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VIA U.S. MAIL AND ELECTRONIC MAIL

Laura E. Duffy, Esq.
United States Attorney
Southern District of California
880 Front Street, Room 6293
San Diego, CA 92101-8893

RE: City of Del Mar Medical Marijuana Ballot Initiative

Dear Ms. Duffy:

I write on behalf of the American Civil Liberties Union to express concern about your recent letter to the Del Mar City Attorney regarding the City's medical marijuana ballot initiative, especially the reference to potential liability of city employees under the Controlled Substances Act (CSA).¹ The letter declares that "State and City employees who conduct activities mandated by the [Del Mar] Ordinance are not immune from liability under the CSA." Such a statement is easily construed—and no doubt will be so construed by city employees and the public—as a threat of prosecution against city employees if they comply with an ordinance duly adopted by local voters. However, such a broad interpretation of liability under the CSA is unprecedented and amounts to unjustified interference in local legislative matters, if not thinly veiled intimidation of city officials and thus potentially of voters.

The citizen-drafted initiative, the Compassionate Use Dispensary Regulation and Taxation Ordinance ("Ordinance"), has qualified for the November ballot in the City of Del Mar. The Ordinance seeks "to ensure safe access to medical cannabis in the City of Del Mar for qualified patients and their primary caregivers in compliance with California's Compassionate Use Act of 1996 and Medical Marijuana Program Act of 2003 through regulated compassionate use dispensaries in the City of Del Mar." The Ordinance primarily addresses the conduct of compassionate use dispensaries, qualified patients, and primary caregivers. It imposes additional restrictions on medical marijuana-related activity permissible under state law in order to "ensure safe access while protecting

¹ Letter from Laura Duffy, United States Attorney, U.S. Dep't of Justice, to Leslie Devaney, City Attorney, City of Del Mar (July 17, 2012).

public safety.” The Ordinance directs the activity of city employees to a limited extent in that if the compassionate use dispensary meets all of the Ordinance’s requirements, “the Planning and Community Development Department of the City of Del Mar must issue the Compassionate Use Dispensary Permit.”

Compliance with this ministerial duty cannot legitimately expose city employees to liability under the CSA. The courts have expressly rejected any conceivable aiding and abetting or conspiracy theory on which such liability could be based. In *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002), the Court of Appeals determined that “[h]olding doctors responsible for whatever conduct the doctor could anticipate a patient *might* engage in after leaving the doctor’s office is simply beyond the scope of either conspiracy or aiding and abetting.” Similarly, in *City of Garden Grove v. Superior Court*, 157 Cal.App.4th 355, 368 (2007), the court held that an order requiring City officials to return improperly seized medical marijuana “would appear to be beyond the scope of either conspiracy or aiding and abetting.” Finally, and most directly on point, in *Qualified Patients Ass’n v. City of Anaheim*, 187 Cal.App.4th 734, 759-60 (2010), the same court held that “governmental entities do not incur aider and abettor or direct liability by complying with their obligations under the state medical marijuana laws.” Thus, it is clear that a ministerial requirement to issue a permit in compliance with the ordinance cannot subject city employees to liability under the CSA.

While the federal government may enforce federal law, it has no business attempting to interfere in local legislative decisions or influence local voters with unfounded insinuations about potential prosecution. The ACLU calls on you to either identify the specific elements of the citizen-drafted initiative which you assert would require city employees to violate federal law, or clarify or retract your inflammatory statement regarding city employees and assure local voters that the federal government has no interest in prosecuting city employees for performing duties contemplated by the Ordinance. We are glad to meet and discuss these issues if that would be helpful.

Sincerely,

David Loy
Legal Director
ACLU Foundation of San Diego & Imperial Counties

Novella Coleman
Criminal Justice and Drug Policy Fellow
ACLU of California