Green Business Law, LLC

Green Business Law LLC
4207 SE Woodstock Blvd, #231
Portland, OR 97206
Bradley@greenbusinesslaw.us

Bradley M. Steinman Attorney and Counselor at Law Cell: 847-917-9673

MEMORANDUM

Date: May 20, 2015

To: Joint Committee on Implementing Measure 91

From: Bradley Steinman

Re: Dash-1 Amendment to House Bill 3400

Co-Chairs Burdick and Lininger, Members of the Joint Committee on Implementing Measure 91,

My name is Bradley Steinman, and I am a cannabis law reform activist and attorney. I helped finalize the language of Measure 91 before I got admitted to practice law here in Oregon. I am proud to represent medical cannabis patients and their providers in my practice, and look forward to helping the State implement Measure 91's responsible adult use cannabis programs and representing *responsible adult use* clients in the near future.

Here are my ideas for Dash-1 to HB 3400, which has a lot of great policy ideas embedded in them to help hasten an end to the failed and costly War on Drugs.

First, please try to not see the Cole memo as your instructions for implementing Measure 91. And please stop calling anything the 'black market' because its all equally illegal under the federal CSA if it relates to cannabis, unless it happens to be an approved hemp research activity – thanks to Rep. Bluemenauer and Sen. Wyden.

In any event, the Cole memo, the federal CSA, the principle of federal supremacy and associated preemption doctrine is ***not*** a license for the federal government to compel Oregon's legislature to criminalize marijuana, or to otherwise commandeer state or local resources to achieve federal policy. Supremacy does not mean that the federal government can dictate to Oregon what laws it, as a Sovereign State, and member of the United *States* of America will enact, or what its people, the only true source of government authority, may approve or disprove at an election.

As Judge Kozinski of the Ninth Federal Circuit Court of Appeals explained in 2002 - that medical cannabis patients may be more likely to violate federal law if the additional deterrent of state liability is removed, this may worry the federal government, but, the proper response for the federal government—according to the Tenth Amendment doctrine of the Supreme Court contained in *New York* and *Printz*—is to ratchet up federal law enforcement activity by enforcing its own federal regulatory regime, i.e., to institute another federal crackdown on medical marijuana, rather than to commandeer the state." *(Conant v. Walters* (9th Cir.2002)

309 F.3d 629, 646, original italics [conc. opn.].)

The Supreme Court has already ruled that the primary purpose of the federal CSA is to combat recreational marijuana use, not to regulate a state's medical practices. And in December, for the first time ever, Congress recognized the medical use of marijuana. *See,* Sec. 538 of the CROMNIBUS Federal Appropriations Legislation.

Second, there is no reason to refer to Measure 91 as a law legalizing the 'recreational use' of marijuana.

Measure 91 legalizes under *State* law the responsible adult use of cannabis, similarly to how the Oregon Medical Marijuana Act legalized the medical use of marijuana. *See* ORS 475.302(8) and ORS 475.309(1).

Please, please, please - STOP calling it '***recreational'*** marijuana.

Do you see the word 'reccreational' anywhere in the text of M91?'

It is demeaning to use the term *marijuana* generally, in light of the term's loaded meaning and past use as a tool of discrimination against dark-skinned minorities. Use the term *cannabis*, which is the scientifically and politically correct term to refer to the dioeciouis flowering annual herb.

Do not call it RECREATIONAL marijuana, unless you want to be encouraging or inviting the federal government to preempt the State's new responsible adult use of cannabis regulation and taxation laws. The United States Supreme Court has already set forth the purposes of the federal CSA. As discussed above, the main objectives of the federal CSA are "combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances," (Gonzales v. Oregon, supra, 546 U.S. at p. 250, 126 S.Ct. 904), with a particular concern of preventing "the diversion of drugs from legitimate to illicit channels." (Gonzales v. Raich, supra, 545 U.S. at pp. 12–13, 125 S.Ct. 2195.)

Next, **Please make certain that Section 58 of Measure 91 or in the Dash -1's, section 70, is amended to be abundantly clear, even moreso than SB 844 -6 and -7. Preempt local authority to BAN! Clarify that the State has the exclusive authority to tax, make this preemptive, and provide that the State, in general, outright preempts the authority of local government to regulate cannabis at all, medical or responsible adult use, except as allowed specifically under the act.**

<u>Section 1 - changes</u>

Please Amend Sec. 5., the definitions section of M91 to add a new definition that lists activities that shall not constitute a crime or be unlawful under *state* law and the activities for which persons in compliance with M91 are immune from state civil and criminal penalty in any manner for engaging in the '***responsible adult use of cannabis'*** as defined. Just enumerate the activities legalized by M91 as OMMA does in ORS 475.302(8) for the *medical use of marijuana.* And put '*cannalysis testing'* or something along those lines in there as well.

