Department of
Cannabis Control
CALIFORNIA

Gavin Newsom
Governor

Nicole Elliott
Director

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Mollie Lee
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Via electronic mail

Dear Ms. Lee:

Pursuant to Section 12519 of the Government Code, I write on behalf of the Department of Cannabis Control and its Director, Nicole Elliott, to request a written opinion from the Attorney General addressing the following question:

> Whether state law authorization, under an agreement pursuant to Chapter 25 of Division 10 of the Business and Professions Code, for medicinal or adult-use commercial cannabis activity, or both, between out-of-state licensees and California licensees, will result in significant legal risk to the State of California under the federal Controlled Substances Act.

We ask this question against the backdrop of historic legislation recently signed into law by the Governor. Until now (in the absence of that legislation), California state law has flatly prohibited state-licensed cannabis businesses from exporting cannabis outside the state. *See* Bus. & Prof. Code, § 26080, subd. (a). Now, however, new legislation—Senate Bill 1326 (Caballero, Chapter 396, Statutes of 2022), which took effect on January 1, 2023—has created a pathway to allow California cannabis licensees to engage, for the first time, in commercial cannabis activity with cannabis businesses licensed in other states. Under SB 1326 (codified in relevant part at Chapter 25 of Division 10 of the Business and Professions Code), California may work with other states to negotiate agreements allowing, as a matter of state law, for commercial cannabis activity between California cannabis licensees and licensees in those other states. *See* Bus. & Prof. Code, §§ 26300–26308. Such agreements would represent an important step to expand and strengthen California's state-licensed cannabis market.

Importantly, however, SB 1326 limits the circumstances under which such an agreement may take effect. In particular, SB 1326 provides that an agreement may not take effect unless at least one of four specified conditions is satisfied. *See* Bus. & Prof. Code, § 26308, subd. (a). One of those conditions is as follows:

> The Attorney General issues a written opinion, through the process established pursuant to Section 12519 of the Government Code, that

> state law authorization, under an agreement pursuant to this chapter, for medicinal or adult-use commercial cannabis activity, or both, between foreign licensees and state licensees will not result in significant legal risk to the State of California under the federal Controlled Substances Act, based on review of applicable law, including federal judicial decisions and administrative actions.
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> Bus. & Prof. Code, § 26308, subd. (a)(4).[1]

Accordingly, we request that the Attorney General issue a written opinion addressing this question—that is, whether state-law authorization for medicinal or adult-use commercial cannabis activity, or both, between out-of-state licensees and California licensees, under an agreement pursuant to SB 1326, will result in significant legal risk to the State of California under the federal Controlled Substances Act.

For the reasons that follow, we submit that it will not.

I. The Controlled Substances Act could not constitutionally prohibit California from legalizing and regulating commercial cannabis activity with out-of-state licensees.

The Controlled Substances Act could not constitutionally prohibit California from legalizing and regulating commercial cannabis activity as a matter of state law, including commercial cannabis activity involving out-of-state licensees.

The Controlled Substances Act could not constitutionally prohibit California from legalizing and regulating commercial cannabis activity as a matter of California state law. Under the U.S. Constitution's anti-commandeering principle, federal statutes may not "command[] state legislatures to enact or refrain from enacting state law." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1478 (2018). "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York v. United States*, 505 U.S. 144, 166 (1992). This means that "the federal government lacks the power to compel [states] . . . to criminalize possession and use of marijuana under state law." *In re State Question No. 807*, 468 P.3d 383, 391 (Okla. 2020); *accord Conant v. Walters*, 309 F.3d 629, 645–46 (9th Cir. 2002) (Kozinski, J., concurring). Nor, by the same token, could the federal government prohibit states from affirmatively legalizing certain commercial cannabis activity. In *Murphy*, the Supreme Court expressly rejected any distinction, for anti-commandeering purposes, between federal laws that compel states to prohibit activity and those that prohibit states from authorizing them: "[t]he basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event." 138 S.Ct. at 1478. In short, the U.S. Constitution's anti-commandeering rule protects

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[1] As used here, "foreign licensee" means the holder of "a commercial cannabis license issued under the laws of another state that has entered into an agreement" under SB 1326. *See* Bus. & Prof. Code, § 26300, subd. (c). For clarity, we use the term "out-of-state licensee."

