STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL

No. 19-010

SUBJECT: Constitutionality of LB 110 – Adoption of the Medical Cannabis Act

REQUESTED BY: Senator Andrew La Grone
Nebraska Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
David A. Lopez, Deputy Solicitor General

INTRODUCTION

You have requested an opinion from this office regarding the constitutionality of LB 110, which would create the Medical Cannabis Act ("MCA"). Committee Amendment 1680 to LB 110 ("AM1680"), currently pending on General File, would authorize the cultivation, processing, wholesale distribution, and retail sale of cannabis (marijuana) and cannabis products for medical uses under Nebraska law. It would establish a regulatory framework to govern these activities and a wholly new government agency—the "Cannabis Enforcement Department"—to enforce this regulatory scheme through producer and patient registration, inspections, licensure, fee collection, and related rulemaking.

Your specific question asks whether the MCA, if enacted, would be preempted by the federal Controlled Substances Act ("CSA"), the money laundering statutes, the unlicensed money transmitter statute, or the Bank Secrecy Act. To the extent the latter three categories of statutes govern this question, it is primarily based on the underlying CSA provisions. *See*, *e.g.*, 18 U.S.C. §§ 1956(c)(7)(B)(i), 1957 (money laundering); 18 U.S.C. § 1960(b)(1)(C) (unlicensed money transmitting); 31 U.S.C. § 5318; 31 C.F.R. § 1020.320 (Bank Secrecy Act regulation requiring financial institutions to file suspicious

activity reports for transactions involving funds derived from federally illegal activities). The following analysis will thus focus on preemption under the CSA. As explained below, it is the opinion of this office that the MCA would be preempted.

ANALYSIS

I. The Controlled Substances Act

The CSA establishes a comprehensive federal scheme to regulate the market in controlled substances. This "closed regulatory system mak[es] it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Gonzales v. Raich*, 545 U.S. 1, 13 (2005) (citing 21 U.S.C. §§ 841(a)(1), 844(a)).

To effectuate that "closed" system, the CSA "authorizes transactions within 'the legitimate distribution chain' and makes all others illegal." *United States v. Moore*, 423 U.S. 122, 141 (1975) (quoting H.R. Rep. No. 1444, supra, Pt. 1, at 3). Violators of the CSA are subject to criminal and civil penalties, and ongoing or anticipated violations may be enjoined. 21 U.S.C. §§ 841-863, 882(a).

The CSA categorizes all controlled substances into five schedules. *Id.* at § 812. The CSA's restrictions on the manufacture, distribution, and possession of a controlled substance depend upon the schedule in which the drug has been placed. *Id.* at §§ 821-829. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body. *Id.* at §§ 811, 812. Each schedule is associated with a distinct set of controls regarding the manufacture, distribution, and use of the substances listed therein. *Id.* at §§ 821-830.

Since Congress enacted the CSA in 1970, marijuana and tetrahydrocannabinols have been classified as Schedule I controlled substances. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 202, 84 Stat. 1249 (Schedule I(c)(10) and (17)); 21 U.S.C. § 812(c) (Schedule I(c)(10) and (17)).

A drug is listed in Schedule I if it has "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use . . . under medical supervision." 21 U.S.C. § 812(b)(1)(A)-(C). By classifying marijuana as a Schedule I drug, Congress mandated that the manufacture, distribution, or possession of marijuana be a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study. 21 U.S.C. §§ 823, 841(a)(1), 844(a); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 489-490, 492 (2001).

In the CSA, Congress included findings and declarations regarding the effects of drug distribution and use on the public health and welfare and the effects of intrastate drug activity on interstate commerce. Congress found, for example, that "[t]he illegal

importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2). Congress also found:

> A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—
>
> (A) after manufacture, many controlled substances are transported in interstate commerce,
>
> (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
>
> (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

Id. at § 801(3). Congress further found that "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances," *id.* at § 801(4); that "[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate" and "[t]hus, it is not feasible to distinguish" between such substances "in terms of controls," *id.* at § 801(5); and that "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic," *id.* at § 801(6). The federal executive branch confirmed this understanding of the intent and purpose of the CSA in 2004. Brief for the Petitioners, *Ashcroft v. Raich*, 545 U.S. 1 (2005) (No. 03-1454), 2004 WL 1799022, at *11.

