivered last month to all federal prosecutors emphasizing the importance of quality priorities for all cases we bring, with an eye toward promoting public safety, deterrence (ph), and fairness.

Our updated guidance also makes one overarching point clear: The Department of Justice expects that state and local governments that have enacted laws authorizing marijuana-related conduct will implement effective regulatory and enforcement systems to protect federal priorities and the health and safety of every citizen. As the guidance explains, a jurisdictions regulatory scheme must be tough in practice, not just on paper.

LEAHY:

Thank you.

You know, what I -- what I worry about, to the extent that we have some who do not take the position -- or are unwilling to (inaudible) may create further problems. For example, the banking industry is not willing to provide services to state-authorized marijuana dispensaries. They fear they may be violating federal money laundering laws. So then they said operate as a cash-only business, no access to bank accounts or credit card transactions. That's a -- a prescription for problems -- tax evasion and so on.

And we're hearing that the DEA agents, in what seems to me like a significant step away from reality, are instructing armored car companies to cease providing services to marijuana dispensaries almost as if they are saying, 'Get out there so we can have robberies.'

Now, I'm sure it's not stated that way. And maybe sometimes, whether it's DEA or (inaudible) bureaucracy trumps reality, as it has in this case. But it creates a problem.

So what's the department gonna do to address these concerns? What sort of guidance are you giving to states about these banking and tax issues?

COLE:

Chairman Leahy, as -- as far as the banking issue is concerned, we agree it is an issue that we need to deal with. When the attorney general talked to the governors of Washington and Colorado they raised the same issue and others have raised the same issue.

Obviously, there is a public safety concern when businesses have a lot of cash sitting around. There is a tendency that there's guns associated with that, so it's important to deal with that kind of issue.

And we're, at the present time talking with FinCEN, and they're talking with and bringing in bank regulators to discuss ways that this could be dealt with in accordance with the laws that we have on the books today.

LEAHY:

May want -- you may want to talk with DEA, too.

COLE:

Well, as far as DEA is concerned, Mr. Chairman, I certainly have heard about that. From what I understand, DEA was merely asking questions of the armored car companies at the time as to what their practices are. I think those questions occurred before the guidance memo was put out. And, certainly, at the present time I don't believe there's any effort to instruct the armored car companies not to do anything at this time (ph).

LEAHY:

Well, the implication is out there. And I would hope that it'd get cleared up. Because I don't want to see a shoot-out somewhere and have innocent people or law enforcement endangered by that. So I think it should be specific guidance to the financial service industry or the Treasury Department.

Now, you've noted the department generally does not prosecute individuals who are using small amounts of marijuana on private property, which I think is sort of the general attitude of most state prosecutors. They've usually got real problems to deal with and not that. (inaudible) the department (inaudible) sophisticated and large scale drug traffickers; they (ph) rely upon state and local law enforcement to go after lower level drug activity, although they're usually overwhelmed with things that really affect people.

In the wake of the recent guidance, we've heard some concerns that the federal government is abdicating our responsibility for enforcing drug laws in Colorado or Washington state, and that the department's decision will lead to free-for-all drug activity in those states.

I assume you do not agree with that characterization, the Justice Department is abdicating its responsibility for enforcing federal drug laws in those states?

COLE:

I don't agree with it at all, Mr. Chairman. I think it's quite the contrary. What I think is very clear in our memo is that we are going to aggressively enforce the Controlled Substance Act when it implicates any of the eight priorities that are listed there. And I think those -- that's a pretty fulsome list of priorities and important public safety issues that are present and associated with marijuana.

We expect to continue to enforce in every state whenever that is implicated, whether the state has a state law legalizing it or not. We are not giving immunity. We are not giving a free pass. We are not abdicating our responsibilities. We are dedicating ourselves to enforcing the Controlled Substance Act in regard to marijuana when it implicates those federal priorities.

LEAHY:

Are you going to monitor the implementation of the regulatory system in these states?

COLE:

We will certainly be looking at how they go about implementing it and we hope that they will be doing it in a full and robust way. But largely how we operate is on a case-by-case basis. And when we see somebody who is marketing marijuana in a way that's going to be attractive to



minors, we're gonna go after them. If we see somebody who's growing and cultivating marijuana so they can import it or export it out of state, we're gonna go after them. If they're involved in drug cartels and illegal enterprises we're gonna go after them.

LEAHY:

Now, you said in your testimony the department reserves this right to file a lawsuit challenging the state laws of Colorado and Washington at a later time. The law is clear, of course, that the federal government can't force a state to criminalize a particular type of conduct or activity. So such a lawsuit would have to challenge the state laws focusing on the regulatory framework set by them but not on the question of telling them what they have to criminalize or not criminalize. Is that correct?

COLE:

That's correct, Chairman Leahy. This -- this was a difficult issue that we had to contend with in deciding whether or not to seek any pre-emption action here. Because it would be a very challenging lawsuit to bring to -- pre-empt the state's decriminalization law. We might have an easier time with the regulatory scheme in pre-emption, but then what you'd have is legalized marijuana and no enforcement mechanism within the state to try and regulate it. And that's probably not a good situation to have.

LEAHY:

Kind of an incentive for a black market, isn't it?

COLE:

Very much so, sir. And money going into organized criminal enterprises instead of going into state tax coffers and having the state regulate from a seed to sale basis what happens to it.

LEAHY:

They basically -- everything the state voted for you'd be trying to overturn.

COLE:

We would be trying to overturn that and yet there would still have decriminalization of marijuana, so it would still exist in the state.

LEAHY:

Thank you.

Senator Grassley?

GRASSLEY:

Mr. Cole, I have three questions. But before I do that I want to take 30 seconds out of my time to bring an issue up that I think you can help us with. The DEA is refusing to comply with its legal obligations to provide GAO access to DEA records. Senator Whitehouse and I have a GAO request for a report on drug shortages that is being delayed because DEA's refusal.

I tried to help resolve the issue but the Justice Department told DEA not to even meet with me and GAO to discuss it. So I think that's unacceptable.

I understand that you admitted to the controller general that DEA has a legal obligation to comply. However, the Justice Department and DEA are still withholding records from the GAO. There's no point in wasting time and (ph) the taxpayers on litigation with GAO, but that is where this is headed if DEA does not comply.

So as deputy attorney general, I hope you can help us to -- to work with us in Congress to solve this dispute. DEA needs to provide GAO the information and needs to do its work. I don't expect you to respond to that now, but I want you to know how I feel about it, doing my job of oversight. And there's a distinguished member of the majority that's interested in it as much as I am.

COLE:

Thank you -- thank you, Senator.

I -- I've actually been in contact with the deputy administrator of GAO to discuss this once already. We're planning on having another conversation in the next week, I hope. And I am on top of this, Senator.

GRASSLEY:

God bless you.