California from liability, under federal law, for choosing to legalize and regulate commercial cannabis activity as a matter of its own state laws.

This remains true where, as here, the activity to be authorized under state law involves interstate commerce—such as commerce between in-state and out-of-state cannabis licensees. The anti-commandeering rule does not rise or fall based on the strength of any underlying federal interest: on the contrary, the anti-commandeering rule means that, "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Murphy*, 138 S.Ct. at 1477 (quoting *New York*, 505 U.S. at 178). The U.S. Supreme Court has expressly invoked the rule in the context of interstate commerce, observing that the Commerce Clause "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166. Indeed, the cases in which the Court has articulated the anti-commandeering rule have all concerned invocations of Congress's power over interstate commerce. *See Murphy*, 138 S.Ct. at 1485 (Thomas, J., concurring); *Printz v. United States*, 521 U.S. 898, 923 (1997); *New York*, 505 U.S. at 159–60; *accord Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208, 224–26 (3d Cir. 2013) (confirming that the federal statute at issue in *Murphy* invoked Congress's power to regulate interstate commerce).[2] As these cases make clear, nothing about the interstate-commerce context diminishes the anti-commandeering rule—and so that rule continues to protect California's authority to legalize and regulate commercial cannabis activity as a matter of state law, whether or not that activity involves out-of-state licensees.[3]

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[2] This is unsurprising: most federal regulatory statutes, including the Controlled Substances Act, are rooted in Congress's power to regulate interstate commerce. For this reason, as discussed below (*see* Section II, *infra*), the Controlled Substances Act does not distinguish between cannabis activity involving multiple states and wholly intrastate activity. As far as the Act is concerned, *all* cannabis activity reached by the Act must fall under the rubric of interstate commerce—otherwise, Congress could not reach that activity in the first place.

[3] If anything, the U.S. Constitution's Commerce Clause underscores the importance of proceeding with caution when considering whether federal law could be understood to require a state to prohibit interstate commerce. The dormant aspect of the Commerce Clause generally bars states from discriminating against interstate commerce at all. *Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008). And while Congress can exercise its own Commerce Clause powers to authorize such discrimination, this generally requires an "unmistakably clear," "unambiguous" display of Congressional intent to do so. *Maine v. Taylor*, 477 U.S. 131, 139 (1986). Congress has made no such clear statement as to cannabis. *Ne. Patients Group v. United Cannabis Patients & Caregivers of Maine*, 45 F.4th 542, 554 (1st Cir. 2022).

This context helps explain the Court's reference, in *Murphy*, to states' "regulation of the conduct of activities occurring within their borders." 138 S.Ct. at 1479. Beyond their borders, states generally have no regulatory authority in the first place: in the absence of affirmative

To be clear, none of the foregoing affects the federal government's own authority to enact and enforce federal law—including federal laws prohibiting commercial cannabis activity, whether or not that same activity is legal as a matter of state law. Just as federal law could not (and, as discussed below, does not—*see* Section II, *infra*) purport to compel states to prohibit commercial cannabis activity as a matter of their own state laws, California law could not and does not purport to shield state cannabis licensees from federal enforcement of federal law. The Supreme Court's anti-commandeering cases have emphasized that, while Congress may not commandeer state lawmaking, Congress remains free to legislate directly. *Murphy*, 138 S.Ct. at 1477 (quoting *New York*, 505 U.S. at 178). Such direct federal legislation—for example, the Controlled Substances Act's direct, federal-law prohibition on individual use, possession, and distribution of Schedule I controlled substances like cannabis—is consistent with the rule that Congress has "the power to regulate individuals, not States." *Murphy*, 138 S.Ct. at 1476 (quoting *New York*, 505 U.S. at 166). But precisely because federal laws like the Controlled Substances Act must act upon "individuals, not States," the Act poses no legal risk to the State of California itself (as opposed to private individuals). Here, consistent with the relevant provision of SB 1326 (*see* Bus. & Prof. Code, § 26308, subd. (a)(4)), we ask only about legal risk to the State, and not about any legal risk to private individuals.[4]

Congressional authorization, "the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders." *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1324–25 (9th Cir. 2015) (en banc) (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989)). And *Murphy* itself cited dormant-Commerce-Clause caselaw in describing constitutional limitations on state sovereignty. 138 S.Ct. at 1475–76 (citing *Dep't of Revenue v. Davis*).