Please Amend Sec. 5., the definitions section of M91 to add a new definition reference a new state agency whose exclusive responsibility and duty is the regulation of Oregon's legal *cannabis sativa l* programs. It can be called something along the lines of the "Oregon Cannabis Enforcement Authority". There should be corresponding technical changes elsewhere. Anywhere that commission, authority, or department appear, replace with Cannabis Enforcement Authority.

One agency makes a great deal of sense to me. The truth is that under the current system of M91, and the law as written, we are not going to be regulating marijuana 'like alcohol.' Instead cannabis is going to be regulated *by*

‘alcohol. The OLCC's primary agenda, responsibilities, expertise, 100 year history, and its identityas an agency revolves entirely around booze - beer, wine, spirits, ciders, hard liquor. not cannabis. its foreign to them, and we all know it.

I don't see how having OLCC regulate things does away with reducing the criminal stigma of cannabis, or helps patients, or helps the industry generally, or helps hasten the end of society's and local governments' canna-bigotry, or normalizes the responsible adult use legal cannabis or medical cannabis or industrial hemp into society. Putting OLCC in charge has thus far, been having the opposite effect.

I think it's a very, very bad idea to have OLCC regulating marijuana. And to have the duties shared between 3 agencies...the OLCC, OHA, and DOAg it’s a bunch of nonsense.....it's what M91 committee should have been working on the whole time, instead of undermining the OMMA.

The only folks with any real expertise on cannabis are the folks picked for the OLCC's rac, sub-committees, and the marijuana program manager who the OLCC fired early on, which was an embarrassment to their credibility, among other miss-steps. There was a rac set up for Department of Agriculture that had some good folks on it too who could be tapped. Why not take the OMMP and MMDP and the OLCC’s RAC and sub-committee structure, along with the Agriculture’s Hemp Committee, and plop all of these folks together into a brand new state commission? Bam! There's the beginnings of the Oregon Cannabis Control Commission right there. Use OMMP program fee dollars - there's millions in there just sitting around.

Now you've got a well-funded state agency focused solely and entirely on the regulation and promotion of legal cannabis programs and industry in Oregon - medical, adult use, agricultural hemp, industrial use of cannabis, environmental research and protection and best practices, the public health and safety, public outreach and education programs ("don't eat a whole brownie, maybe just take a bite," or "if you're feeling paranoid, eat a sugary treat and you'll feel a lot better"), promoting research/science, and giving Oregon a jump-start to its economy.

That's the answer. ONE marijuana agency that understands the interests of each market stakeholder and sector and interest and need and goal inside and out. A single agency whose sole existence and purpose is to implement and master and specialize in this area of the law, and to know the laws and rules, and to enforce them. To engender compliance and respect for the legal system. A system where Oregon could lead the nation and live up to its motto. An agency that is sensitive to the diverse stakeholder perspectives of the various competing and complimentary industry interests. Not cops, and not the 4 staffers of the MMDP, or the bureaucrats of the OHA’s almost non-existent OMMP. Something entirely new and unique and different where cannabis and the people who believe in the plant’s beneficial uses are no long treated like criminals, and the state’s legal medical marijuana industry is stigmatized with the ‘black market’ bologna.

A marijuana authority that is focused on doing marijuana right in Oregon, all aspects of it. One who respects and supports medical, and protects patient’s confidentiality and the confidential nature of the program. A regulator that gets labs, gets processors, gets growing indoor/outdoor and the unique climate and growing regions of Oregon, and everything in between there is to know about horticulture and genetics. An authority that gets hemp and the industrial use. An authority that gets the scientific R&D/research/environmental/innovating aspects that come along with legalizing the responsible adult use of cannabis.

An agency with sole authority to exact a ‘privilege tax’ on the legal sales at the retail level. Not a ‘sales tax’.

Three agencies competing to regulate cannabis, none of which has the regulation of cannabis as the primary item on its agenda or has legal, civil cannabis regulation as an area of its expertise or as an interest, is going to be 3

times more challenging than it needs to be. It will result in three agencies treating cannabis and medical marijuana and hemp with neglect and apathy, and the people who know and love the plant being exploited and abused just as if Oregon just passed marijuana prohibition instead of legalization. That is not moving forward into the future. That is not going to lead to an end of the stigmatization of the plant and the people who use it, or hasten the end of the War on Drugs. The current structure we're about to deal with is a 'three headed monster.' But for the sake of what makes actual sense, and what I think would be best for the State, for local governments, and our citizens, and patients, and the industry? One agency.

The difference between having state law allowing local bans and state law preemption local bans is the difference between prohibition and legalization. If the state law is blatantly preemptive, as it currently is under sb 844 with the dash 6 and dash 7, Oregon will get a chance to legalize marijuana and let it play out.