Congress has not amended the CSA to remove marijuana from Schedule I, nor have considerable efforts to administratively reschedule marijuana been successful.[1]

---

[1] Notably, even the recent farm bill, legislation which legalized the commercial production of hemp (defined as cannabis or cannabis derivatives with a tetrahydrocannabinol concentration ("THC") of 0.3 percent or less), stopped well short of removing marijuana from Schedule I. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, §§ 10113, 12619 (2018). Likewise, continuing federal appropriations provisions which prohibit the U.S. Department of Justice from using funds to interfere with state medical marijuana laws in no way modify the CSA, much less remove marijuana from Schedule I. *See, e.g.*, Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 538 (2018). Any argument that such provisions substantively change the underlying CSA marijuana prohibition misapprehends the state of the controlled substances laws, generally, and the function of appropriations riders, specifically.

II. LB 110—the Medical Cannabis Act

The MCA (under AM1680 to LB 110) would authorize the production, distribution, sale, and consumption of medical marijuana in Nebraska and establish an elaborate, state-run regulatory system to govern those activities. There is no material dispute that its text is intended to establish as comprehensive a regime as possible to place the state itself in the position of authorizing, licensing, inspecting, and monitoring these activities, and to collect fees from entities permitted by the state to produce, process, and dispense marijuana and marijuana products. Several of the MCA's provisions are worth specifically highlighting.

The MCA would permit certified patients and designated caregivers to apply to a newly-created "Cannabis Enforcement Department" for enrollment in a registry program, after which they would be permitted to purchase and consume marijuana and marijuana products. AM1680, §§ 8-10, 31. Non-Nebraska residents would be permitted to participate subject to certain conditions. §§ 17, 32. Patients would qualify for participation after a diagnosis of a "qualifying medical condition," which the MCA defines by enumerating seventeen specific health conditions. § 24.

The new Cannabis Enforcement Department would be charged with developing an application for patient enrollment in the registry program, § 34, registration of designated caregivers, § 35, permitting non-patient "caregivers" to possess marijuana and distribute it to patients, § 36, and for creating a written certification form to be used by participating health care practitioners. § 39(1). The new agency is also required to develop requirements for a medical necessity waiver to allow a patient to possess a greater quantity of cannabis than otherwise allowed, § 39(3), and to provide for classification and regulation of commercial producers based on size. § 39(4).

The MCA would require that "[a] producer of cannabis *shall provide a reliable and ongoing supply* of cannabis needed for the registry program." § 41(1) (emphasis added). It would direct the Cannabis Enforcement Department to register and regulate a limited number of producers and all qualifying processors for the production and processing of all cannabis within Nebraska. § 40. The Department would also be required to register a limited number of dispensaries for the dispensing and sale of all cannabis for medical use in the state. § 43. The MCA would direct the Nebraska State Patrol to assist in executing the MCA by conducting criminal background checks of industry participants. § 47.

Additionally, the MCA would provide for the collection of fees by the Cannabis Enforcement Department, directing the new agency to collect an application fee of $25,000 for dispensaries, an application fee of up to $5,000 for producers or processors or, for producers or processors in the tier allowed to cultivate the largest number of plants, an application fee of not more than $25,000. § 61. The Department shall establish an annual fee for producers in the tier allowed to cultivate the largest number of plants of not more than $40,000, and an annual fee of not more than $5,000 for producers not in such

tier. *Id.* Processors not licensed to perform solvent-based extractions on cannabis are subject to an annual fee of not more than $5,000, while processors permitted to perform additional solvent-based extractions are subject to an annual fee of not more than $40,000. *Id.* The Department shall establish an annual fee for dispensaries of not more than $25,000. *Id.* Laboratories are to be assessed an annual fee not to exceed $15,000. *Id.*

In sum, the MCA would, through its extensive licensure and regulatory scheme, place the state in the position of affirmatively facilitating the cultivation, processing, wholesale distribution, and retail sale of marijuana and marijuana products.

