

MEMORANDUM

The following analysis addresses some of the legal issues raised by the proposed Utah Medical Marijuana Initiative, which may appear on the ballot in November 2018.

- **The Marijuana Initiative Will Allow Some People to Grow Their Own Marijuana.** Holders of medical cannabis cards who live more than 100 miles from a cannabis dispensary would be allowed to grow “up to six cannabis plants for personal medical use” (Section 26-60b-201(6)(d).) Nothing in the Initiative allows the State to license or monitor homegrown marijuana operations.
- **The Marijuana Initiative Will Allow People Who Grow Their Own Marijuana to Evade Purchase and Use Limits.** The Marijuana Initiative allows users to purchase up to 2 oz. of cannabis (or 10 grams of tetrahydrocannabinol or cannabidiol) from dispensaries every 14 days.¹ (Section 26-60b-502(3)-(4).) But nothing in the Initiative prevents a person who is authorized to grow his own marijuana from consuming more than that from his own home-grown plants (which can be very large) or from also buying the maximum amount from a dispensary.
- **The Marijuana Initiative Will Create Significant Challenges for Law Enforcement.** Law enforcement will have no way to distinguish between personally-grown legal marijuana and illegal marijuana. Additionally, law enforcement will have no way to distinguish illegally purchased marijuana from legally purchased marijuana. To be sure, a person who has a medical cannabis card who is in possession of cannabis must have “a label that identifies that the cannabis or cannabis product was originally sold from a licensed cannabis dispensary” (Section 26-60b-204.) But we see no reason why a cardholder could not keep a label from marijuana bought legally and show it to law enforcement to justify possession of illegally purchased marijuana. In any event, the fine for someone who does not have the card or label is only \$100. (Section 26-60b-204(5).)
- **The Marijuana Initiative Requires Medical Marijuana to Be Sold Through Marijuana Dispensaries, Not Licensed Pharmacies.** As far as we can determine, marijuana would be the only serious controlled substance in Utah sold for alleged medicinal purposes without a prescription and outside of licensed pharmacies. (Section 26-60b-301, 26-60b-502.)

¹ Two ounces is a substantial amount of marijuana. Nick Lindsay, *How Many Grams In An Ounce*, Green Rush Daily at <https://greenrushdaily.com/many-grams-ounce/> Niraj Chokshi, *How Much Weed Is in a Joint? Pot Experts Have a New Estimate*, NY Times, July 14, 2016 available at <https://www.nytimes.com/2016/07/15/science/how-much-weed-is-in-a-joint-pot-experts-have-a-new-estimate.html? r=0>.

- **The Marijuana Initiative Requires the State to Destroy Records of Cannabis Sales after 60 Days, which Will Hamper Law Enforcement.** Because pharmacies distribute controlled substances, they are subject to strict record keeping requirements under both federal and state law, and all those records must be kept for at least five years. *See* Utah Admin. Code. § R156-37-602. The Marijuana Initiative does not impose these requirements on cannabis production establishments or dispensaries. And it requires the Department of Health to destroy the records it receives from cannabis production facilities and dispensaries within 60 days. (Section 26-60b-103.) This will severely hamper the ability of law enforcement to investigate and punish violations.
- **The Marijuana Initiative Allows Dispensaries to Give Free Samples to Medical Cannabis Cardholders.** (Section 26-60b-502(7).) This will encourage marijuana use.
- **Under the Marijuana Initiative, Large Numbers of Utahans Will Likely Qualify for Medical Cannabis Cards.** Under the proposed law, a person “is eligible” for a medical cannabis card if (1) the person is a Utah resident, (2) a physician diagnoses the person with a “qualifying illness,” and (3) the physician believes the person “may benefit from treatment with cannabis ...” (Section 26-60b-201.) The list of “qualifying illnesses” includes life-threatening and debilitating diseases, but also includes conditions that are difficult to diagnose and can afflict many people in varying degrees, such as “chronic pain,” which by some estimates includes over 15% of the population. Further, the physician must only believe that the patient “may benefit” from marijuana. Finally, the Department of Health does not have discretion to deny a medical cannabis card but “shall ... within 15 days” issue a medical cannabis card to a patient with a referral from a physician. (Section 26-60b-201(1).)
- **The Marijuana Initiative Allows a Person With a Criminal Background, Including Drug Convictions, to Get a Medical Cannabis Card.** (Section 26-60b-201.) There is no restriction for prior convictions. Also, there is no provision in the Initiative for revoking a person’s medical cannabis card.
- **The Marijuana Initiative Allows Marijuana Use for Conditions That Are Common but Difficult to Verify and Diagnose.** Among the “qualifying illnesses,” for example, is “chronic or debilitating pain.” (Section 26-60b-105(1)(k).) In other jurisdictions that legalized medical marijuana, “[o]nly a small percentage of users identified specific serious illnesses and conditions” while “chronic or debilitating pain,” which is hard to diagnose and verify, “is far and away the most common condition identified by medical marijuana

