WASHINGTON
LEGISLATIVE OFFICE

May 9, 2011

Hon. Eric Holder
Attorney General of the United States
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Dear Attorney General Holder,

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On behalf of the American Civil Liberties Union (ACLU), a national non-partisan civil liberties advocacy organization consisting of over a half million members, countless additional activists and supporters, and 53 affiliates nationwide, we are writing to express our deep concerns about recent threatening letters from several United States Attorneys from across the country regarding the potential initiation of federal prosecutions against persons who are complying with state medical marijuana laws.

As you know, United States Attorneys in Washington, Montana, Arizona, Colorado, Rhode Island and Vermont have issued letters that, while tailored to their states, all include the threat to prosecute state law compliant actors, including state employees and state licensed providers of medical marijuana. These letters are inconsistent with both sound policy and the Department's articulated position that it will respect the laws of states whose voters have recognized marijuana as a medicine and have taken steps to implement well-regulated distribution schemes to provide the medicine.

In October 2009, United States Deputy Attorney General David Ogden issued a memorandum to U.S. Attorneys that was widely understood as articulating the Department of Justice's enforcement policies on state medical marijuana laws. The Ogden Memorandum purported to provide "uniform guidance to focus federal investigations and prosecutions on core federal enforcement priorities" in states with medical marijuana laws.

The core of that memo was the following statement:

> As a general matter, pursuit of these priorities ***should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana***. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such

> individuals with marijuana is unlikely to be an efficient use of limited federal resources. On the other hand, prosecution of commercial enterprises that ***unlawfully market and sell marijuana for profit*** continues to be an enforcement priority of the Department (emphasis added).

The recent U.S. Attorney communications to government actors in medical marijuana states clearly deviate from the letter and spirit of the Ogden Memorandum by threatening prosecution against those who are in clear and unambiguous compliance with existing state laws providing for the use of medical marijuana. The letter issued by U.S. Attorneys in Washington State, for instance, goes so far as to suggest that the federal government may prosecute state employees whose only participation in marijuana distribution is fulfilling their duties under a state-mandated licensing process. But this is a misstatement of law; the Washington State regulatory scheme does not require state employees to commit any violation of the Controlled Substances Act. The threat that state employees may nonetheless face federal prosecution therefore appears to be an attempt to influence Governor Gregoire's support of the state medical marijuana legislation that was pending at the time, rather than merely a restatement of the Department's policies.

Our assumption is that, contrary to the positions articulated in the recent U.S. Attorney letters, the Justice Department stands by the Ogden Memorandum and continues to believe that prosecution of those in clear and unambiguous compliance with state law is not an enforcement priority for the Department. We further assume that the low priority status extends not only to patients, but also those who license and distribute medical marijuana in full compliance with state laws that are designed to protect public safety by ensuring an orderly and appropriately circumscribed distribution process for medical marijuana. However, in a New York Times article published on May 8, 2011, entitled "New Federal Crackdown Confounds States That Allow Medical Marijuana," Department spokesperson Jessica Smith described the letters as "a reiteration of the guidance that was handed down in 2009 by the Deputy Attorney General." This is inconsistent both with the Ogden Memorandum itself and your own 2009 statement that, "For those organizations that are doing so sanctioned by state law and do it in a way that is consistent with state law, and given the limited resources that we have, that will not be an emphasis for this administration." The inconsistency between these statements requires clarification and an unambiguous statement from you that the prosecution of those complying with state law is not a priority for the Department.

The U.S. Attorney letters send two distinct and equally problematic messages, one about the role of the federal government vis-à-vis the sovereign states, and the other about the substance of federal drug policy. The federalism concern is that the timing of the U.S. Attorneys' letters creates the appearance that the Department of Justice is using its law enforcement and prosecutorial functions to undermine the outcome of lengthy and public legislative processes by various sovereign states. While the federal government may have a legitimate interest in the outcome of state legislation or rule-making and may seek to affect those outcomes by political means, we believe the U.S. Attorneys' efforts attempt to dissuade the states from enacting and implementing medical marijuana laws through threats of prosecution is an abuse of their role as impartial prosecutors. If the federal government wishes to discourage the implementation of legitimately enacted

medical marijuana laws, it should do so through substantive debate, not the use of prosecutorial threats.