The Cole memorial suggests the Department won't seek to enforce the Controlled Substances Act except in four federal priorities so long as the states that legalize Marijuana have effective regulatory schemes. Those priorities include the diversion of Marijuana from Colorado to other states, increased use among minors, and increased fatalities for drugged driving. Yet Colorado has seen a sharp up tick in each of these three priorities over the last few years.

Moreover, a recent audit concluded, Colorado Department of Public Health, quote, "Does not sufficiently oversee physicians who make medical Marijuana recommendations," end of quote.

Another recent audit found that the city of Denver did, quote, "Not have a basic control framework in place," end of quote, to regulate its medical Marijuana program. Denver did not even know how many Marijuana businesses were operating in the borders.

So question, why has the Department decided to trust Colorado to effectively regulate recreational Marijuana when it's struggling to regulate medical Marijuana, and federal priorities are already being negatively impacted?

Before you answer, would the Department establish metrics concerning these priorities that will trigger when it will take action to either challenge these laws or more vigorously enforce federal law?

I want to give you an example: 2005 to 2012 there was a 407 percent increase in Colorado Marijuana interdiction seizures that were destined for other states.

How high would that number have to go to trigger a change in policy?

I hope this is something that you've thought about.

COLE:

Senator Grassley, we've thought a great deal about these issues. I'm certainly aware of the audit that was done in Colorado about the enforcement of their regulatory scheme under medical Marijuana, and it was disappointing.

I think along the lines of what I have talked to Chairman Leahy about, there are no perfect solutions here, and what we're faced with was a situation we couldn't, we thought, be very successful in trying to preempt the decriminalization. So if we just went after their regulatory scheme, instead of having a bad one, they would have no regulatory scheme.

Our hope with this memo and engagement with the state telling them they are, as we say, trust but verify, that they will have an incentive to actually put in a robust scheme that will, in fact, address a lot of these issues that you've raised, that everyone else raised and that are valid issues in this area. And we're hoping that kind of effort by the state in enforcing its own state laws will have a better effect than having no effort whatsoever.

So I understand the skepticism that you come to it with. We're looking at in terms of a trust but verify method. We will be following what's going on. We have reserved, quite explicitly, the right to go in and preempt at a later date if we feel that, that's at public interest. And I think we're at the point we're trying to find the best of the imperfect solutions before us.

GRASSLEY:

Question number two, you heard in my opening statements how the Department did not consult with major state and local law enforcement groups or with former DEA administrators when reaching policy decisions.

Did the Department consult with anybody at DEA, HHS, or State Department about these policies? And if not, why not? And if so, what were their views?

COLE:

Well, we did consult with HHS, we consulted with DEA, ONDCP. We even heard from many of those groups who wrote that letter. I -- the attorney general and I this morning met with those groups in the attorney general's conference room for about an hour and a half. We had received a lot of input from them concerning this matter prior to the decision that we made.

We stated to them quite clearly we should have reached out to them one more time before we made the decision. And we apologized to them for not making that extra effort. We believe that we understood their position. But, we had been such good partners with them we owed them one more conversation and one more opportunity for them to weigh in. And we ask their forgiveness

and going forward assured them going forward we would be giving them that kind of opportunity.

We did seek out other views in coming to this. We tried to be careful. We tried to be responsible and we tried to look at other avenues of it. And in fact, much of the input we got from them and much of what you've been talking about as the concerns that are -- around this helped us to be able to crystallize and articulate in our eight different areas what it is uniformly around the country that trigger law enforcement problems in the area. So we thank them for that.

GRASSLEY:  
My last question.

In 2010 Colorado was the source of state for 10 percent of all Marijuana interdiction in Iowa. That number grew 25 percent, 2011, 36 percent, 2012. This is all before legalization of recreational use in Colorado was passed.

In the words of Colorado attorney general, the state is becoming, quote, "A significant exporter of marijuana to the rest of the country." The Department's decision not to enforce federal law is obviously imposing costs on states outside of Colorado and Washington. These include public health cost, law enforcement cost.

I would normally ask this question. I'm going to make a statement if I'm wrong. I doubt if the federal government has plans to reimburse the states for these cost. If I'm wrong, tell me.

My question, what do you plan to do to protect states like Iowa from Marijuana diverted from states like Colorado?

COLE:  
I think there's two ways we're hoping to approach this. One is that if the states really do put in the kind of robust system that we're asking them to, where there's control from seed to sale, that it will help really tamp down that kind of export out of Colorado into other states. And secondly, and at least as importantly, one of the main priorities we have is the export of Marijuana from states that make it legal to any other state. And that will be a federal enforcement priority. If it's being exported from Colorado to Iowa and we find out about it, we will prosecute.

GRASSLEY:  
Mr. Chairman, just a short follow-up, you -- in the previous question -- second question I had, you said you consulted with state HHS and DEA, did they agree with the new policy that you announced?

COLE:  
You know, Senator, we had a thorough discussion with them. I don't think it's always appropriate to go into what the internal deliberations are that take place. But, we got everybody's views and had a thorough discussion and aired it out. This was a well thought through process.

WHITEHOUSE:

Thank you, Chairman.

Mr. Cole let me recap what brought us to this point, because I don't think we were in a very good place to begin with.

I begin with the Ogden memorandum in 2009 which indicated it would not be a federal enforcement priority to prosecute, and I quote, "Individuals whose actions are in clear and unambiguous compliance with existing state laws."

And then, it gave us an example of individuals with cancer or other serious illnesses. As another example, "Or those caregivers in clear and unambiguous compliance with existing state law." It then distinguished commercial enterprises that unlawfully market and sell Marijuana for profit. And a close reading of the paragraph indicates that the term, "unlawfully" refers to state law, because the following sentence says -- talks , "Bout operations inconsistent with the terms, conditions or purposes of those laws," meaning state laws.

So we come out of the Ogden memorandum with protection for federal prosecution for patients, caregivers and lawful commercial enterprises that are, quote, "In clear and unambiguous compliance with state laws."

Among other things I would presumably include dispensaries. So, the next thing that comes out is the U.S. attorney general's letter, which I assume is a Department of Justice product, because all of the U.S. attorney letters that came out were identically phrased. So I don't think this was a unique one to Rhode Island.

Now, those protected from federal prosecution are limited to seriously ill individuals who use Marijuana as part of the medically recommended treatment regimen in compliance with state law. There is no longer any mention of caregivers. And further in the paragraph it says that, "The Department of Justice maintains authority to enforce CSA vigorously against individuals and organizations that participate in unlawful manufacturing and distribution activity," only for purposes of this paragraph, the term "unlawful" has been reversed to now mean federal law and eliminate any shelter of state law.

WHITEHOUSE:

So there was a dramatic difference, I believe, between the Ogden memo and the U.S. attorney's letter, and it created immense confusion, which you then sought to clarify somewhat in your June 29, 2011, memo, which said that we'll protect individuals with cancer, other serious illness, and now caregivers are back. They were out in the U.S. attorney's letter; they came back in your letter. Caregivers are back in. And then you said but it wouldn't apply to commercial operations, cultivating, selling, or distributing marijuana. You just dropped out the word "unlawful," rather than have to deal with whether that word applied to federal law or state law. And then you added that those who engage in transactions involving the proceeds of such activity might be prosecuted, so somebody that was paid with money that was earned by one of these folks.

