



Wash. effort to legalize pot faces legal pitfalls

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SEATTLE (AP) — An effort to decriminalize and tax recreational marijuana sales for adults in Washington state has won some high-profile endorsements — including from two former Seattle U.S. attorneys and the former head of the FBI here — and its sponsors are well on their way to collecting enough signatures to place the measure before the Legislature.

Supporters say it would boost funding for education and public health, and polls show a slight majority of Washington voters approve.

But Initiative 502 faces serious legal pitfalls. Not only could the federal agents raid and shut down the state-licensed pot grows and retail stores, they could ask a judge to simply throw out the entire system on the grounds that it conflicts with federal law.

And that new tax revenue, conservatively estimated at \$215 million a year? The feds can almost certainly just take it, as proceeds of drug deals that remain illegal under federal law.

Whether the federal government would actually take such steps is anybody's guess — and it's what makes the effort, which is being closely watched by legalization advocates around the country, a gamble.

"This is an evolving area of the law," says [Alison Holcomb](#), the initiative's campaign director. "We'd be foolhardy to say we think we know what's going to happen."

Initiative 502 would create a system of state-licensed growers, processors and stores, and would impose a 25 percent excise tax at each stage. Adults 21 and over could buy up to an ounce of dried marijuana; one pound of marijuana-infused product in solid form, such as brownies; or 72 ounces of marijuana-infused liquids. It would be illegal to drive with more than 5 nanograms of THC, the active ingredient of cannabis, per milliliter of blood.

Holcomb's group, New Approach Washington, is pushing the measure at a time of serious upheaval in the marijuana world, with the Obama administration pressuring states and cities that attempt to regulate the medical marijuana industry.

Federal prosecutors in California have announced a concerted effort to warn property owners that they could face sanctions if they rent to marijuana grows or dispensaries, and the DOJ has made clear that prosecuting commercial marijuana businesses remains a priority. Rhode Island Gov. [Lincoln Chafee](#)

announced last month that he was suspending a system to license nonprofit "compassion centers" where people could get medical pot, out of concerns it would violate federal law. And the raids on 19 medical marijuana dispensaries by [Drug Enforcement Administration](#) agents and sheriffs' deputies in Western Washington last week served as a wake-up call about how much the feds will tolerate here.

At the same time, Washington isn't alone in considering legalizing the fun use of marijuana. Colorado will vote next year if a similar measure there makes the ballot. Supporters say that treating marijuana use as a crime has failed, and now is the time to decriminalize, tax and regulate the drug.

Whether states can get away with enacting such systems — whether they can regulate a substance that is illegal under federal law — isn't clear.

No one disputes that federal authorities have the power to enforce federal law, and thus could shut down state-licensed marijuana gardens or stores at whim, arresting the proprietors and prosecuting them in federal court.

Nor do many dispute that states have the power to decriminalize marijuana under their own laws. That's why states can "legalize" medical marijuana — they simply decide to stop prosecuting people for certain offenses. Federal authorities can't make state officials enforce federal law, and there aren't nearly enough DEA agents or assistant U.S. attorneys to keep up with all the marijuana gardens, dispensaries or patients.

The stickier issue is whether states can go beyond simple decriminalization by setting up licensing or other regulatory schemes. In such cases, rather than doing nothing in the face of federal marijuana prohibition — i.e., not prosecuting people under state law — a state would be doing something, and that something could arguably conflict with federal law. When state and federal laws conflict, the federal law wins out; it "preempts" the state law.

"Can the feds bring a challenge on preemption grounds? Yes. Will they prevail? We don't know," Holcomb says.

She says I-502 is drafted as strongly as possible to survive such a challenge. The Controlled Substances Act contains a provision saying that it will only preempt state laws that are in "positive conflict" with it — in other words, if the state law forces someone to violate federal law. I-502 doesn't do that, Holcomb says, because a citizen could comply with both laws by simply not buying, growing or selling marijuana. The licensing scheme simply helps state police determine who is complying with state law, she said.

Karl Manheim, a constitutional law professor at Loyola Law School in Los Angeles, said he tended to agree with that analysis, and two recent opinions from state appeals courts in California took the view that states can take some regulatory steps without running afoul of the federal Controlled Substances Act.

But another California appeals court ruling last month took the opposite view. It unanimously said that in addition to considering whether a state law forces someone to violate federal law, courts must also look at whether the state law "frustrates the purpose" of federal laws. The court noted that there is some question as to whether state or local officials could be liable for aiding and abetting federal crimes. The court threw out a dispensary licensing scheme in Long Beach on the grounds that it authorized people to engage in conduct at odds with the federal law, and thus frustrated the purpose of the federal law.

The Oregon Supreme Court came to the same conclusion last year in determining that that state's medical marijuana law could be preempted by federal law.

Under such a rationale, licensing schemes that already exist for medical marijuana distribution — such as in Colorado and New Mexico — would also be subject to federal preemption. But the DOJ has never

made any such arguments. Some speculate it's because the distribution was for medical reasons, and trumping such laws would be more unpopular than trumping a scheme for distributing recreational marijuana.

In an interview this week, Seattle U.S. Attorney [Jenny Durkan](#) declined to discuss whether she believed the [Justice Department](#) could preempt I-502.

"Every lawyer that I have talked to, including those who support the initiative, think that it will be preempted by federal law," Durkan said.

Douglas Hiatt, a Seattle medical marijuana attorney and advocate of legalization, agrees. He argues that it requires those who would apply for licenses to incriminate themselves in violation of the Fifth Amendment, that the state would be laundering money when it taxes marijuana transfers, and that the intoxicated driving limit is so strict that it would keep medical marijuana patients from driving at all.

If the parts of I-502 he considers unconstitutional were struck down, the result could be that Washington would wind up with possession of up to an ounce of marijuana being decriminalized, with no way to legally buy it, he said.

Holcomb disputes his criticism, but concedes the Justice Department almost certainly could seize any taxes collected through a "forfeiture" action — one that requires the disgorgement of proceeds of illegal activity.

Ultimately, both Holcomb and Hiatt propose legalization approaches that might be preempted by federal law. Hiatt's group, Sensible Washington, wants to first repeal all state criminal and civil penalties for marijuana in any amount. Having done that, Hiatt argues, marijuana would be totally legal under state law — and the Legislature could then pass regulations governing pot sales.

Faced with the choice between no state pot laws and whatever regulation scheme the Legislature comes up with, the DOJ would be less likely to seek to invalidate the Legislature's scheme, Hiatt argues. That's the strategy states used in knocking down the federal prohibition of alcohol in the 1920s and '30s.

But Sensible Washington's initiative has twice failed to qualify for the ballot.

Holcomb hopes the DOJ will not try to preempt I-502 — that the feds will ultimately consider its licensing and taxing scheme a lesser evil than the "wild West" of full decriminalization.

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