III. The U.S. Supreme Court's decision in *Gonzales v. Raich* establishes that state-level marijuana schemes like the Medical Cannabis Act are preempted by the CSA and therefore unconstitutional.

The Supremacy Clause of the United States Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. As a consequence of this constitutional command, "a state statute is void to the extent it conflicts with a federal statute – if, for example, 'compliance with both federal and state regulations is a physical impossibility' . . . or where the law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981) (citations omitted).

In 1996, California voters passed Proposition 215, known as the "Compassionate Use Act." Under this Act, "seriously ill" California residents were allowed access to marijuana for medical purposes. *Gonzales v. Raich*, 545 U.S. 1, 7 (2005). The Act exempted from criminal prosecution patients and their "primary caregivers" who possessed or cultivated marijuana for medicinal purposes with the recommendation or approval of a physician. *Id.* at 6. The Act required that the marijuana that was being grown by the patient or caregiver be used *only* for the patient's personal use. *Id.* The California scheme was thus a purely noncommercial, compassionate use-based regime.

After DEA agents raided the homes of two seriously ill Californians who were in full compliance with the California Act, those Californians brought suit, seeking injunctive and declaratory relief prohibiting the enforcement of the federal CSA to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. *Id.* at 7.

The case made its way to the Supreme Court, where the federal government argued that marijuana was a drug with "significant potential for abuse and dependence," and was a "fungible commodity that is regularly bought and sold in an interstate market." Reply Brief for Petitioners, *Ashcroft v. Raich*, 545 U.S. 1 (2005) (No. 03-1454), 2004 WL 2652615, at *1. "That market," the federal government explained, "like the market for

numerous other drugs having a significant potential for abuse and dependence, *is comprehensively regulated by the [CSA].*" *Id.* (emphasis added). Because Congress explicitly found that marijuana has "no currently accepted medical use in treatment in the United States" and had categorized marijuana as a "Schedule I" drug, the CSA was enacted "[i]n order to eradicate the market for such drugs." *Id.* As such, the federal government argued, "the CSA makes it unlawful to manufacture, distribute, dispense, or possess *any* Schedule I drug for *any* purpose, medical or otherwise, except as part of a strictly controlled research project." *Id.* (emphasis in original).

Nor, argued the federal government, was it "relevant that respondents' conduct may be lawful under state law" because "[u]nder the Supremacy Clause, state law cannot insulate conduct from the exercise of Congress's enumerated powers." *Id.* "Here," argued the government, "regulation of intrastate activities is an *essential* part of Congress's regulation of the interstate drug market and Congress's goal of achieving a comprehensive and uniform system that guards against drug abuse and diversion and permits manufacturing and distribution for legitimate medical uses only under carefully prescribed safeguards in the CSA itself." *Id.*

The Supreme Court agreed, having "no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave *a gaping hole in the CSA*." *Raich*, 545 U.S. at 22 (emphasis added).

"First," the Court said, "the fact that marijuana is used 'for personal medical purposes on the advice of a physician'" is irrelevant, because "the CSA designates marijuana as contraband for *any* purpose." *Id.* at 27 (emphasis in original). "Moreover," said the Court, "the CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner." *Id.* "Thus, even if respondents are correct that marijuana does have accepted medical uses . . . the CSA would still impose controls beyond what is required by California law" because "[t]he CSA requires manufacturers, physicians, pharmacies, and other handlers of controlled substances to comply with statutory and regulatory provisions mandating registration with the DEA, compliance with specific production quotas, security controls to guard against diversion, recordkeeping and reporting obligations, and prescription requirements." *Id.* "Accordingly," the Court concluded, "the mere fact that marijuana – like virtually every other controlled substance regulated by the CSA – is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA." *Id.*

"One need not have a degree in economics to understand why . . . an exemption [from the CSA] for the vast quantity of marijuana (or other drugs) locally cultivated for personal use . . . [would] have a substantial impact on the interstate market for [marijuana]." *Id.* at 28. Thus, the policy judgment Congress made in the CSA "that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of

validity." *Id.* Nor, said the Court, can "limiting the activity to marijuana possession and cultivation 'in accordance with state law' . . . serve to place [California's law] beyond congressional reach." *Id.* at 29.

