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ATTORNEY-CLIENT PRIVILEGE

Via email: senshimabukuro@capitol.hawaii.gov

The Honorable Maile S.L. Shimabukuro
Chair, Senate Committee on Hawaiian Affairs
State Senator, Senate District 22
State Capitol, Room 222
415 S. Beretania Street
Honolulu, Hawaii 96813

Via email: repnakashima@capitol.hawaii.gov

The Honorable Mark M. Nakashima
Chair, House Committee on Consumer Protection & Commerce
State Representative, House District 1
State Capitol, Room 432
415 S. Beretania Street
Honolulu, Hawaii 96813

RE: HCR 132 (2021) Medical Cannabis

Dear Senator Shimabukuro and Representative Nakashima,

This responds to your April 9, 2024 letter wherein you requested advice regarding steps the State can take to protect medical cannabis patients and dispensaries that are operating legally under state law from federal law enforcement, including taking action pursuant to House Concurrent Resolution 132, H.D. 1, S.D. 1 (2021) (HCR 132). Your letter also requested advice regarding protection for the local medical use of cannabis from a national interstate market.

Initially, we note that while cannabis is federally illegal there is no interstate cannabis market. Any interstate sales or shipping of cannabis, whether for medical use or otherwise, is illegal. However, there are currently hemp-derived cannabinoid products that are federally legal and may be shipped interstate. These products can resemble medical cannabis products and contain highly intoxicating concentrations of lesser-known cannabinoids, the health effects of which are not well studied. The local

sale of these hemp-derived cannabinoid products is currently regulated by chapter 328G, Hawaii Revised Statutes. Some forms of these products, such as hemp vapes, are prohibited altogether. See HRS § 328G-3(h). These laws should be publicized and enforced to the greatest extent possible to ensure consumers are informed and protected.

Regrading HCR 132, that resolution requested that the Department of Health (DOH) seek an exception from the federal Controlled Substances Act (CSA) for the state-authorized use of medical cannabis by applying to the Drug Enforcement Administration (DEA) for an exception under 21 CFR § 1307.03. Based upon the analysis below, we conclude that making a broad request for a statewide DEA exception concerning medical cannabis under Hawaii law has a low probability of success and could potentially lead to negative consequences to Hawaii's existing medical cannabis program.

We note that the DOH is not an entity that would request a DEA exception because the DOH is not the party in interest with respect to any exception request. An exception under 21 CFR § 1307.03 concerns the application of DEA regulations to specific regulated conduct, i.e. the manufacture, distribution, possession, or use of cannabis. No state agency, including the DOH, engages in the manufacture, distribution, possession, or use of cannabis. Instead, the DOH registers medical cannabis patients and licenses medical cannabis dispensaries, who then have a limited affirmative defense to prosecution under state cannabis laws only. The DOH does not grow, manufacture, or otherwise provide cannabis to patients or dispensaries and therefore does not engage in any activities regulated by the DEA.

Even if the DOH or another state agency could request a broad statewide exception for Hawaii's medical cannabis program, there is very little likelihood that the DEA would grant such a request. The DEA has never granted such a broad open-ended request, and it is questionable whether the DEA even has authority to do so or if this is instead the province of Congress. In practice, the DEA only grants exceptions to the CSA in very narrow and controlled circumstances. We believe that a statewide program, even if it's well-regulated, will not have the safeguards against diversion and abuse that the DEA would require before considering an exception.

If the DEA were to entertain an exception for a statewide medical cannabis program, it would likely require a much narrower program than what we currently have in Hawaii. The freedom that medical cannabis patients currently enjoy under state law would likely need to be significantly curtailed and the DEA would likely impose additional controls on the medical cannabis program. The DEA has consistently denied requests for cannabis programs that are much narrower than Hawaii's program and those denials have been upheld by federal courts. See *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, 1462 (D.C. Cir. 1989).

The DEA's recent proposal to reschedule cannabis to Schedule III would not impact this analysis. Unless the DEA completely de-schedules cannabis, it is highly unlikely that any exception to the CSA will be granted. Whether the DEA or Hawaii recognizes a medical benefit to the use of cannabis would not be enough to override the DEA requirements for substances in any schedule of the CSA. The United States Supreme Court in *Gonzales v. Raich*, 545 U.S. 1, 27-28 (2005), has opined that "the mere fact that [cannabis] – like virtually every other controlled substance regulated by the CSA – is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA."

The biggest risk of requesting a broad exception is that the DEA could make a formal determination that Hawaii's medical cannabis program directly violates federal law. Such a determination could result in heightened scrutiny from federal agencies and private entities regulated by federal laws, like banks. In our estimation, the risk of a negative impact to the program outweighs the low probability of obtaining a programmatic exception.

We acknowledge that federal law has made state regulation of cannabis difficult. It is with this in mind that our Department has provided the Legislature with draft legislation that would provide for a cannabis program that best addresses the numerous legal and law enforcement concerns associated with both medical cannabis and broader adult-use cannabis legalization. Having a well-regulated state cannabis program is the most effective way to protect state-legal medical cannabis patients and local businesses.

We hope that the foregoing is helpful. If you have any further questions, please do not hesitate to contact me at 587-3050.

Very truly yours,



Andrew Goff
Deputy Attorney General

APPROVED:

Anne E. Lopez

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