The U.S. attorney's letter had also singled out landlords and property owners and financiers for prosecution. So as you can imagine, this was a mess. So I appreciate very much that the August

29th letter straightens out that mess considerably. I don't dispute the sense of the eight different federal priorities, but I just want to -- actually, there's considerable, but imperfect overlap between your eight priorities and the priorities from the original Ogden memo, lo those many years and memos ago.

But let me just be clear. As long as they are not the proper subjects of federal prosecution under the eight 2013 memo federal interests, a dispensary can do business as long as it is in clear and unambiguous compliance with state law, correct?

COLE:

I think the proper way to phrase it, Senator Whitehouse, is as long as they are not violating any of the eight federal priorities in the course of what they're doing, that the federal government is not going to prosecute them and the state law is up to state law and up to state enforcement.

WHITEHOUSE:

Understood.

COLE:

But there also is -- just in all fairness, there is a catchall at the end, and it's not meant to swallow the entire memo, but you can't anticipate everything that's going to come into the future. So there is an ability, if it's an important enough matter that we hadn't anticipated, to prosecute another kind of case, even if it doesn't fall within the eight priorities.

WHITEHOUSE:

Understood. And those who received proceeds from a lawful and proper state law enterprise will also not be prosecuted unless they violate one of the eight federal interests?

COLE:

This is something that we're trying to work through with the banking regulators, because the memo really talks about the Controlled Substances Act. Now, the prosecution otherwise on the banking end would be the money-laundering statutes, and those, I think, are a separate matter, but one, as I've said -- in answer to Chairman Leahy's questions -- ones that we need to deal with. There's a lot of public safety and -- and public interest aspects of that that I think we need to deal with as we go down this road. And we're working on that.

WHITEHOUSE:

But you're not intending to put people who are simply getting their bills paid by a proper, lawful, state law enterprise from being the -- it's not your intention that they be the subject of prosecution, in the same way that if you knew it was a criminal cartel and you -- no matter what your business is, the proceeds of that cartel carries some taint with them and you can go after individuals just because they receive money, you can, if nothing else, reclaim the funds as the proceeds of criminal activity. You're not intending to use that, unless those eight federal interests are implicated.

COLE:

I think that's part of what we're trying to work through right now in trying to deal with the -- the money-laundering aspect of it. But certainly this memo is meant to guide our enforcement efforts concerning marijuana in regard to the Controlled Substances Act, and it will probably spill over in other ways as we're trying to work through them.

WHITEHOUSE:

And similarly, property owners, landlords, and financiers should not fear federal prosecution if -- unless they implicate those eight federal interests.

COLE:

Certainly, a lot of that is covered by the Controlled Substances Act, so that will be directly within the ambit of the memo. That's correct.

WHITEHOUSE:

OK. Well, I think that helps clarify things.

Senator Grassley raised a number of concerns related -- and I thought from hearing them that all of them fell into the category of either involving children or involving effects in other states or involving a relationship with trafficking organizations.

And just to be clear, it's my understanding that in all three of those situations, those are federal interests that would be implicated, and the federal government would be willing and able to prosecute in those areas.

COLE:

That's correct.

WHITEHOUSE:

Thank you. My time is expired.

LEAHY:

Senator Blumenthal?

BLUMENTHAL:

Thank you, Mr. Chairman. Thank you for having this hearing on a subject vitally important to my home state of Connecticut.

As you know, our law -- a new law currently allows the production and sale and use of marijuana for medicinal purposes in a regulatory regimen that I think is fairly straightforward and complete and certainly indicates the will of our legislature and our state that Connecticut wants to move in the direction of providing legal access to this kind of substance.

Essentially, it decriminalizes statutes so that anyone found in possession with less than half an ounce of marijuana will be subject to a citation, rather than criminal action. And it, I think, mirrors other state laws that contain similar kinds of provisions.

I don't want to speak for the Department of Justice, but my guess is there are very few cases authorized by the Department of Justice that involve simple possession of small amounts of marijuana currently. That has been the ongoing practice for some time, has it not?

COLE:

I think that's correct. And from what we heard from the state and local law enforcement organizations this morning, they say there's very few of those under state law, as well.

BLUMENTHAL:

Right. So that current practice will not be altered by anything in the memorandum, as I -- as I read it?

COLE:

That's correct.

BLUMENTHAL:

And in terms of some of the other priorities, my assumption is that the enforcement efforts there on individual prosecution cases would depend to some extent on the amounts of marijuana involved, would they not?

COLE:

That's certainly a factor that's taken into account. It's not the sole factor.

BLUMENTHAL:

Would the resulting -- and I apologize if this question's been asked -- action by the Department of Justice, if there were not enforcement in some of these areas, involve a challenge to the statutory scheme? And how would that be brought? Or would it involve individual prosecution cases? And how would you make those decisions?

COLE:

Well, we -- we did briefly talk before about -- in response to Chairman Leahy's question what the legal mechanisms would be to challenge the state laws. And first of all, you start off with the Controlled Substance Act has in its body itself a disclaimer of preempting state laws in the area, so that's explicit in it, so you would only have it if there's a conflict that is unreconcilable.

When have you a law that decriminalizes marijuana, it's a very big challenge to challenge that law on a preemption ground, because it can co-exist with a federal law that criminalizes it. We can go ahead and enforce our federal law regardless of what the state law says.

We might be in a position and have a better case to try and challenge the regulatory scheme, but that puts you in a difficult position. There's no perfect solutions here of having the legalization or decriminalization of marijuana and not even a legal structure for the state to try and regulate it. And that's not a very good solution, either. None of them are very good in this field, frankly, but that seems to be one that takes you in the wrong direction.

BLUMENTHAL:



So the Department of Justice, as I understand your answer, would be very cautious and deliberate about any challenge to a regulatory scheme, because the results might do more harm than good?

COLE:

We're going to have to look at all the facts and circumstances that come up. We've certainly put the governors of Colorado and Washington state on notice that we expect them to have robust systems. We hope that all the other states that have medical marijuana or any other sort of legalized system will view this memo as it should be taken, as telling them they ought to have a robust system to regulate the marijuana usage under their own state laws so that they deal with these eight priorities, which we think are important.

And then we'll make our decisions as we see what kind of public interest issues are raised in the course of this and what the need is for us to take action.

BLUMENTHAL:

I understand that the memo deals only with the Controlled Substances Act, but there -- there are also provisions in the tax code that forbid deduction of expenses by some of these enterprises, noncriminal enterprises -- dispensaries and others engaged in medicinal marijuana business.

BLUMENTHAL:

Has the Department of Justice taken a position on changing the tax code to make those legitimate businesses eligible to deduct common business expenses?