I would like to applaud the heroic work and leadership of Senator Prozanski, and of the Democratic House Members of this committee, most recently demonstrated by Representative Buckley on Monday. Thank you for recognizing the truth - that '*local control'* is a euphemism and buzz word, and it has absolutely nothing to do with reasonable local regulations on the medical use of marijuana or on the responsible adult use of cannabis.

Local control means local authority to ban, not regulate. Local control means this legislature being undermined by its local governments into providing state sanctioning of local authority to trample on the will of the people. Local control in this case is about promoting '*home rule authority'* of Oregon's political subdivisions over the integrity and Sovereignty of the State of Oregon, whose motto is "*she flies with her own wings."*

Local control is sly and underhanded sabotaging of the State and People's experiment with the legalization of cannabis for responsible adult use before it is allowed to begin. It's a twisted game of AOC/LOC and local governments playing 'gotcha' and 'I told you so', based on their own interference and intransigence.

I also would like to point out the impressive stance Senator Prozanski has taken in past meetings, and encourage him and all of Oregon's elected officials to respect the voice of the people, and not to violate the social contract between the government, and the people that are goverened. Please preempt local authority to ban and discriminate against persons suffering from debilitating medical conditions and the compassionate entrepreneurs who serve them, and defend the responsible adult use of cannabis.

no conflict" arises "based on the fact that Congress has chosen to prohibit the possession of medical marijuana, while California has chosen not to." Simply put, "California's statutory framework has no impact on the legality of medical marijuana under federal law...." (Ibid.; accord, Hyland v. Fukuda (9th Cir.1978) 580 F.2d 977, 981 [state law allowing felons to carry guns not preempted by contrary federal law since "there is no conflict between" the two].) As we observed in Garden Grove, the high court's decision in Gonzales demonstrated the absence of any conflict preventing coexistence of the federal and state regimes since " '[e]nforcement of the CSA can continue as it did prior to the [CUA].' " (Garden Grove, at p. 385, 68 Cal.Rptr.3d 656.) No positive conflict exists because neither the CUA nor the MMPA require anything the CSA forbids.

The federal CSA does not direct local governments to exercise their regulatory, licensing, zoning, or other power in any particular way. *Qualified Patients Association v. City of Anaheim*, 187 Cal.App.4th 760 (2010). Consequently, a city or county's compliance with state law in the exercise of its regulatory, licensing, zoning, or other power with respect to the operation of medical marijuana dispensaries that meet state law requirements does not violate federal law.

There is no reason to suppose state preemption of city and county authority to ban the responsible adult use or the medical use of cannabis would require a city or its employees or agents to engage in any conduct prohibited by the CSA. Governmental entities do not incur aider and abettor or direct liability by complying with their obligations under the state medical marijuana laws. (Garden Grove, supra, 157 Cal.App.4th at pp. 389-390, 68 Cal.Rptr.3d 656; accord, County of San Diego, supra, 165 Cal.App.4th at p. 825, fn. 13, 81 Cal.Rptr.3d 461.)

In the landmark federal preemption decision *County of San Diego v. San Diego NORML*, a California appellate court concluded the state's medical marijuana program "identification card laws do not pose a significant impediment to specific federal objectives embodied in the CSA" because the CSA's purpose "is to combat recreational drug use, not to regulate a state's medical practices." (County of San Diego, supra, 165 Cal.App.4th at pp. 826-827, 81 Cal.Rptr.3d 461, citing Gonzales v. Oregon (2006) 546 U.S. 243, 272-273, 126 S.Ct. 904, 163 L.Ed.2d 748 [construing CSA as a "statute combating recreational drug use" rather than as an "expansive" interposition of "federal authority to regulate medicine"].)

Where the Legislature's intent to preempt local governments is not express and where the local and state law can operate concurrently, there is no state preemption. So please act accordingly.

Article IV, section 1, Article VI, section 10, and Article XI, section 2, of the Oregon Constitution, act as limitations on state regulation of local charters and acts of incorporation. These provisions affirm the right of a municipality to select the form of municipal government and to exercise police power (regulate for the common health and welfare) within the municipality. See generally *La Grande/Astoria v. Public Employes Benefit Board,* 281 Or. 137, 576 P.2d 1204 (1978), *aff'd* 284 Or. 173, 586 P.2d 765 (1978). Although local government enactments are presumed to be valid in a home rule state like Oregon, local government charter enactments are still subject to preemption by the State. *Hunter v. City of Pittsburg,* 207 U.S. (1907).