Of course, resolution of the question presented does not require determining whether and how the dormant Commerce Clause applies to interstate commerce in cannabis: even if states were *authorized* to discriminate against interstate cannabis commerce (which is the relevant question for purposes of the dormant Commerce Clause), it would not follow that states are *required* to do so. Thus, we see no need for the Attorney General's opinion to address the dormant Commerce Clause. Consistent with the relevant provision of SB 1326 (*see* Bus. & Prof. Code, § 26308, subd. (a)(4)), we ask only about legal risk under the Controlled Substances Act, and not about any other aspect of federal law.

[4] For similar reasons, the Attorney General's opinion need not address federal preemption. "[E]very form of preemption is based on a federal law that regulates the conduct of private actors, not the States." *Murphy*, 138 S.Ct. at 1481. In other words, federal preemption concerns whether and how state law and federal law may "impose[] restrictions or confer[] rights on private actors." *Id.* at 1480. We thus are not concerned with federal preemption, because we are not concerned with restrictions imposed upon private actors: consistent with the relevant provision of SB 1326, we ask only about legal risk to the State of California itself.

In any event, there is no federal preemption here. The Controlled Substances Act expressly disavows any preemption of state law except to the extent of "a positive conflict"

In sum, under the U.S. Constitution's anti-commandeering principle, the Controlled Substances Act could not criminalize California's legalization and regulation (as a matter of state law) of commercial cannabis activity—including commercial cannabis activity involving out-of-state licensees.

II. The Controlled Substances Act does not, in fact, criminalize California's legalization and regulation of commercial cannabis activity with out-of-state licensees.

Consistent with the constitutional limits just discussed, the Controlled Substances Act does not, in fact, purport to criminalize a state's legalization and regulation of commercial cannabis activity under state law—including commercial cannabis activity involving out-of-state licensees.

By its terms, the Controlled Substances Act shields state officials from liability in connection with their enforcement of state law. The Act expressly confers immunity upon (as relevant here) "any duly authorized officer of any State . . . who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." 21 U.S.C. § 885(d). This provision is broad and unqualified: on its face, it would seem to encompass all state laws relating to federal controlled substances, including state laws legalizing and regulating those controlled substances as a matter of state law. And courts have confirmed this straightforward reading, concluding (for example) that this immunity even protects covered officials from liability for conduct (the return of cannabis to an individual allowed to possess it under state law, but not federal law) that could otherwise constitute criminal distribution under the Controlled Substances Act. *City of Garden Grove v. Superior Court*, 157 Cal.App.4th 355, 368–69, 390 (2007); *cf.* 21 U.S.C. § 802(11). More relevant here, courts have confirmed that this immunity protects officials responsible for administering state laws legalizing and regulating cannabis—that is, officials who are engaged in regulatory activities like "processing applications" and "promulgating reasonable regulations" (*White Mountain Health Ctr., Inc. v. Maricopa Cty.*, 386 P.3d 416, 432 (Ariz. Ct. App. 2016)), or who are responsible for collecting cannabis taxes (*Tay v. Green*, 509 P.3d 615, 621 (Okla. 2022)). This broad immunity protects

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between state law and the Act. 21 U.S.C. § 903. As the California Court of Appeal has repeatedly recognized, there is no such conflict between the Controlled Substances Act (which classifies controlled substances like cannabis as a matter of federal law) and state laws that legalize and regulate cannabis as a matter of state law (without purporting to affect the operation of federal law)—and, therefore, no preemption by the former of the latter. *See City of Palm Springs v. Luna Crest Inc.*, 245 Cal.App.4th 879, 884–86 (2016); *Kirby v. Cty. of Fresno*, 242 Cal.App.4th 940, 962–63 (2015); *Qualified Patients Ass'n v. City of Anaheim*, 187 Cal.App.4th 734, 756–63 (2010); *Cty. of San Diego v. San Diego NORML*, 165 Cal.App.4th 798, 818–28 (2008); *City of Garden Grove v. Superior Court*, 157 Cal.App.4th 355, 380–86 (2007); *accord City of San Jose v. MediMarts, Inc.*, 1 Cal.App.5th 842, 849 (2016).