COLE:

We have not taken a position on a change of legislation. We think that's something the United States Congress should probably in its wisdom take up and debate and determine what the appropriate course of action should be.

BLUMENTHAL:

But it would probably be consistent with your memorandum to have those expenses deducted, as long as none of the other priorities are -- are infringed on.

COLE:

Well, our memorandum is really focused on what the federal enforcement will be of the Controlled Substances Act. There are, obviously, other issues that spin-off of that, that do need to be dealt with.

And I -- I think those are the kinds of things that the Senate and House can debate and determine if there's an appropriate policy change to be made.

BLUMENTHAL:

And, finally, let me ask you about Connecticut. Have there been consultations with Connecticut officials about the implementation of that law?

COLE:

Not that I'm aware of right now, but the U.S. attorney there I'm sure has been in touch with them. But I'm not positive.

BLUMENTHAL:

Thank you. Thank you, Mr. Chairman.

LEAHY:

Thank you very much.

WHITEHOUSE:

Mr. Chairman?

LEAHY:

Mr. Cole.

Yes?

WHITEHOUSE:

Can I make one point before the deputy attorney general is excused?

LEAHY:

Of course.

WHITEHOUSE:

You have three prosecutors, former prosecutors, here, and so we clearly appreciate the flexibility that it's important for prosecutors to have. And we clearly appreciate the discretion that prosecutors enjoy and that should be protected by the department.

But at the same time I think the department would be well advised to listen to Senator Grassley's advice about trying to establish as clear metrics as you comfortably can, because there can be a lot of unintended consequences from the broad zone of uncertainty that you can create, and that can frankly be quite harmful in and of itself.

So I think in this area and particularly with respect to the regulatory regimes and what you would expect to approve and disapprove, the more you move towards the kind of metrics that Senator Grassley recommended, I think the better off you'd be.

I speak only for myself in that. But I think that's -- well, that's my advice anyway.

BLUMENTHAL:

If I may add, Mr. Chairman, I would -- I would second what Senator -- Senator Whitehouse has just said, particularly as Senator Grassley has pointed out some of the banking implications.

In Connecticut my understanding is that some bankers are reluctant currently to be involved with marijuana businesses because they are fearful about violating federal law.

And the clearer and more definitive you can make your expressions of prosecutorial policy, I think the more helpful it will be to them insofar as they're aiding legitimate businesses, not criminal enterprises, not businesses selling to minors and others who may violate your priorities.

So I would just -- I would second what Senator Whitehouse has just said.

Thank you.

LEAHY:

Thank you very much.

And, Mr. Cole, thank you very much.

COLE:

Thank you, Mr. Chairman.

LEAHY:

And we'll call Sheriff Urquhart, who is the King County sheriff, Jack Finlaw, who's the chief legal counsel of the office of Governor Hickenlooper, and Kevin Sabet, who is the co-founder and director of Project SAM.

Sheriff Urquhart is the elected sheriff of King County in Washington state. He's the sheriff of the state's largest metropolitan county.

I think he's particularly qualified to help us here. Sheriff Urquhart has been in law enforcement for more than 35 years. He's been a patrol officer, field training officer, master police officer, street level vice (inaudible) detective, public information officer, administrative aide to several sheriffs.

And, Sheriff, would you go ahead and give your statement?

Incidentally, all statements -- I've been advised that we have another Syria meeting -- but all statements will be placed in the record in full. You also will be able to -- when you see the record if you want to add to the things you said, you'll have a chance to do that.

So I'd ask you to summarize within the five minutes your statement.

I hate to say this, Sheriff, because I know you and others have traveled some distance to get here. And I appreciate you being here.

Sheriff, go ahead.

URQUHART:

Thank you, Mr. Chairman.

And at the risk of stating the obvious, I am a police officer. Thank you for having me here today. My name is John Urquhart. I'm the sheriff of King County, Washington.

Seattle is located in King County. And with almost 2 million residents, we're the 14th largest county by population in the United States.

I have over -- I have over 1,000 employees in the sheriff's office and a budget exceeding \$160 million.

As sheriff I am therefore the top law enforcement official in the largest jurisdiction in the country that has legalized marijuana.

I've been a police officer for 37 years. And I was elected as King County sheriff last year. During my career I've investigated everything from shop lifts to homicides, but I've also spent almost 12 years as a narcotics detective.

My experience shows me that the war on drugs has been a failure. We have not significantly reduced demand over time, but we have incarcerated generations of individuals, the highest incarceration rate in the world.

So the citizens of the state of Washington decided it was time to try something new. And in November of 2012 they passed Initiative 502 which legalized recreational amounts of marijuana and at the same time created very strict rules and laws.

I was a strong supporter of Initiative 502 last year, and I remain a strong supporter today. There's several reasons for that support. Most of all I support 502 because that's what the people want. They voted for legalized marijuana. We, the government, have failed the people, and now they want to try something else.

Too often the attitude of the police is we're the cops and you're not, don't tell us how to do our job. That's the wrong attitude, and I refuse to fall into that trap.

While the title of this hearing is the conflict between state and federal marijuana laws, I don't see a huge conflict. The reality is we do have complementary goals and values.

We all agree we don't want our children using marijuana. We all agree we don't want impaired drivers. We all agree we don't want to continue enriching criminals.

Washington's law honors those values by separating consumers from gangs and diverting the proceeds from the sale of marijuana toward furthering the goals of public safety.

And legalizing and regulating the possession and the sale of marijuana, is it a better alternative?

You know, I think it is, but I'm willing to be proven wrong. The only way we will know, however, is if we are allowed to try.

DOJ's recent decision provides clarity on how we in Washington can continue to collaborate with the federal government to enforce our drug laws while at the same time respecting the will of the voters.

It's a great step, but more needs to be done. And I hate to beat a dead horse here, but, for example, we are still limited by not knowing the role of banking institutions as we go forward.

Under federal law, it is illegal for banks to open checking, savings or credit card accounts for marijuana businesses. The result is that the marijuana stores will be operating -- operated as cash only, creating two big problems for me as a police officer.

Cash only businesses are prime targets for armed robberies and cash only businesses are very difficult to audit, leading to possible tax evasion, wage theft and diversion of the resources we need to protect public safety.

I am simply asking the federal government to allow banks to work with legitimate marijuana businesses who are licensed under this new state law.

In closing, let me make one thing abundantly clear: What we have in Washington state is not the wild, wild west. And as sheriff, I am committed to continued collaboration to DEA, FBI, and DOJ for robust enforcement of our respective drug laws.

For example, I have detectives right now that are assigned to federal task forces including a DEA HIDTA task force. It's been a great partnership for many years, and that partnership will continue.

Furthermore, the message to my deputies has been very clear: You will enforce our new marijuana laws. You will write somebody a ticket for smoking in public. You will enforce age limits. You will put unlicensed stores out of business.

URQUHART:

In other words, the King County Sheriff's Office will abide by the standards and laws voted on and adopted by the citizens of the state of Washington and the guidance provided by the Department of Justice on August 29th.