applicants.”² As one commentator notes: “[T]he statistical dominance of ‘chronic’ or ‘severe’ pain, as well as abundant anecdotal evidence, suggest that applicants offer, and physicians accept, chronic pain as a qualifying condition when in fact it is not....”³

- **The Marijuana Initiative Allows Patients to Get a Recommendation from a Physician Based on a One-time Visit.** Nothing in the Initiative requires the physician who refers a patient for a medical cannabis card to have a prior relationship with the patient, to review the patient’s medical records, or to schedule a follow-up visit to see how the treatment is working. The physician is required to do “a full assessment of the patient’s condition and medical history,” but this can presumably be done through patient reporting during a single visit. (Section 26-60b-107(4).) In states that have legalized medical marijuana, “prescribing physicians typically have no prior relationship with the applicant-patient” and often know nothing more about the patient than what the patient discloses during a single visit.⁴ Also, nothing in the Marijuana Initiative prevents a patient from going to a different physician every six months to get a renewal recommendation.
- **The Marijuana Initiative Will Allow a Small Number of Physicians to Give a Large Number of Recommendations.** Physicians can recommend cannabis for *up to 20%* of their patients (and there is no mechanism for enforcing this limitation) and some specialized physicians can recommend cannabis to an *unlimited* number of patients. (Section 26-60b-107(2)-(3).) In states where medical marijuana has been legalized, relatively few physicians have prescribed marijuana for the large majority of users. At one point in Colorado, for example, 70% of the recommendations were written by fewer than 15 physicians, “and severe and chronic pain, a catchall category, accounted for ninety-four percent of all reported conditions.”⁵
- **The Marijuana Initiative Does Not Require Physicians Providing a Recommendation to Have Any Training or Experience with the Effects of Marijuana or Even the Illness Being Treated.** (Section 26-60b-105; 26-60b-201.) Any “physician” can refer a patient for cannabis treatment. A “physician” is defined as anyone who, under Utah law, can prescribe Schedule II controlled substances. (Section 26-60b-107(1).) This list includes, among others, optometrists, podiatrists, dentists, physician’s assistants, and certified nurse midwives. (Utah Admin. Code § R156-37-301.)

² Gerald Caplan, *Medical Marijuana: A Study of Unintended Consequences*, 43 McGeorge L. Rev. 127, 136 available at http://www.mcgeorge.edu/Documents/Publications/06_Caplan_FINAL.pdf

³ *Id.*

⁴ *Id.* at 138.

⁵ *Id.* at 130.

- **The Marijuana Initiative Does Not Require a Prescription.** Once a person has a medical cannabis card, which is good for six months unless the physician recommends a shorter time (section 26-60b-201(5)), the cardholder can buy the maximum amount allowed under the law every 14 days and use it as he or she chooses. (Section 26-60b-502(3)-(4).) The Initiative does not require that the physician prescribe a specific dosage, and continued use is not determined by the effectiveness of the treatment. The dosage is not determined by the severity of the person’s illness or current need; and the amount that can be purchased is the same for every medical cannabis cardholder regardless of the type or severity of the condition.
- **The Marijuana Initiative Does Not Require Monitoring of the Medical Effects of Marijuana Usage on Particular Patients.** Drugs interact with patients in different ways depending on age, illness, medical and family history, and use of other medications. Unlike other legal drugs, which are closely monitored for adverse effects and interactions prior to being made generally available to the public, the Initiative bypasses the normal scientific processes designed to ensure that patients are properly protected. The Initiative does not require physicians to monitor patients for adverse side effects arising from marijuana use.
- **The Marijuana Initiative Prohibits Accountability for Physicians.** The Initiative prohibits any kind of civil or criminal liability, or even licensure sanctions, against any physician who recommends treatment with cannabis “in accordance with this chapter.” (Section 26-60b-108.) A physician could routinely rubber stamp recommendations for a medical cannabis card after a brief visit, or mistakenly recommend marijuana use under conditions where it would do harm, and there is no mechanism in the Initiative for investigating, punishing, or imposing sanctions on the physician.
- **The Marijuana Initiative Allows Minors to Use Medical Marijuana.** A parent or guardian can get a medical cannabis card if his or her child has a “qualifying illness.” (Sections 26-60b-201(2)(b) and 26-60b-105(1).) There is no lower age limit.
- **The Marijuana Initiative Will Make Marijuana More Accessible to Minors.** A careful review of the 2015-2016 National Survey on Drug Use and Health, conducted by the Substance Abuse and Mental Health Services Administration, an agency within the U.S Department of Health and Human Services, reveals that marijuana usage among children ages 12-17 (and adults ages 18-25) is generally significantly higher in states that have legalized recreational and medicinal use. Utah had the *lowest* rates of usage in the nation among both age groups.⁶ The marijuana initiative may change that.

