June 20, 2019

Representative Sharon E. Har
State Capitol, Room 418
415 S. Beretania Street
Honolulu, HI 96813

Dear Representative Har,

I am very interested in your recent comments on the House floor regarding Conf. Comm. Rep. No. 55 (HB290 – Relating to the Uniform Controlled Substances Act):

At 1:28:15:
"Thank you, Mr. Speaker, in opposition. Just briefly, this bill is unconstitutional, it goes against federal law, the fact of the matter is when you're going through the airport, through TSA, whether you're in federal air space, the fact of the matter is, the federal law controls, under federal law marijuana remains a Schedule I substance and is therefore illegal, this bill will be challenged, for these reasons I'm asking members to think carefully about this because you don't want your vote to go down that you've supported an unconstitutional bill. For these reasons, Mr. Speaker, I stand in opposition."

At 1:29:26, in response to Representative Lee's comments in support:
"Thank you, Mr. Speaker, still in opposition. California is different, it is not comprised of neighbor island states in which you have to travel, we don't have freeways that connect our neighbor island states to each other, and therefore the only mode of transport is through the airplane, and again airplanes fall under federal jurisdiction, again this law is unconstitutional. Thank you, Mr. Speaker."

Could you please explain why you think that the inter-island transportation of cannabis for personal medical use by our registered patients is unconstitutional.

I'm assuming you arrived at this conclusion based upon the Supremacy Clause, which can be used to justify federal pre-emption when there is a conflict between state and federal law.

However, in the case of the state-accepted medical use of cannabis, there is no conflict between state and federal law. Hawaii state law says that cannabis has medical use, and the federal Controlled Substances Act (CSA) says that a substance cannot be in federal Schedule I if it has accepted medical use. Therefore, the federal regulation that has marijuana listed as a Schedule I controlled substance does not apply to the medical use of cannabis in Hawaii.

This is a perfect example of how state law can impact federal law under federalism, which was envisioned by Congress when it provided a mechanism within the CSA for harmonizing the state and federal regulation of controlled substances when there is a change in state medical use.

Congress never defined the term "accepted medical use", which leaves it to the states to determine what constitutes accepted medical use. And Hawaii determined that cannabis has accepted medical use when it amended its Uniform Controlled Substances Act in 2000 by adding Section IX. "Medical Use of Marijuana", thereby authorizing patients to engage in the production of cannabis for personal medical use under the supervision of a physician.

You stated in your comments that "airplanes fall under federal jurisdiction", which would explain why there is already a federal aviation regulation that specifically exempts the carriage of marijuana aboard aircraft from federal transportation restrictions if such transportation is authorized by state law or state agency:

14 CFR 91.19 - Carriage of narcotic drugs, marihuana, and depressant or stimulant drugs or substances.
(a) Except as provided in paragraph (b) of this section, no person may operate a civil aircraft within the United States with knowledge that narcotic drugs, marihuana, and depressant or stimulant drugs or substances as defined in Federal or State statutes are carried in the aircraft.
(b) Paragraph (a) of this section **does not apply** to any carriage of narcotic drugs, marihuana, and depressant or stimulant drugs or substances authorized by or under any Federal or State statute or by any Federal or State agency."

Our state has already authorized the inter-island transportation of cannabis by dispensaries for analytical testing purposes, and some would argue that the existing statute also authorizes patients to transport cannabis between islands for personal medical use, as long as patients are not transporting for the purpose of transferring cannabis to other patients.

However, because of differences in the interpretation of this provision, and because the local law enforcement agencies that serve our state airports are improperly imposing federal restrictions upon patients traveling to other islands, specific authorization for the inter-island transportation of cannabis by registered patients for personal medical use is desperately needed.

If anything were to be considered unconstitutional, it would be the unauthorized application of a federal Schedule I administrative rule to the medical use of cannabis that is accepted under state law.

I hope you can find your way towards recognizing that the state-accepted medical use of cannabis in Hawaii is “currently accepted medical use in treatment in the United States”, in order to arrive at a more balanced position that would include the inter-island transportation of cannabis for personal medical use, and prevent the unconstitutional application of the Supremacy Clause to our Medical Use of Cannabis Program.

This position is supported by the State Medical Use Argument, which is attached for your convenience.

Thank you for considering this important issue. I look forward to hearing from you.

