Akamai Cannabis Clinic
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August 10, 2020

Dear Congresswoman Gabbard,

Thank you very much for your letter of August 6, 2020 regarding the difficulties we are currently facing with the medical use of cannabis in Hawaii.

I'm thrilled to hear that you will always fight on behalf of the people of Hawai'i, because our medical cannabis patients, who now number over 30,000, really need your help.

The problem is that Hawaii's Medical Cannabis Program, created under the authority reserved to the states to decide how controlled substances are used within the state, is being subjected to the ongoing unlawful application of the federal regulation of the unauthorized non-medical use of marijuana.

Some people will say that Hawaii's Medical Cannabis Program is fine the way it is because there is no apparent immediate risk of federal interference. To those who hold this opinion I would ask that you look at the discrimination and injury that our medical cannabis patients are constantly facing as a direct result of the ongoing misconception that our program violates federal law.

Unable to obtain employment or keep a current job because of failing a urine drug screening test that is unable to detect acute cannabis impairment in the workplace as required by the federal drugfree workplace policy, unable to receive fair consideration in child custody hearings, unable to travel to other islands with their medicine, unable to receive medical advice on cannabis from the VA and other local healthcare organizations, unable to conduct research on the medical use of cannabis within the University of Hawaii System, unable to apply for life insurance, unable to receive Temporary Disability Insurance, unable to apply for a new firearms permit for home protection and hunting: these are just a few of the ways that our medical cannabis patients are being discriminated against every day.

While I appreciate all your efforts to fix this problem at the Congressional level, I believe that this situation needs to be approached from the bottom up, not the top down.

Because Hawaii decided to accept the medical use of cannabis under state law, it has an obligation to object to the current conflict between the federal regulation of the non-medical use of marijuana and the state-accepted medical use of cannabis in Hawaii.

Governor Cayetano, who signed Hawaii's Medical Use of Cannabis Act into law over twenty years ago, decided not to consult with the federal administration at that time about setting up a state-regulated medical cannabis program in Hawaii because he believed that the U.S. Department of Justice and the Drug Enforcement Administration (DEA) would not cooperate. As a result, our state has endured two decades of believing that it is somehow acceptable to run a state program that violates federal law, as though Congress never intended for there to be harmony between the state and federal regulation of controlled substances.

If we accept the finding that the state-accepted medical use of cannabis in Hawaii is "currently accepted medical use in treatment in the United States", as you discussed in your House floor speech on Marijuana Decriminalization on March 21, 2017, then we must recognize that there is no real conflict between state and federal law regarding the state-authorized medical use of cannabis. Hawaii's Medical Use of Cannabis Act has determined that cannabis has accepted medical use, and the federal Controlled Substances Act has established that a substance cannot be on the Schedule I controlled substance list if it has accepted medical use.

The problem lies with the unconstitutional application of the federal regulation that controls the unauthorized non-medical use of marijuana, 21 CFR 1308.11(d)(23), to the state-authorized medical use of cannabis in Hawaii. This error is what is creating the impression that Hawaii's Medical Cannabis Program is violating federal law.

There are at least two solutions to this conflict:

One is to move marijuana into a less restrictive federal Schedule, such as Schedule III, which would facilitate research at the federal level, allow for FDA-approved botanical cannabis drug products to be sold in a pharmacy with a refillable prescription, and make it possible for banks to work directly with medical cannabis companies. The major problem with this approach, aside from really only benefiting large pharmaceutical corporations, is that it does not pertain to state-authorized medical use, since cannabis produced under state license for exclusive intra-state medical use does not require FDA approval nor is it subject to FDA regulation.

Another approach, which is aligned with federalism and a recognition of state sovereignty, would be very similar to the existing federal Schedule I exemption for the ceremonial use of Peyote by members of the Native American Church. If a church can obtain a federal special use exemption for the ceremonial use of Peyote by its members, then there should be no reason why a state cannot do the same, especially when an administrative process for obtaining such an exemption from the DEA already exists.

In fact, obtaining such an exemption from the DEA makes perfect sense, since it fulfills the obligation that the State has to resolve a conflict with the federal regulation of the unauthorized non-medical use of marijuana that it created when it accepted the medical use of cannabis.

SB2462 is a bill that was introduced into the State Legislature this past Session, with the purpose of obtaining such an exemption from the DEA. Unfortunately, this bill died early on because of the misguided federal supremacy attitude held by one of our powerful Senate chairs, and because of deeply flawed legal advice provided by the Hawaii State Attorney General, which was refuted here.

It is difficult to understand why our state lawmakers are in general unwilling to address a conflict that the state created in the first place when it determined that cannabis has accepted medical use in Hawaii. I can only conclude that this is because of a longstanding campaign to promote the idea that it is somehow acceptable to have a state program that violates federal law, which is possibly being perpetuated by an unspoken agreement to keep things the way they are in order to avoid a veiled threat of federal intervention.

Similarly, it is difficult to comprehend why our local dispensaries will not take any action to remove this misconception that they are violating federal law. Maybe this is because many of their members have been operating within the black market for years and therefore have no regard for the rule of law. Or maybe they are enjoying the lack of competition that comes with deterring more competent law-abiding companies from becoming involved. Or maybe our dispensaries are just too scared and too over-regulated to consider doing anything that might bring more attention to themselves.

Whatever the reason, Hawaii's dispensaries are at a significant tax disadvantage because of being considered a Continuing Criminal Enterprise by the IRS. As a result, dispensaries are unable to deduct standard business operating expenses on their federal tax returns and must even pay a penalty for submitting their taxes in cash because they cannot engage in regular banking activities.

The result is an estimated tax burden of about seventy percent, which would make it extremely challenging for any normal business to survive, let alone organizations that must self-report their nearly 100% cash revenue. These increased costs are inevitably passed onto their customers, which means that our patients are often forced to make product selection decisions based upon ever-changing cheap dispensary deals rather than medical effectiveness.

I have done just about everything I can to get our state to take action on this issue, including writing numerous emails and letters to various individuals such as our state lawmakers, the Director of Hawaii's Department of Health, the Governor and Lieutenant Governor, media reporters, and even our State Attorney General.

I have also spent countless hours meeting with select elected officials and their staff, testifying at public hearings, educating my patients, and giving presentations on the subject at local seminars and conferences.

I even submitted multiple requests to your Hawaii and D.C. offices for a meeting with you on this subject, which I withdrew after a year of being intentionally overlooked by your legal staff.

However, your recent reply encouraged me to reach out to you one last time.

In the original version of Hawaii's Medical Use of Cannabis bill, our state lawmakers recognized the medical potential for cannabis in Hawaii by stating in the introduction "that allowing the medical use of marijuana could promote Hawaii as being an international center for medical treatment and research".

I believe that Hawaii can still realize this bold vision, but we must first free our patients and our medical cannabis program from the misconception that everyone involved is violating federal law.

As Hawaii's response to the SARS-CoV-2 pandemic has revealed, sometimes our Congressional representatives must become directly involved in state matters in order to get our State back on track. I hope you will consider a similar mission to convince our elected officials that we cannot wait any longer to end the unnecessary suffering that thousands of our medical cannabis patients are enduring every day.

Thank you for everything you are doing for the people of Hawai'i.

Aloha,

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