The Court thus soundly rejected the notion that the marijuana production and use at issue "were not 'an essential part of a larger regulatory scheme' because they had been 'isolated by the State of California, and [are] policed by the State of California,' and thus remain 'entirely separated from the market.'" *Id.* at 30. "The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition," concluded the Court, and one that Congress rationally rejected when it enacted the CSA. *Id.*

In the end, concluded the Court, if California wished to legalize the growing, possession, and use of marijuana, it would have to seek permission to do so "in the halls of Congress." *Id.* at 33.

It is the opinion of this office that the MCA would suffer from the same legal infirmities as the California scheme in *Raich*. Notwithstanding the fact that state-level marijuana legalization schemes have spread in the recent (and discretionary) unwillingness by the federal government to civilly enforce the CSA against states, that exercise of discretion simply does not change the federal law that remains on the books and which Congress has steadfastly maintained.

That is evident from the text of the various administrative memoranda that have been issued to guide the federal government's present posture of nonenforcement. In the most recent of these, issued in early 2018, even as the U.S. Attorney General directed federal prosecutors to follow well-established principles in determining which marijuana activities merited prosecution within their jurisdiction, he premised his guidance with a reaffirmation of the CSA's prohibition of the cultivation, distribution, and possession of marijuana. Memorandum from Jefferson B. Sessions, Attorney General, U.S. Department of Justice, to All United States Attorneys (Jan. 4, 2018). Intra-bureaucratic guidance memoranda simply do not change federal law.

Given *Gonzales v. Raich*, and given the text and legislative history of the CSA, there is no doubt that *Congress* intended the CSA to serve the purpose of making *all* manufacture, sale, and possession of regulated drugs illegal, except to the extent explicitly authorized by the CSA. Nothing about the federal government's relaxed view of its enforcement obligations under the CSA changes the fact that *Congress* intended the CSA to prohibit the type of legalization proposed by the MCA.

Indeed, in the briefing it filed with the Supreme Court in *Gonzales v. Raich*, the federal government confirmed that it shares this understanding of the intent and purpose of the CSA. Brief for the Petitioners, *Ashcroft v. Raich*, 545 U.S. 1 (2005) (No. 03-1454), 2004 WL 1799022, at *11 ("Congress has concluded that regulation of *all* intrastate drug activity 'is *essential* to the effective control' of interstate drug trafficking.") (emphasis

added). Congress has taken no action in the decade-plus since to indicate a different intent and purpose. And, if "excepting drug activity for personal use or free distribution from the sweep of the CSA would discourage the consumption of lawful controlled substances and would undermine Congress's intent to regulate the drug market comprehensively to protect public health and safety" (Brief for the Petitioners, *Ashcroft v. Raich*, 545 U.S. 1 (2005) (No. 03-1454), 2004 WL 1799022, at *11), then the comprehensive commercial distribution scheme proposed by the MCA undoubtedly would do the same.

This is particularly so given the CSA's provision at 21 U.S.C. § 903 that a state law is preempted when a "positive conflict" exists such that a CSA provision and the state law in question "cannot consistently stand together." Such a positive conflict clearly exists between the CSA and the MCA.

CONCLUSION

In sum, we conclude that the MCA, by creating a state regulatory scheme that would affirmatively facilitate the cultivation, processing, wholesale distribution, and retail sale of federal contraband on an industrial scale, would frustrate and conflict with the purpose and intent of the CSA. Accordingly, we conclude that the MCA would be preempted by the CSA and would be, therefore, unconstitutional.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

David A. Lopez
Deputy Solicitor General

Approved by:

Attorney General

pc: Patrick J. O'Donnell
Clerk of the Nebraska Legislature