⁶ See Substance Abuse and Mental Health Services Administration, Reports and Detailed Tables from the 2016 National Survey on Drug Use and Health available at <https://www.samhsa.gov/samhsa-data-outcomes-quality/major-data-collections/reports-detailed-tables-2016-NSDUH> and <https://www.samhsa.gov/data/population-data-nsduh/reports?tab=38>.

- **If the Marijuana Initiative Passes, Most Users of Medical Marijuana Will Likely Be Younger People.** While advocates of medical marijuana often portray the typical user as older and incurably ill, that has not been the case in states that have already legalized medical marijuana. Documents seized by law enforcement officers during a raid in San Diego, California showed that 72% of medical marijuana patients were between the ages of 17 and 40. In Colorado, 61% of patients had an average age of 39. In Montana, 25% of patients were between 21 and 30. In Nevada, 53% of patients were 44 or younger. This trend is typical in states that have legalized medical marijuana. The primary reason for which people take medical marijuana is not a specific diagnosable disease, but “chronic pain.”⁷
- **The Marijuana Initiative Immediately Legalizes Marijuana Possession Before Medical Cannabis Cards Are Distributed.** If arrested, the person must merely show that they “would be eligible for a medical cannabis card” and that his or her conduct “would have been lawful after July 1, 2020” when cards are first issued. (Section 58-37-3.7(1).)
- **The Marijuana Initiative Immediately Legalizes Possession By a Person With a Medical Marijuana Card from Another State.** (Section 58-37-3.7(2).) In other words, Utah must honor medical marijuana cards issued by other states.
- **The Marijuana Initiative Prohibits Landlords from Refusing to Rent to Medical Marijuana Users.** (Section 26-60b-110.) The Initiative does not say whether landlords can prohibit the possession or use of marijuana on the premises. But they cannot refuse to rent to a person because they are a medical cannabis card holder unless doing so would cause the landlord to lose a federal benefit.
- **The Marijuana Initiative Prohibits Local Zoning Ordinances Targeted at Marijuana Dispensaries.** Municipalities and counties cannot “enact a zoning ordinance that prohibits a cannabis dispensary from operating” within their jurisdiction. (Section 26-60b-506(1)-(2).)
- **The Marijuana Initiative Prohibits Local Law Enforcement from Cooperating With Federal Authorities Enforcing Federal Laws that Are Violated by Legal Use of Cannabis in Utah.** (Section 58-37-3.8.) This could eventually affect distribution of federal law enforcement funds to Utah.

⁷ Caplan, *supra* at 135-36.