Mr. Chairman, I say to you and the members of this committee, I do appreciate the deference the federal government has shown to my constituents and I look forward to continuing that cooperation.

Thank you.

LEAHY:

(inaudible) and we'll come -- I'm going to have each of the witnesses testify and then we'll go to questions. But certainly, testimony based on 35 years experience in law enforcement is extremely helpful.

Mr. Finlaw is the chief legal counsel for the governor of Colorado, John Hickenlooper. He served as co-chair to the task force that recommended legislation and rules to implement Colorado's new constitutional provisions legalizing the possession, use and sale of marijuana in the state. He thus has a unique perspective on the challenges facing states. They deal with the conflict between state and federal marijuana laws.

And I believe prior to your current position, you were chief of staff to the mayor of Denver. Is that correct?

FINLAW:  
That's correct.

LEAHY:  
Thank you. Please go ahead, sir.

FINLAW:  
Thank you, Chairman Leahy, Ranking Member Grassley, members of the committee. I have been working for the past 10 months with a really large collection of Coloradans -- stakeholders, government officials, members of the marijuana industry -- to put together what we will affirm to you is a robust and strong enforcement regime.

You know, the voters of Colorado approved what we call amendment 64 in 2012 by about 55 percent of the vote, even though the governor, the attorney general, state leaders opposed the ballot initiative. But we determined that with that sort of clear statement from the people of Colorado, we needed to effectively and efficiently implement the law. We began through a stakeholder process, through a task force, followed by very detailed enabling legislation by the Colorado General Assembly. And now, just yesterday, the Colorado Department of Revenue issued 141 pages of regulations to regulate the industry.

You know, within days of passage of amendment 64, the governor, our attorney general, got on the phone with General Holder and began this conversation about this conflict between federal and state law. And although we just recently, as we've talked about today, received official guidance, we do want to recognize that General Holder, the Justice Department, our U.S. attorney, was very forthcoming about expressing federal law enforcement's concerns about this new legalization effort. And it really allowed us to focus our efforts to develop a robust regulatory and enforcement regime for marijuana in Colorado.

The -- one of the things we did besides passing bills to regulate the industry, we enhanced tools for law enforcement by passing a new law that gives law enforcement the ability to better address the issues of impaired driving. We now have a law that provides that if a driver's blood contains 5 nanograms or more of THC, there's a permissible inference that the driver was driving under the influence.

You know, we really -- we really appreciate the collaboration we've had with federal officials. We know we have more to do, as has been discussed today. We have audits critical of some of the things we've done in the past to address. I will say that the main reason we've had failures of

regulation of our medical marijuana industry is because we've lacked the resources to hire staff and partner with law enforcement. But we are sending to the voters this fall a marijuana tax measure that will provide the kind of revenue we need to hire staff, to also work on public health issues related to marijuana, and education and prevention efforts that we are determined to focus on.

The bottom line is, we commend the Department of Justice for this guidance that they issued in the new Cole memo. We think it was, for us, timely clarification because we were in the final weeks of doing our rules. And so we got it in time to make sure that our rules complied with the enforcement priorities outlined in the Cole memo. We actually affirm and embrace those eight priorities. And we look forward to working with the federal government, our Department of Public Safety, our local law enforcement. We'll work with federal law enforcement. We have a great working relationship with our U.S. attorney.

And I think that you'll discover that not only will Colorado's regulators and law enforcement want to partner with federal law enforcement, but the industry will as well.

One of the things I've discovered in working on marijuana issues over the last 10 months is how entrepreneurial, how -- how much integrity the folks in our state that have developed these new businesses have. I mean, I would compare them to folks that you've all met as you've toured wineries in Napa or gone to distilleries in your state, Mr. Chairman. I know they make some great rye whiskey in Vermont.

These are the same types of folks who have established medical marijuana dispensaries, grow operations in Colorado. And they will be partners with us in making sure that minors don't have access to marijuana; that the marijuana doesn't flow to Iowa or other states. I think that we look forward to a very successful regulatory regime. And I will echo the sheriff's comments and other comments we've heard today about the banking issue. It's both a law enforcement issue and a regulatory issue, and also a tax issue.

So, we look forward to working with our members of Congress to address those issues.

LEAHY:

Thank you, Mr. Finlaw.

And without objection, I'll also put in the written testimony of Washington Governor Jay Inslee and Washington Attorney General Bob Ferguson in the record. Their views are also important and relevant.

Our next witness is Kevin Sabet, who is the cofounder -- did I pronounce that correctly?

SABET:

Yes, perfect.

LEAHY:

... cofounder and director of Project SAM, Smart Approaches to Marijuana; and the director of the Drug Policy Institute at the University of Florida. He previously served in the Office of National Drug Control Policy in various capacities; written extensively about this topic.

Please go ahead.

SABET:

Thank you, Chairman Leahy, Ranking Member Grassley and distinguished members of the committee, for providing me with the opportunity to appear before you today to discuss marijuana policy.

As mentioned, I've studied, researched and written about drug policy for almost 18 years, and currently am the director and cofounder with former Congressman Patrick Kennedy of Project SAM, Smart Approaches to Marijuana.

Because we share the Obama administration's drug control goals of reducing drug abuse and its consequences, I and dozens of prevention, treatment, medical and scientific groups around the country found the recent guidance by the Department of Justice disturbing on both legal and policy grounds. The guidance, which expressly defers the department's right to challenge and preempt laws legalizing marijuana, contradicts the Controlled Substances Act both on the policy and legal level, especially policy principles designed to protect public health and safety.

Colorado and Washington have now become, and have now been given the green light, to become the first jurisdictions in the world to allow for the creation of large, for-profit marijuana entities, far surpassing any reforms in Europe. Now, I think I should mention that the Controlled Substances Act is an important tool for public health. In fact, by keeping marijuana illegal, it's use is a sixth and a third lower than alcohol and tobacco, respectively, in the United States.

I applaud the way the Controlled Substances Act has been used so far by the federal government, not to go after low-level users with an addiction problem, but instead to target drug traffickers and producers. This is not about putting marijuana smokers in jail. In fact, analyses has long debunked the myths that our prison cells are full of people whose only crime was smoking marijuana.

Indeed, as a side note, if we were today to let out every single person in the United States for any drug offense, our incarceration rate in the U.S. would be four times its historical high, not five times. Still, a massive incarceration problem regardless of drug offenses.

Now, we do not have to wait for legalization to happen. For several years, many states like Colorado have been operating with a de facto legalization policy under the guise of medicine. In fact, we can get, and anybody who's been to Colorado since 2009 can get a sense of full legalization -- mass advertising and promotion, using items that are attractive to kids, whether they are medical marijuana lollipops, ring pots, pot-tarts to mimic pop-tarts, are all characteristics of current policies.