The recent U.S. Attorneys' letters also reflect a policy of obstructionism in the face of the complex and evolving issue of medical marijuana, which nearly one-third of the states have now decriminalized in recognition of the unique and substantive benefit this drug provides to patients with certain serious conditions. The states to which the recent U.S. Attorneys' letters have been directed have wisely recognized not only the needs of patients and the value of marijuana as a medicine, but also the need for a rational distribution scheme that channels this drug to humanitarian uses without contributing to a black market. As a policy matter, the same protections that extend to patients should also be extended to state-licensed distributors or state employees who are in clear compliance with state law. The laws of the affected states further recognize that it is not enough to permit patients to use the medicine; there must be a mechanism for growing and distributing medicine that provides a safe method of access. The state laws and detailed regulations implementing distribution promote both public health and public safety. The U.S. Attorneys' implied threats of prosecution against those who are merely following state law are thus inconsistent with the administration's announced intention to end the "war" on drugs and adopt a public health approach to drug policy.

The U.S. Attorneys' letters conflict not only with previously articulated Justice Department policy but also with the Department's representations to a U.S. district court in connection with litigation. The ACLU represents a group of plaintiffs including the City and the County of Santa Cruz who, in response to government assurances about its adherence to the Ogden Memorandum, voluntarily dismissed a lawsuit against the federal government arising from a 2002 DEA raid of a medical marijuana garden sanctioned by City and County officials. At the time that lawsuit was dismissed in 2009, the case was entering into discovery after the federal district court had upheld (against a government motion to dismiss) the plaintiffs' Tenth Amendment claim alleging that the federal government had selectively enforced federal marijuana laws in an improper federal attempt to undermine and disable the functioning of state medical marijuana laws. Before the plaintiffs were able to notice depositions of DOJ officials in order to conduct discovery concerning the federal government's enforcement polices, DOJ issued the Ogden Memo. DOJ attorneys in the Santa Cruz case asserted that the Ogden Memo announced a significant policy shift, under which those individuals and entities that use or distribute marijuana in full compliance with state medical marijuana laws would no longer be targeted by federal law enforcement. The plaintiffs pointed out that the federal government might at any moment abandon the new policy and revert to enforcement policies that would endanger legitimate entities complying with state law and working most closely with local and state governments to implement state laws. The DOJ attorneys acknowledged this legitimate concern, and so entered a stipulation, as follows:

> The parties further stipulate and agree that if Defendants withdraw, modify, or cease to follow the Medical Marijuana Guidance [announced in the October 19, 2009 Memorandum from Deputy Attorney General David Ogden to selected United States Attorneys], this case may be reinstituted in its present posture on any Plaintiffs' motion, although if any Plaintiff seeks to reinstitute

this case, Defendants reserve the right to argue that they have not withdrawn, modified, or ceased to follow the Medical Marijuana Guidance, and that this case is moot.

In light of the recent series of threatening letters issued by U.S. Attorneys to various state officials in medical marijuana states around the country, we are concerned that DOJ is now asserting an interpretation of the Ogden Memorandum at odds with the government's representations to the U.S. district court in the Santa Cruz litigation. If, contrary to the assurances its attorneys provided the court in the Santa Cruz case, the federal government's enforcement policies now include "vigorously enforcing" federal drug laws against individuals and entities who manufacture and distribute marijuana on a completely non-profit basis and in full compliance with state medical marijuana laws, it marks a significant departure from the federal government's position in the Santa Cruz litigation and could lead to that case being reinstated in its October 2009 posture with discovery proceeding as originally planned.

The ACLU would welcome a dialogue with the Department on this issue. We have sought a meeting with the Office of Legislative Affairs over the past week to no avail. We continue to believe that the Department can and will pursue a policy that balances respect for state sovereignty and for the important humanitarian uses of marijuana with rational, measured enforcement of the Controlled Substances Act.

Thank you for your attention to this matter.

Sincerely,

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Washington Legislative Office

Jay Rorty
Director
Criminal Law Reform Project

Jesselyn McCurdy
Senior Legislative Counsel
Washington Legislative Office

cc: Lanny A. Breuer, Assistant Attorney General for Criminal Division
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