Municipalities may enact ordinances that deal with issues of local concern, as long as those ordinances do not conflict with substantive general laws of statewide concern. *La Grande v. Public Employees Retirement Bd.*, 281 Or 137, 143, 576 P 2d 1204 (1978), a*ff'd* rehearing 284 Or 173, 586 P 2d 765 (1978). State law is generally presumed to not displace a local law that regulates local conditions absent a clear intent to do so, but state law will prevail over a conflicting local law even without a clear expression of intent to preempt the municipal law. *Springfield Utility Board v. Emerald People's Utility District*, 191 Or. App. 536, 84 P.3d 167 (2004), *aff'd*, 339 Or. 631, 125 P.3d 740 (2005). The Oregon Supreme Court has consistently held that the legislature's intent to preempt must be unambiguous. *Gunderson, LLC v. City of* Portland, 352 Or. 648, 660, 290 P.3d 803 (2012). The State preemption at issue in this case is unambiguous. Because the preemption of Chapter 4, Oregon Laws 2013 (special session) (Senate Bill 863) at ORS 633.738 contains explicit language of state preemption, and the prohibition of local control could not be more expressly worded on the face of the text.

The legislative intent required for state preemption must be "apparent - that is, clear and unequivocal." *Rogue Valley Sewer Services v. City of Phoenix*, 262 Or. App 183, 192 (2014). Express preemptive language is not a necessary requirement under the 'apparent - clear and unequivocal' standard of legislative intent necessary for a court to find state preemption. *Thunderbird Mobile Club, LLC v. City of Wilsonville,* 234 Or App 457, 472

(2010).

ORS 633.738 is an express prohibition of local government authority to enact or impose any local law, not limited to an ordinance, regulation, control area or quarantine, to inhibit or prevent the production or use of seeds or products of seeds. According to the testimony and lobbying of AOC's legal counsel Rob Bovett, this statute, colloquially referred to as the GMO bill, i.e., SB 863. SB 1531 carved out an exception for local governments, which they abused, and which they continue to abuse. They interpret home rule and local control to mean, 'we don't have to follow state law'. What kind of respect for law and the rule of law does a system that allows this kind of intransigence and disrespect foster? Why should the people comply with state and local law when the government itself need not do so?! That is nonsense. Local governments certainly deserve authority to reasonably regulate, and I think that HB 3400 largely enshrines this in its land use and reasonable regulations language. It should be revisted with the language from SB 844 -6 and -7 and improved and made more strongly preemptive than it currently even is.

Then as now, Mr. Bovett testified several times during the short session in February and March of 2014, on behalf of the euphemism of "local control", which is not about whether or not local governments may reasonably regulate the medical use of marijuana or the responsible adult use of marijuana – but rather, is entirely about local government authority to trample on the will of the people, and to give state sanction to local government's discrimination against marijuana patients and their providers. Local control is about re-criminalization, undermining the Sovereignty of the State, the will of the people, the authority of the State legislature, and is a hail-mary play to reinvigorate the failed war on drugs.

The Tenth Amendment and Oregon's State Motto: "She flies with her own wings….."

Finally, I would urge this committee to recognize that the Ninth and Tenth Amendments of the U.S. Constitution system encapsulate American Federalism, and its virtue, which "rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.' " Bond, 564 U. S., at ___ (slip op., at 8) (quoting Alden v. Maine, 527 U.S. 706, 758 (1999).

This Committee has misunderstood the role that federal law plays in the system of Federalism. State courts do not enforce the federal criminal statutes. Moreover, the Cole memo is not instructions for this legislature to follow.

Implementing Measure 91 and respecting the will of the people is this committee's only instruction:

> Although the United States Constitution establishes the supremacy of the federal government in most respects, it reserves to the states certain powers that are at the core of state sovereignty. It is well established that the federal government lacks constitutional authority to commandeer the policy-making or enforcement apparatus of the states by requiring them to enact or enforce a federal regulatory program. Printz v. United States, 521 U.S. 898, 925–31, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997); New York v. United States, 505 U.S. 144, 161–69, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Although the United States Constitution establishes the supremacy of the federal

> government in most respects, it reserves to the states certain powers that are at the core of state sovereignty. New York, 505 U.S. at 156–61, 112 S.Ct. 2408. One expression of that reservation of powers is the notion that Congress lacks authority "to require the states to govern according to Congress's instructions." Id. at 162, 112 S.Ct. 2408
>
> State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." New York v. United States, 505 U.S. 144, 181 (1992). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293(J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." Bond v.United States, 564 U. S. ___, ___ (2011) (slip op., at 9–10).
>
> . . . .

The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions. See, e.g., United States v. Comstock, 560 U. S. ___ (2010). The same does not apply to the States, because the Constitution is not the source of their power. The Constitution may restrict state governments—as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act.

The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power."

> Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.C.t (2012).

Thank you,

Bradley Steinman, Esq.
Green Business Law LLC
OSB 136110