The result, as mentioned, has been an increase in drug-related referrals for high school students; more intentional marijuana poisoning, now reaching children as young as five; and the fact that three-quarters of kids in treatment in Colorado today report that their marijuana came from a medical marijuana dispensary.

SABET:

Now, this is all consistent with a recent National Bureau of Economic Research paper conducted by RAND researchers that found that two distinct features in marijuana policy increases use. Those two features are home cultivation and legal dispensaries. Now, these are found, obviously, in states that have legalized -- some states that have legalized this under medicine.

Now, this should matter because despite popular myth, scientists from the American Medical Association, the American Academy of Pediatrics, the American Psychological Association, the American Society of Addiction Medicine -- and we could go on and on -- are universal in stating that marijuana is harmful for young people. Marijuana use, especially among young people, is significantly associated with a reduction in IQ, mental illness, poor learning outcomes, lung damage and addiction.

According to NIH, one out of every six kids who tries marijuana will become addicted. And last year, 400,000 emergency rooms admissions were -- were applicable for marijuana.

Now, in Colorado, though traffic fatalities have fallen over the last six years, marijuana-related fatalities on the roads have increased.

Now, we already have evidence showing that, in some cases, quote/unquote, "medical marijuana" is going to criminal enterprises and foreign drug trafficking groups. We know, as Senator Grassley mentioned, about the diversion to other state (ph) and interdictions. And we also know, as mentioned, that two very damning state audits released in the last month shows that there has been no, quote/unquote, "seed to sale" vertical integration of marijuana policy in states that have allowed this for medical purposes.

How on Earth can we think that a task so much more infinitely difficult of full legalization is gonna be handled any better?

Now, right now we are at a precipice. By threatening legal action the administration can prevent the large-scale commercialization of marijuana. In fact, you all know, after spending decades of fighting big tobacco, we are now on the brink of creating big marijuana.

An executive from Microsoft is teaming up with a former president of Mexico in their assertion that they will mint more millionaires than Microsoft in their creation of the Starbucks of marijuana. This is what people in public health care about. The issue of a small amount used by an adult in the privacy of their own home is not what the initiatives in Colorado and Washington are about.

So I would just conclude by saying, when we can prevent the negative consequences of commercial sale and production of marijuana now, why would we open the floodgates, hope for the best and try with our limited resources later to patch everything up when things go wrong?

Thank you.

LEAHY:

Back to Sheriff Urquhart, because you've heard what Dr. Sabet has (ph) said, and others. And I'm interested in your insight, 35 years in law enforcement, significant part of that as a narcotic detective. You, obviously, have -- your sheriff's department is larger than all our law enforcement in Vermont put together.

So those who criticize your state's initiative (inaudible) whether legalizing small amounts of marijuana (inaudible) to increase drugged driving or illegal use by minors, cross-border trafficking. You've heard all those concerns.

How do you -- how do you address that from a public safety point of view?

URQUHART:

Well, I think what we need to do is continue doing what we've been doing all along, which is really robust enforcement. This is not gonna change a whole lot. The rules that are in place are about to be in place in the state of Washington. Put a limit on the amount of marijuana that can be produced, and -- with the idea that they're only gonna match demand. They're not gonna produce enough so it can be exported to other states.

Now, that's not to say illegal marijuana grows (ph), like I'm sure is going on in Colorado, are not going to be exported. But we can go after those. And we will go over -- go after those. We don't expect what's grown legally under the new system to be exported.

As far as driving, under this new law we now have a way to go after people that are driving under the influence of marijuana. In the past, it was very, very difficult -- very difficult to get a conviction. Now we have a per se standard of 0.5...

(UNKNOWN)

Nanograms.

URQUHART:

... nanograms -- thank you -- nanograms per milliliter of blood. Now we have a standard that we can use, just like we use 0.08 for driving under the influence of alcohol.

We never had that before. So one of the things that I'm doing is retraining many of my deputies so they can be drug recognition experts. So when they go to the scene of a suspected drunk driver who's under the influence of narcotics, whether it's any narcotic or marijuana, they can test that driver to see if they need to arrest that person and take them in for a blood test.

LEAHY:

So let me ask...

URQUHART:  
(inaudible) something brand new.

LEAHY:  
I'm not even sure we have that standard in my state of Vermont. I recall the frustration as a prosecutor when I was there because we did not have a standard we could use. Alcohol was easy. We had a very strict standard.

So your -- your commitment is to enforce the law as it is in your state. Are there areas where the federal government can help you?

URQUHART:  
Absolutely. And I think the -- the clarifying letter that came out on October -- on August 29th helped immensely. It -- it removed the uncertainty that we had. It knows that they're gonna allow the citizens of the state of Washington what they say want; and what they want is legalized marijuana. And that's a very big deal, I think.

It's gonna -- it's gonna take the criminal element, as best we can, out of the sale of marijuana. And that really was -- was brought home to me just two nights ago when I was here in Washington, D.C. My chief of staff here in the front row, Chris Barringer, and I went out to dinner. We went to an Old Ebbitt Grill just two or three blocks from the White House.

We're walking back to our hotel. It's about 9:00 at night, but it's dark. And we saw two gentlemen, young gentlemen, college-aged, walked up to a man standing on the corner, and said, 'Hey, can I get some weed around here?'

Now, they certainly didn't come up to us. But they did go up...

(CROSSTALK)

LEAHY:  
I take it you were not in your uniform?

URQUHART:  
I was not wearing this outfit, no.

(LAUGHTER)

But they -- they did go up to the most sketchy guy on the block, the most sketchy guy on the block to try and buy weed. That is going to go away in Washington, 'cause they can go into a store -- not a Starbucks store. They can go into -- into a freestanding store and buy their marijuana legally. So they know what they're gonna get. They know what the price is gonna be. They don't have to go to that criminal element on the street corner 9:00 at night and solicit

somebody to sell them marijuana. This -- our 502 is gonna eliminate all of that, and that's a huge step forward.

LEAHY:

My -- my time is almost up, but I want to ask Mr. Finlaw, sort of a similar type question, because I understand that Governor Hickenlooper did not support the constitutional amendment to legalize marijuana in Colorado. But it's very clear from your testimony that you intend to follow the law and make sure it works.

I understand that the lack of access to financial services, the inability to deduct business expenses, for example, from federal taxes are cited as a hurdle for a successful -- to successful regulation of the marijuana business. Am I correct in that?

FINLAW:

Yes, Chairman -- Chairman Leahy, you are correct. Thank you for raising that issue.

You can understand that these businesses that are cash-only that have dozens of employees, payroll to make. They're dealing with cash and not with credit cards. They're -- they're having to find loans from disreputable financial institutions. It's -- it's a great challenge.

It's a criminal challenge as well as a regulatory challenge. It's criminal, of course, because any business that has that much cash on hand and is having to transport it is ripe for robbery. It's also a regulatory challenge because it will be so much easier to audit the books and make sure that the taxes are being paid; make sure that the rules that we put in place are being followed if -- if the folks are doing business with -- with a bank or a credit union or other financial institution.