- **The Marijuana Initiative Only Requires Cannabis Dispensaries to Be 300 feet (One Football Field) from Residential Neighborhoods and Only 600 Feet from Schools, Churches, Libraries, Parks, and Playgrounds.** (Section 4-41b-201(2)(a).) This is true even though federal law substantially increases penalties for distributing marijuana within 1,000 feet of schools and playgrounds. *See* 21 U.S.C. § 860.
- **The Marijuana Initiative Could Weaken Penalties for Causing Serious Bodily Injury while Operating a Vehicle Under the Influence of Marijuana.** Current law states that a person who negligently operates a motor vehicle while “having in the person’s body ... marijuana, tetrahydrocannabinols, or equivalents” and causes an accident resulting in serious bodily injury is guilty of a second degree felony. Utah Code § 58-37-8(2). The Marijuana Initiative appears to narrow this liability from anyone who has marijuana in their system to only those who *ingest* marijuana *while operating a motor vehicle*. Specifically, Section 58-37-3.6b(b) of the Initiative states: “An individual is not exempt from the penalties described in this title for *ingesting* cannabis or a cannabis product *while operating* a motor vehicle.” Whether intended or not, this poorly-worded provision appears to narrow liability for driving under the influence of marijuana.
- **The Marijuana Initiative Requires Science to Be Ignored.** The Initiative tasks the Cannabinoid Product Board (Utah Code § 26-61-201) with reviewing studies regarding the efficacy of cannabis treatment. This Board can “develop guidelines for treatment with cannabis” but those guidelines “may not limit the availability of cannabis” for any reason, even if further studies conclude marijuana use is more dangerous than currently known or is ineffective in treating any of the qualifying illnesses. (Section 26-61-202(6).)
- **The Legislature May Choose Not to Remedy Unintended Consequences.** Laws often have unknown or unintended consequences. That will almost certainly be the case here. State legislatures are often reluctant to amend or repeal ballot initiatives, choosing instead to respect the will of the people.
- **Marijuana Cultivation, Distribution, and Possession are Federal Crimes with Stern Penalties.** Congress criminalized the cultivation, distribution, and possession of marijuana. *See* 21 U.S.C. § 801 *et seq.* Marijuana is a Schedule 1 drug, listed alongside heroine, methamphetamine, LSD, and mescaline. *See* 21 U.S.C. § 812. Penalties range from up to one year imprisonment for a first conviction of possessing a small amount of marijuana (up to two years for a second conviction and three for a third conviction) to up to 5 years to life for selling or cultivating marijuana—depending on the amount—with fines ranging from \$1,000 to \$1,000,000. *See* 21 U.S.C. § 841 *et seq.*⁸ Distribution to a minor and distribution within 1,000 feet of a school or other protected place substantially increases the penalties.

⁸ *See also* United States Sentencing Guidelines Manual available at <https://www.ussc.gov/guidelines>.

See 21 U.S.C. §§ 859-860. A person convicted of possessing marijuana can also be denied certain federal benefits. See 21 U.S.C. §§ 862, 862a.

- **The Marijuana Initiative Will Put Utahans at Serious Risk of Federal Prosecution.** On January 4, 2018, Attorney General Jeff Sessions rescinded the Obama administration’s lenient approach to federal marijuana laws. He reminded Federal prosecutors of Congress’s determination “that marijuana is a dangerous drug and that marijuana activity is a serious crime.”⁹ Federal prosecutors may now vigorously enforce federal marijuana laws. Passing the marijuana initiative will encourage Utahans to violate federal marijuana laws, which could result in prosecution and imprisonment.
- **Gun Owners Who Rely on the Marijuana Initiative May Face Severe Federal Sentences.** Federal law imposes a mandatory minimum sentence of 5 years imprisonment on any person who “carries a firearm” or “in furtherance of such a crime, possesses a firearm” while selling or possessing marijuana. 18 U.S.C. § 924(c). This law is “often applied to nonviolent gun owners who do not actually harm or injure anyone. Additionally, the law applies even to legally purchased and registered guns and rifles found in the person’s home, even if the guns were not present or used during the actual offense.”¹⁰ A person with a concealed-carry permit who lawfully carries a firearm while relying on the marijuana initiative to possess or distribute marijuana risks years of mandatory imprisonment.
- **Immigrants Who Rely on the Marijuana Initiative Could Harm Their Immigration Status.** According to the Immigrant Legal Resource Center, “Immigrants may reasonably think that using marijuana according to these state laws will not hurt their immigration status. Unfortunately, that’s wrong! It is still a federal offense to possess marijuana, and immigration is a part of federal law.”¹¹ Use or possession of marijuana can affect the immigrant if, for example, he or she applies for a green card, applies for citizenship, or travels outside the United States.¹²

⁹ See Memo from Attorney General Jeff Sessions to United States Attorneys dated Jan. 4, 2018 available at <https://www.documentcloud.org/documents/4343764-Sessions-marijuana-memo.html>. See also Charlie Savage and Jack Healy, *Trump Administration Takes Steps That Could Threaten Marijuana Legalization Movement*, NY Times, Jan. 4, 2018 available at <https://www.nytimes.com/2018/01/04/us/politics/marijuana-legalization-justice-department-prosecutions.html> (explaining that the new policy “freed prosecutors to more aggressively enforce federal laws against [marijuana] in states that have decriminalized its production and sale”).

¹⁰ See Families Against Mandatory Minimums, *Gun Mandatory Minimum Sentences* available at <http://famm.org/projects/federal/us-congress/gun-mandatory-minimum-sentences/>

¹¹ See Immigration Legal Resource Center, *Warning for Immigrants About Medical and Legalized Marijuana* available at https://www.ilrc.org/sites/default/files/resources/marijuana_english.pdf

¹² See *id.*