California and its officials from liability under the Controlled Substances Act for administering state laws related to the legalization and regulation of cannabis.

Even in the absence of such immunity, it is doubtful that the Controlled Substances Act would impose liability on state officials for administering state cannabis laws. At least in the absence of activities that could constitute outright possession or distribution, any such liability would presumably be incurred under conspiracy or aiding-and-abetting theories. But even a doctor's recommendation that a patient use medicinal cannabis—a necessary precondition for that patient's use of medicinal cannabis under state law—does not, without more, "translate into aiding and abetting, or conspiracy." *Conant v. Walters*, 309 F.3d 629, 635–36 (9th Cir. 2002). In this light, it is perhaps unsurprising that courts have concluded that "governmental entities do not incur aider and abettor liability by complying with their obligations under" state laws legalizing and regulating cannabis. *Cty. of San Diego v. San Diego NORML*, 165 Cal.App.4th 798, 825 n.13 (2008); *see also Qualified Patients Ass'n v. City of Anaheim*, 187 Cal.App.4th 734, 759–60 (2010); *City of Garden Grove*, 157 Cal.App.4th at 368; *White Mountain Health Ctr.*, 386 P.3d at 432. Indeed, at least one respected federal jurist has found it trivially obvious, in the context of a local government's state-law permitting scheme regulating cannabis activity, that "the permit scheme *itself* does not violate the Controlled Substances Act but rather regulates certain entities that do." *Joe Hemp's First Hemp Bank v. City of Oakland*, No. 15-cv-5053, 2016 WL 375082, at *3 (N.D. Cal. Feb. 1, 2016) (Alsup, J.) (emphasis in original). Consistent with these cases, the Controlled Substances Act should not be read to criminalize state officials' enforcement of state cannabis laws—even before considering the fact that, as discussed above, the Act's immunity provision removes any doubt on this point.[5]

And once again, this conclusion holds whether or not the state cannabis laws at issue authorize commercial activity with licensees in other states. The operative provisions of the Controlled Substances Act make no distinction between activity involving multiple states and

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[5] This reading of the Controlled Substances Act is further bolstered by the rule (sometimes called the "federalism canon") that "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute." *Bond v. United States*, 572 U.S. 844, 859 (2014). "[B]efore construing a federal statute in a way that 'would upset the usual constitutional balance of federal and state powers,' courts must search for a clear statement indicating that such a result represents Congress's intent." *Ryan v. U.S. Immigration and Customs Enforcement*, 974 F.3d 9, 29 (1st Cir. 2020) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). Thus, even if the Controlled Substances Act otherwise remained ambiguous as to whether it reached state officials' administration of state law, it would be appropriate to conclude that it does not.

Of course, as discussed above, the Act does *not* remain ambiguous on this point. On the contrary, the Act itself—consistent with the concerns that animate the federalism canon—repeatedly evinces a concern for the preservation of state sovereignty. *See* 21 U.S.C. § 885(d) (conferring immunity upon state officials, as discussed); *id.* § 903 (disavowing preemption of state law except to the extent of "a positive conflict").

wholly intrastate activity: under the Controlled Substances Act, both kinds of activity are equally illegal. *See, e.g.*, 21 U.S.C. § 841; *Standing Akimbo, LLC v. United States*, 141 S.Ct. 2236, 2237 (2021) (Thomas, J., respecting the denial of certiorari) (noting that the Controlled Substances Act "flatly forbids the intrastate possession, cultivation, or distribution of marijuana"). Indeed, the Act's findings take pains to reject the feasibility of a distinction between interstate and intrastate commerce in controlled substances. 21 U.S.C. § 801(5), (6). After all, the entire Controlled Substances Act is an exercise of Congress's power under the Commerce Clause—which is to say that the entire Act is, at minimum, an exercise of Congress's "power to regulate activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Simply put, the Controlled Substances Act does not distinguish between interstate and wholly intrastate activity. There is, therefore, no reason to conclude that the Act subjects a state to greater liability for legalizing and regulating commercial cannabis activity involving out-of-state licensees, as compared to legalizing and regulating wholly in-state commercial cannabis activity.