LEAHY:

Thank you.

My -- my time is up. (inaudible) further question I can submit for the record.

Senator Grassley?

GRASSLEY:

I have a couple questions for Mr. Finlaw and one for Mr. Sabet.

Start with you, Mr. Finlaw. There has been a sharp uptick in drug-related suspensions and expulsions in Colorado schools in recent years. And in the state's second largest city, Colorado Springs, drug-related referrals for high school students testing positive for marijuana has increased every year between 2007 and 2012.

With legalization for recreation use, the challenge is to protect youths (ph) will increase. And yet I understand that under certain circumstances the rules in Colorado will allow for marijuana advertising on television or radio. The rules will permit marijuana businesses to maintain websites that could be accessible by children, and the rules will permit marijuana-themed magazines to be sold in stores within the reach of children.

My question is, if -- if I'm right on those things I just cited, won't all of these rules all effectively allow marijuana advertising to children? And then why do you believe that Colorado can successfully protect children from marijuana?

FINLAW:

Senator Grassley, you raise some really important issues that we have been grappling with.

Even the constitutional amendment authorizing marijuana specifically says that advertising directed at children can be prohibited. We've -- the enabling legislation in the new rules also do the same.

So we've tried to develop rules that are narrowly focused on making sure that, whether it's print or television, radio, web advertising, that it will not be targeted at young people. Cartoon characters and other advertising that would be particularly appealing to young people is -- are prohibited.

The proposed -- the final rule, which was based upon testimony at our -- at our rulemaking hearings, provides that, if there is to be advertising for marijuana, the -- there has to be documentary evidence that the audience, that no -- no -- no more than 30 percent of the audience is young people, so that advertising will be restricted.

The problem we've had in one -- one of the rules that was adopted in May has already been voided under First Amendment grounds. So we have First Amendment issues to grapple with as we try to restrict advertising.

But the good news is that the voters of Colorado are going to have an opportunity to approve a new tax in November that will give us the resources to develop sort of best practices for education and prevention efforts. So what we intend to do is to counter any ads with very, very strong and effective programming that will be public service programming that will be geared towards young people to let them know that -- because we agree with you. We believe that for adolescents, marijuana is a danger, and we intend to educate them.

GRASSLEY:

OK. Also, Mr. Finlaw, you had an interview with NPR in February. Quote, "We have very strict controls over who can have access to medical marijuana," end of quote. There was an audit by your state in June, concluded by the Colorado Department of Public Health, quote, "does not" -- no, let me start over again.

But an audit by your state in June concluded that the Colorado Department of Public Health, quote, "does not sufficiently oversee physicians who make medical marijuana recommendations," end of quote. The audit noted that one physician had recommended marijuana for over 8,400 patients. Would you still stand by your statement that Colorado has strict control over what can -- who can have access to marijuana? And if so, why would you stand by it? And why, with these damaging audit findings, should the Department of Justice have confidence that Colorado can implement robust regulation of recreational marijuana?

FINLAW:

Thank you. You're right. As a matter of fact, in our conversation with General Holder just a few weeks ago, he raised the same question to us. He asked us about those audits and he told us we needed to address the issues that are raised in those audits, and we are committed to doing that.

The particular audit you talked about is -- is the regulation over -- over doctors who issue prescriptions. We -- what I meant when I was quoted in February is that we've got really good medical marijuana rules and regulations. What we haven't done a good job of is enforcing those, because we've lacked the resources.

With the -- with the new tax coming, with the advent of legalized marijuana, we'll have the resources to hire staff, to enhance our oversight of doctors, of those other businesses that are involved in the -- in the marijuana world.

GRASSLEY:

My time's up. I'll submit one question to you and one to Mr. Sabet for an answer in writing. Thank you.

WHITEHOUSE:

Sheriff Urquhart, let me ask you, are you familiar with the eight federal interest areas?

URQUHART:

Yes.

WHITEHOUSE:

In the -- are you satisfied with those?

URQUHART:

Yes.

WHITEHOUSE:

From a law enforcement perspective, you think that they're adequate and appropriate?

URQUHART:

Absolutely. And we will have no problem meeting those at all. Now, some of them don't apply necessarily straight to the sheriff's office, but many of them do. But from what I've seen, from the regulatory standpoint the state is enacting, I think it's going to work out very well. I have no problems with those whatsoever. And I thank the Justice Department for coming forward with those when they did.

WHITEHOUSE:

And, presumably, given all your years in law enforcement and your years as a narcotics investigator, you have worked with the federal government on federal investigations in the past in various capacities, correct?

URQUHART:

That's correct. And my detectives are doing that currently, yes.

WHITEHOUSE:

And are there current activities...

URQUHART:

Yes.

WHITEHOUSE:

... specifically in the same areas that these eight federal interest areas provide for? Or do you see any areas of activity that you're undertaking now that would stop?

URQUHART:

No, not at all. In fact, a week ago, we assisted with serving several federal -- federal search warrants and confiscated \$193,000, several guns, heroin, methamphetamine, marijuana, and we do that all the time. And that's not going to change. Our cooperation with the federal government is not going to change one iota because of Initiative 502.

WHITEHOUSE:

And so by limiting itself to those eight areas of federal interest, you don't see that reducing the federal law enforcement footprint in the state of Washington in any significant respect?

URQUHART:

Absolutely not.

WHITEHOUSE:

Very good. From a public health, safety point of view, Mr. Finlaw, how do you feel about the eight areas of federal interest? Are they adequate from your perspective?

FINLAW:

We also embrace those. The task force that we've put together to implement our new law developed guiding principles, and they were amazingly parallel with the Justice Department's guidance to us.

And while this was a formalization of guidance, we really appreciate the fact that, throughout this process, the Justice Department, particularly through our U.S. attorney's office, has been very forthcoming about their general concerns about this new law. And it really allowed us to focus as we developed our legislative and regulatory response.

WHITEHOUSE:

And as the governor's -- you're the governor's legal counsel. It's a great job. I used to have that job. You have the responsibility of representing the governor in the legal negotiations about the enforcement program, the regulatory program. Say a word, if you will, about the comments that Senator Blumenthal and I concluded Deputy Attorney Cole's testimony with about the

importance of the department providing metrics that are as clear as possible so that people know what their -- what the rules are that they'll be engaging in.

FINLAW:

Well, let me affirm what both you and Senator Blumenthal said. We and I believe that the industry itself in Colorado would really appreciate that sort of kind of guidance. Our Department of Public Safety, our state patrol, our Bureau of Investigation in Colorado, along with local law enforcement, all will appreciate definitive guidance. And I think it will -- when the day comes, if there is evidence of an operation that's appealing to young people or exporting marijuana growing in Colorado to other states, an enforcement action that shuts that down would be welcomed by us.

WHITEHOUSE:

My time is nearly expired, but, Dr. Sabet, I assume that your policy disagreement with the choice to decriminalize or make medical marijuana available sort of would drive your answer to all those questions. You're opposed to the metrics; you're opposed to the eight areas of interest. You think that we should just continue along the previous path?