With warmest Aloha,

Clifton Otto, MD

Akamai Cannabis Clinic
3615 Harding Avenue #304, Honolulu, HI 96816
T: 808-233-8267 F: 808-395-4720

HAWAII
STATE MEDICAL USE
ARGUMENT

Clifton Otto, MD
June 11, 2019

cliftonotto@hotmail.com
808-233-8267

HAWAII STATE MEDICAL USE ARGUMENT

The State Medical Use Argument proposes that Hawaii's Medical Use of Cannabis Program does not violate federal law. This is based upon the finding that the medical use of cannabis in Hawaii is "currently accepted medical use in treatment in the United States", which means that the federal regulation of marihuana as a Schedule I controlled substance, and the criminal penalties associated with the illegal use and distribution of a Schedule I controlled substance, do not apply to the medical use of cannabis in Hawaii.

The federal regulation of marihuana as a Schedule I controlled substance does not apply to the medical use of cannabis in Hawaii because:

Point #1

The federal Controlled Substances Act (CSA) says that a substance cannot be in federal Schedule I if it has "currently accepted medical use in treatment in the United States".

(See 21 U.S.C. 812. Schedules of Controlled Substances, (b) Placement on schedules; findings required, (1) Schedule I, (B) The drug or other substance has no currently accepted medical use in treatment in the United States.)

Point #2

The courts have acknowledged that Congress never defined the term "currently accepted medical use", which leaves it to the states to determine what constitutes accepted medical use in their state.

(See ACT v. DEA, 930 F.2d 936,936 (D.C. Cir. 1991): Neither the statute nor its legislative history precisely defines the term "currently accepted medical use".)

Point #3

The courts have acknowledged that having medical use in just one state is sufficient for there to be medical use in the United States.

(See Grinspoon v. DEA, 828 F.2d 881,886 (1st Cir. 1987) Congress did not intend "accepted medical use in treatment in the United States" to require a finding of recognized medical use in every state.)

Point #4

The Supreme Court has acknowledged that the decision-making authority to accept the medical use of controlled substances is reserved to the states.

(See Gonzales v. Oregon (2006) The Attorney General has rulemaking power to fulfill his duties under the CSA. The specific respects in which he is authorized to make rules, however, instruct us that he is not authorized to make a rule declaring illegitimate a medical standard of care and treatment of patients that is specifically authorized under state law.)

Point #5

The State of Hawaii exercised its authority to accept the medical use of controlled substances when it determined that cannabis has medical use in Hawaii by enacting Hawaii's Medical Use of Cannabis Act in 2000, thereby creating a state-regulated medical use of cannabis program.

(See Hawaii's Uniform Controlled Substances Act, HRS 329, Part IX. Medical Use of Cannabis.

Point #6

State medical use of cannabis is "currently accepted medical use in treatment in the United States", which means that the federal regulation that places marijuana in federal Schedule I "**does not apply**" to the medical use of cannabis in Hawaii.

(See 21 CFR 1308.11 Schedule I. (d) Hallucinogenic substances. (23) Marihuana and (31) Tetrahydrocannabinols.)

Existing exemptions

We already have several examples of specific activities being exempt from state and federal Schedule I regulation:

Exempt from federal Schedule I:
21 CFR 1307.31 - Native American Church.
"The listing of peyote as a controlled substance in Schedule I **does not apply** to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration."

Exempt from Guam Schedule I:

Section 2. The following *new* subsection (g) is added to Appendix A of Chapter 67 of Title 9 Guam Code Annotated, to read as follows:
"(g) The enumeration of marihuana, tetrahydrocannabinols or chemical derivatives of these as Schedule I controlled substances **does not apply** to the medical use of cannabis pursuant to the Joaquin Concepcion Compassionate Cannabis Use Act of 2013."

Exempt from aircraft carriage restriction:

14 CFR 91.19 Carriage of narcotic drugs, marihuana, and depressant or stimulant drugs or substances.
(b) Paragraph (a) of this section **does not apply** to any carriage of narcotic drugs, marihuana, and depressant or stimulant drugs or substances authorized by or under any Federal or State statute or by any Federal or State agency."

The State of Hawaii has determined that cannabis has accepted medical use, which means that cannabis has currently accepted medical use in treatment in the United States, which means that the federal regulation that lists cannabis as a Schedule I controlled substance does not apply to the medical use of cannabis in Hawaii.

What is the advantage of continuing the current myth that our patients and our dispensaries are violating federal law?