In sum, by its terms, the Controlled Substances Act does not criminalize a state's legalization and regulation of commercial cannabis activity under state law—including commercial cannabis activity involving out-of-state licensees.

III. Federal law further insulates California from significant risk as to agreements concerning medicinal cannabis.

Although it is unnecessary to reach this issue (because either or both of the reasons set forth in Section I and Section II of this letter are sufficient to establish that the answer to the question presented is "no" as to both medicinal and adult-use cannabis), federal law further insulates California from "significant" risk as to agreements concerning medicinal cannabis.

Federal law—in the form of an appropriations rider attached to federal spending bills since December 2014—expressly forbids the U.S. Department of Justice from expending funds to interfere with states' implementation of their medicinal-cannabis laws. *See United States v. Bilodeau*, 24 F.4th 705, 709 (1st Cir. 2022); *United States v. McIntosh*, 833 F.3d 1163, 1169–70 (9th Cir. 2016). That rider (often called the "Rohrabacher-Farr Amendment" or the "Rohrabacher-Blumenauer Amendment," *see Bilodeau*, 24 F.4th at 709) "prohibits [the U.S. Department of Justice] from spending money on actions that prevent [states'] giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *McIntosh*, 833 F.3d at 1176. This protection extends even to private parties using, distributing, possessing, or cultivating medicinal cannabis in compliance with state law (though courts disagree as to how strictly private parties must comply with state law to avail themselves of that protection). *See Bilodeau*, 24 F.4th at 713–15; *McIntosh*, 833 F.3d at 1176–78. It is undisputed that, at its core, the rider prevents the U.S. Department of Justice from "taking legal action against the state." *McIntosh*, 833 F.3d at 1176. Thus, the Rohrabacher-Farr/Blumenauer Amendment further insulates the State of California from "significant" legal risk as to agreements concerning medicinal cannabis.

To be sure, the impact of the Rohrabacher-Farr/Blumenauer Amendment should not be overstated. The Amendment does not change the fact that cannabis remains a Schedule I controlled substance under the Controlled Substances Act. *See McIntosh*, 833 F.3d at 1179 & n.5. Nor, as the Ninth Circuit noted in *McIntosh*, is there any guarantee that Congress will continue to add the same appropriations rider to future federal spending bills—though Congress has, in fact, consistently attached the rider to federal spending bills in the six years since *McIntosh* was decided. We do not rely on the existence of the Rohrabacher-Farr/Blumenauer Amendment as dispositive: in our view, an agreement under SB 1326 would not result in significant legal risk to the State under the Controlled Substances Act even if the Amendment did not exist, for reasons we have already explained. Nevertheless, the existence of the Rohrabacher-Farr/Blumenauer Amendment further insulates the State from any hypothetical legal risk as to agreements involving medicinal cannabis, and thus further supports the conclusion that such an agreement presents no "significant" risk to the State.

* * *

For the foregoing reasons, we submit that the answer to our question is "no": state law authorization, under an agreement pursuant to Chapter 25 of Division 10 of the Business and Professions Code, for medicinal or adult-use commercial cannabis activity, or both, between out-of-state licensees and California licensees, will *not* result in significant legal risk to the State of California under the federal Controlled Substances Act. Under the U.S. Constitution's anti-commandeering principle, the Controlled Substances Act *could not* criminalize the State's legalization and regulation of commercial cannabis activity (as a matter of state law), including commercial cannabis activity with out-of-state licensees. By its terms, the Controlled Substances Act *does not* criminalize the State's legalization and regulation of commercial cannabis activity, including commercial cannabis activity with out-of-state licensees. And other federal law—the Rohrabacher-Farr/Blumenauer Amendment—would only further insulate the State from (and thus only further reduces the significance of) any hypothetical risk under the Controlled Substances Act.

We thank you for considering our request for an opinion on the question presented above. We are happy to work with you as you further analyze the legal issues that question might raise, and we look forward to reading your response.

Sincerely,

Matthew Lee
General Counsel
Department of Cannabis Control

Opinion request approved by:

Nicole Elliott
Director
Department of Cannabis Control