WASHINGTON
LEGISLATIVE OFFICE

October 25, 2010

Attorney General Eric Holder
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Gil Kerlikowske
Director, Office of National Drug Control Policy
Drug Policy Information Clearinghouse
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Dear Attorney General Holder and Director Kerlikowske,

The American Civil Liberties Union is a national non-partisan advocacy organization having over half a million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the protection and advancement of civil liberties and individual rights under the U. S. Constitution and the Bill of Rights. The three ACLU affiliates in California, the ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego and Imperial Counties, collectively have 96,500 members. Recent comments issuing from your respective agencies have threatened costly litigation and the deployment of federal drug police to arrest individuals who might use marijuana if Proposition 19 is enacted by the voters of California. Such comments are unnecessarily alarmist and do little to help foster a balanced discussion of a legitimate policy issue. We write to encourage you to refrain from such rhetoric in the days leading up to the November 2 vote on this issue in order to encourage a reasoned vote on the issues. Further, in the event Californians adopt the measure, we urge you not to bring a facial challenge to the new law and to make no change to established administration priorities focusing on major criminal activity in favor of new enforcement activities against California marijuana users.

Proposition 19 will let Californians decide whether to change the failed policy of using scarce state law enforcement resources to prohibit, under state law, the adult consumption and possession of small amounts of marijuana. The ACLU took heart from Director Kerlikowske's acknowledgement that the 'war on drugs' has failed. But instead of scaling back the rhetoric associated with that ineffective and out-of-date campaign, it appears the administration would resist California's modest attempt to begin dismantling one of the defining injustices of our failed drug policies: that the war on drugs has become a war on minorities. African-Americans and Latinos are disproportionately arrested for low-level marijuana possession in California and across the nation even though usage rates are

the same as or lower than those of whites. The historical and racially disparate enforcement of marijuana laws is a primary reason the California ACLU affiliates have endorsed Proposition 19. This also no doubt explains why the California NAACP, the League of United Latin American Citizens (LULAC) of California, the National Black Police Association and the Latino Voters League, among so many others, have also endorsed the initiative.

While the federal government can continue to enforce its own laws, even if California removes state criminal sanctions from some adult marijuana use, recent DOJ statements appear to threaten a new regime of targeting minor marijuana offenses that have never been a federal enforcement priority. For example, in an October 13, 2010 letter to former administrators of the Drug Enforcement Administration, Attorney General Holder threatened to vigorously enforce the CSA against individuals possessing or cultivating marijuana in California even if they are permitted to do so under state law. But it has long been DOJ policy to focus its enforcement efforts only on large scale cultivation or sale of marijuana, and federal law enforcement has never targeted the small-scale personal possession and cultivation that Proposition 19 would allow under state law. Such comments do nothing to advance the policy debate and, instead, contribute to a climate of fear that detracts from allowing voters to consider the policy arguments for and against the law in a reasoned fashion.

We commend DOJ's instruction last year to U.S. Attorneys that prosecuting medical marijuana patients who comply with state laws should not be a federal law enforcement priority. The very same standards should apply if Proposition 19 is enacted. Regardless of the federal government's disagreement with California's choice to amend state criminal law, it makes no more sense for the federal government to waste scarce resources policing low-level, non-violent marijuana offenses after Proposition 19 passes, than before.

Threats of federal interference, however, go beyond just poor policy; suggestions of a facial challenge to Proposition 19 misconstrue the preemptive reach of the Controlled Substances Act ("CSA") and ignore constitutionally-imposed limitations on the federal government's authority to dictate state criminal laws. Politics should not confuse the legal analysis here. The express anti-preemption provision of the CSA and the anti-commandeering principles embodied in the 10th Amendment plainly foreclose any claim that Proposition 19, if enacted, would be void under the Supremacy Clause because preempted by federal law.

Congress included an express anti-preemption clause in the CSA, codified at 21 U.S.C. § 903. Preemption of state drug laws is explicitly limited to the narrow set of circumstances where there is a "positive conflict" between state and federal law "so that the two cannot consistently stand together." Proposition 19 would remove state criminal penalties for certain adult marijuana use. The new law would not require anyone to do anything in violation of federal law. There would be no positive conflict. The most obvious analogy is to state medical marijuana laws, now in place in 14 states and the District of Columbia, allowing regulated possession, cultivation and distribution of marijuana for medical purposes without state law penalties. It is telling that in the 14 years since the inception of these laws, neither the Obama administration nor any of its predecessors has challenged any state medical marijuana laws as preempted by the CSA under the Supremacy Clause. California appellate courts have considered, and soundly rejected, similar arguments raised by local government and law enforcement officials opposed to medical

marijuana laws. See *City of Garden Grove v. Superior Court*, 157 Cal.App.4th 355, 68 Cal.Rptr.3d 656 (2007) and *County of San Diego v. San Diego* NORML, 165 Cal.App.4th 798, 81 Cal.Rptr.3d 461 (2008). In both cases, the California Supreme Court denied review and the U.S. Supreme Court denied certiorari.

Those who urge a facial challenge to Proposition 19 under the Supremacy Clause also fail to acknowledge the restrictions imposed by the 10th Amendment upon the federal government's power to force states to maintain or enact state criminal laws. The Supreme Court made clear in *Printz v. United States*, 521 U.S. 898 (1997) and *New York v. United States*, 505 U.S. 144 (1992) that the federal government cannot compel states to enact particular laws or enforce federal laws or regulatory schemes. This is a fundamental tenet of our federalist system of government.

The so-called war on drugs has been an abysmal failure; a recent study from the National Center on Addiction and Substance Abuse at Columbia University reported that teens today find it easier to obtain marijuana than alcohol or cigarettes. And yet this war has wasted vast public resources and incurred incalculable cost in human lives. Over 850,000 people were arrested in the U.S. last year for marijuana offenses, the vast majority of which were for simple possession of small amounts. In California alone, over 850,000 people have been arrested over the past 20 years for possession of small amounts of marijuana; half a million of those arrests were in the last ten years. Those arrested were disproportionately young African-American and Latino men, despite study after study establishing that whites use marijuana at the same or greater rates. Additionally, every dollar spent policing low-level adult marijuana offenses diverts scarce resources from preventing and solving serious and violent crime. Since 1990, in fact, arrests for nearly every serious crime have declined in California, while arrests for marijuana possession have tripled.

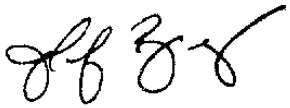
Californians have every right to enact Proposition 19 to stop this incredible waste of criminal justice resources and to dismantle one of the most shameful legacies of the war on drugs, the selective enforcement of these laws. This is about priorities. Given the state of the economy, record unemployment and foreclosure rates, and thousands of troops deployed abroad, should voters enact Proposition 19, we hope that the federal government will re-evaluate its priorities and use scarce federal enforcement resources wisely. For these reasons, we urge you to direct your agencies to refrain from polarizing rhetoric in the California referendum, to refrain from a facial challenge to any successfully enacted law, and to reconfirm your commitment to investigating and prosecuting serious offenses and not to the victimless and non-violent use of marijuana by Californians contemplated under Proposition 19.

We would welcome the opportunity to discuss these issues with you again in the weeks ahead, as we have in the past, regardless of the outcome of the California referendum.

Respectfully,

Laura W. Murphy

Laura W. Murphy
Director, Washington Legislative Office



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