SABET:

Well, not necessarily. I mean, I think that eight provisions are as agreeable as baseball and apple pie. I mean, I don't know anybody who would say that those provisions are not helpful. The issue is how -- and which I think you bring up which is very helpful, how are we going to be monitoring and what are the specific metrics that we're going to -- that the federal government is going to use to trigger enforcement?

WHITEHOUSE:

So from your perspective, metrics are very important?

SABET:

They're extremely important. I mean, you know, yesterday, there were 4,000 joints publicly passed out in Colorado by the campaign who used to be in favor of legalization, now is against the tax, and they just launched their campaign by handing out 4,000 joints publicly.

I mean, at a marijuana festival in Seattle a month or two ago, 50,000 people smoked marijuana publicly. I mean, so -- if we're talking about actually doing the enforcement at a local level, I just haven't seen the evidence so far that we're going to try and rein in these big industries that are going to advertise on the Internet legally. I don't know any kid who watches TV anymore. It's all on social media. Advertisements in these two states will be legal on the Internet for kids.

These are the kinds of things that worry, you know, the Academy of Pediatrics and others and myself. And so we will be monitoring this with a very watchful eye.

WHITEHOUSE:

Got it. Well, we look forward to working with you on that. And I want to extend through you my personal best wishes to Congressman Kennedy, who was a colleague in my delegation for many years and who I respect very greatly.



Senator Blumenthal?

SABET:

(OFF-MIKE) thank you.

BLUMENTHAL:

I would say the same, if you could pass along my best wishes. And as I understand your position, it is not so much against legalization, but the evils and abuses that may be the result. And I wonder if you could say -- I know you elude to it in your testimony -- whether, in fact, those evils or abuses have, in fact, occurred in Colorado and Washington. What would be your advice to Connecticut.

SABET:

Sure, well I mean I've definitely seen them already occurring in these states, and I don't -- I understand state officials are in very difficult positions here trying to implement these laws that have been passed a majority of their voters.

But, the effects of what we've seen, for example, in a state like Colorado, where less than 2 percent of people with cards that authorize them to use Marijuana medically have Cancer, HIV or any other serious chronic illness, and that we've seen them being handed out like candy, that we have seen the mass advertising already. That worries me. What we see with the public use of Marijuana on -- in places like Washington -- especially in a place like Seattle, that worries me.

So, again, I don't see if evidence of, although it's a difficult task of trying to implement something robust and trying to enforce that, especially in the face of an industry that will be pushing back against every single kind of provision like putting magazines that advertise Marijuana just behind the counter -- and I know the government tried to do that lawsuit when it was challenged. Or, you know, things like in Washington state how you -- although packaging will be sterile, you can still have, you know, gummy, candy-shaped, attractive to kids, you know, Marijuana products.

You can still have Marijuana products that are edibles that are actually sometimes a thing that is sending more people to ERs than joints in terms of an experienced Marijuana user eating a Marijuana brownie that has very concentrated forms of THC in that brownie, all at once. That can be a very traumatic experience for some people.

So I don't see any of that being regulated. And that's what I worry about.

In terms of the position that Sam and others and myself have put forward, you know, again, I think we are positing that in a country with a first amendment, in a country that has seen the alcohol and Tobacco industries relentless target kids -- and by the way, target addicts, because these industries do not make money off of casual users. OK, the marijuana industry does not make money off of the person person who decides once every 10 years to light up a joint. The industries -- alcohol and Tobacco are included -- make money off of addiction. They make money off of the small amount of users that consume the vast amount of volume.

What I worry is that, inevitably in this country, American-style legalization is commercialization, is promotion, no matter the best, you know, interest that state officials and regulators and liquor control boards and others try and implement.

So that is the worry. It's not about imprisoning people for small amounts. It's not about saddling people with criminal records who get caught with a small amount. It's about this mass commercialization.

BLUMENTHAL:

I wonder if the two other witnesses reacting to the points that have just been made about the problems that have arisen under the Colorado and Washington law would respond? .

FINLAW:

You know, I think that we do agree with the concerns that Dr. Sabet's raised with respect to the dangers of products that are designed for young people. And so we have put into place some significant restrictions on packaging and labeling -- the gummy bear story, you're right. It's a problem. And our department of public health, our regulators who are looking over the license premises will be making sure that those types of packages, that, that type of promotion for young people doesn't happen in Colorado.

It's happened, admittedly in the past, but we're going to redouble our efforts to make sure that young people don't have encouragement. And don't take the fact that it's now legal for adults a sign that it's good for kids.

URQUHART:

I think there's some urban myths floating around out there, that Seattle is going to turn into the Starbucks of Marijuana, for example. 50,000 people are all smoking it Hempfest in downtown Seattle a couple weeks ago, that there's going to be gummy bears infused with the Marijuana. That's just not going to happen in the state of Washington.

Big business is not going to take over the Marijuana business, the legal Marijuana business in the state of Washington. There's no vertical integration allowed. The processors and the growers of Marijuana cannot own retail stores. Only three retail stores can be owned by one owner, for example. no advertising, security, surveillance systems, lots and lots of protections in place to make sure Marijuana is not sold, marketed to people under the age of 21 or used by people under the 21 -- under the age of 21 in any way, shape or form.

We realize what's going on. We're going to avoid that when it comes to legalized Marijuana for recreational purposes.

BLUMENTHAL:

Thank you.

Thank you, Mr. Chairman. My time is expired.

Thank you to all of you for being here today.

WHITEHOUSE:

Well, that brings this hearing to its conclusion. Let me thank Deputy Attorney General Cole, and our three witnesses on the second panel for their contributions to our understanding and work on this issue.

For those who wish to add anything to this hearing, the record will be open for one additional week.

But, other than that, we are adjourned.

CQ Transcriptions, Sept. 10, 2013

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# **Exhibit 4**

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March 19, 2013

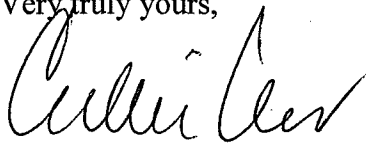
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P.O. Box 883  
Washington, DC 20044**Re: *City of Oakland v. Holder, et al.*, Dist. Ct. No. CV 12-5245 MEJ;  
Ninth Circuit Appeal No. 13-15391**

Dear Kathryn:

I am writing to ask if defendants-appellees will join plaintiff-appellant City of Oakland in a request that the Ninth Circuit Court of Appeals expedite the City of Oakland's appeal from the District Court's order dismissing the action on standing grounds. As is evident from the fact that Oakland filed its Notice of Appeal 46 days early, Oakland is doing its part to expedite the appeal.

I would appreciate it if you would let me know your position so that I may inform the District Court when we file our Reply in Support of Oakland's Motion to Stay Forfeiture Proceedings Pending Appeal. Thank you.

Very truly yours,



Cedric C. Chao