

MEMORANDUM

To: The Church of Jesus Christ of Latter-day Saints

From: Kirton McConkie

Re: Response to Libertas Institute

The Libertas Institute denounces our 31 points of legal analysis as a “political attack piece, designed to cast fear and confusion.” But in almost every respect Libertas actually agrees with our analysis. Where Libertas disagrees on the law, it is simply wrong.

Libertas’s response is not really a legal rebuttal but rather an assertion of its own libertarian policy preferences. Libertas appears to favor full legalization of marijuana, and the Marijuana Initiative is a big step in that direction. The primary purpose of our analysis, by contrast, was to identify some of the legal problems and risks the Marijuana Initiative would create. Whether those problems and risks are worth it—or whether the Marijuana Initiative is a slippery slope to full legalization—is a policy question for voters to decide.

We will now set forth each of the original 31 points in our analysis and respond to Libertas’s critique.

- **“The Marijuana Initiative Will Allow Some People to Grow their Own Marijuana.”** Libertas does not dispute the primary point – that people who live more than 100 miles from a dispensary can grow marijuana without any oversight. Libertas argues that such marijuana cannot be “homegrown,” by which Libertas means it cannot be grown in a person’s home. Of course, the word “homegrown” is not limited to growing something inside one’s house. Our point was that it can be privately grown on one’s own property. But Libertas’s quibble is false even under its own narrow definition of “homegrown.” The Initiative only prohibits homegrown operations “within 300 feet of an area zoned *exclusively* for residential use.” (Section 26-60b-201(6)(d).) Marijuana can in fact be grown in a person’s home or in any other enclosed space that is not in an area zoned “*exclusively*” for residential use.

Libertas’s claim that this provision was included as an “insurance policy” to make sure “bureaucrats” do not stand in the way of implementation raises another concern. If for *any* reason dispensaries are not up and running by January 1, 2021, then every person who has a medical cannabis card can start growing their own marijuana. Or if only a few dispensaries are up and running, then large numbers of people will be able to grow their own marijuana.

Finally, Libertas’s claim that “nobody will live in an area in which there is not a dispensary within 100 miles” is simply speculation. Libertas “estimate[s] that no more than 15 dispensaries will operate statewide.”

- **“The Marijuana Initiative Will Allow People Who Grow Their Own Marijuana to Evade Purchase and Use Limits.”** Libertas does not dispute this. It only speculates that no one will be able to grow their own marijuana because there will be dispensaries within 100 miles of every medical cannabis cardholder.
- **“The Marijuana Initiative Will Create Significant Challenges for Law Enforcement.”** Libertas calls this concern “silly” because “the initiative includes a database to track all cannabis plants and purchases, and any officer suspicious of one’s cannabis possession can verify that 1) the person has a legal medical card authorized by a physician; and 2) the patient actually purchased the cannabis from a dispensary as allowed under the law.” Libertas does not explain why a person could not show to law enforcement a label from *legally*-purchased marijuana and simply claim that *illegally*-purchased marijuana was purchased from a dispensary. Law enforcement will have no way of knowing whether the marijuana in the person’s possession actually came with the dispensary label or whether it was purchased illegally on the street. Also, the “database” Libertas refers to is the State database, which must destroy records after 60 days. (Section 26-60b-103.)

Libertas claims that “cannabis obtained illegally is still subject to a class B misdemeanor, which carries a penalty of a fine up to \$1,000 and up to six months in jail.” But the only way law enforcement will know if a cardholder purchased cannabis illegally would be if the person admitted it, which is extremely unlikely.

- **“The Marijuana Initiative Requires Medical Marijuana to Be Sold Through Marijuana Dispensaries, Not Licensed Pharmacies.”** Libertas *agrees* and explains that “because of federal ‘law’ pharmacies “cannot provide it to the public for sale” and thus medical marijuana must be sold “outside of the pharmacy system” That’s precisely our point.
- **“The Marijuana Initiative Requires the State to Destroy Records of Cannabis Sales after 60 Days, which Will Hamper Law Enforcement.”** Libertas *agrees*. “This is intentional,” says Libertas, “because cannabis is a Schedule I substance and thus illegal” under federal law. In other words, the very point is to hamper law enforcement.
- **“The Marijuana Initiative Allows Dispensaries to Give Free Samples to Medical Cannabis Cardholders.”** Libertas *agrees*, asserting that the purpose is “to allow low/no-income patients to access medicine from dispensaries who wish to offer it to them on a charitable basis.” Perhaps. But charity is not the only reason for handing out free samples.

- **“Under the Marijuana Initiative, Large Numbers of Utahans Will Likely Qualify for Medical Cannabis Cards.”** Nothing in the Libertas response disputes this. The problem is not so much that large numbers of Utahans will actually qualify, it is that large numbers of Utahans will likely be able to get a medical cannabis card even if they *don’t* qualify because (1) some of the qualifying illnesses are difficult to diagnose, (2) patients can go from physician to physician until they find one willing to refer them for a medical cannabis card, (3) some physicians can refer a limitless number of patients and all can refer up to 20% of their patients, and (4) physicians face no legal accountability for referring patients who do not actually qualify. The experience in other states that have legalized medical marijuana has been that a small number of ideologically sympathetic physicians issue the majority of prescriptions, primarily to younger people who complain of undiagnosable “chronic pain.” This Initiative would allow that to happen in Utah.
- **“The Medical Marijuana Initiative Allows a Person With a Criminal Background, Including Drug Convictions, to Get a Medical Cannabis Card.”** Libertas *agrees*. Even a person who has been convicted of illegally dealing drugs could get a medical cannabis card.
- **“The Marijuana Initiative Allows Marijuana Use for Conditions That Are Common but Difficult to Verify and Diagnose.”** Libertas *agrees*. Libertas even agrees that people will lie to a physician to get a medical cannabis card: “This will of course happen.” Libertas says that “any system can and will be abused.” This one seems set up for widespread abuse.
- **“The Marijuana Initiative Allows Patients to Get a Recommendation from a Physician Based on a One-time Visit.”** Libertas attempts to dispute this by pointing to this language in the Initiative: “A physician may recommend cannabis to an individual ... only in the course of a physician-patient relationship after the physician has completed a full assessment of the patient’s condition and medical history.” Libertas claims the “intent” of this language is “to ensure a pre-existing relationship” But under existing law, a “physician-patient relationship” is created during a single visit. Libertas concedes the language may not suffice.

Libertas suggests that, in any case, this should not be a concern because physicians “have access to a database that shows the ‘purchase history of cannabis or a cannabis product by a medical cannabis card holder, including the time and date of the purchase, [and] the quantity and type of cannabis or cannabis product purchased’ to see past use and recommendations from other physicians.” But Libertas ensured that the “database” can only keep records for 60 days. (Section 26-60b-103.) And nothing in the Initiative gives physicians access to the database. So, in fact, physicians have no way of tracking a patient’s purchase history.

- **“The Marijuana Initiative Will Allow a Small Number of Physicians to Give a Large Number of Recommendations.”** Libertas *agrees* and says this is necessary because many physicians may not be willing to recommend an illegal drug—so the ones who are willing must be able to

recommend marijuana use to lots of patients. The problem is that the Initiative will allow a small number of activist physicians to refer large numbers of people suffering from alleged “chronic pain” for a medical cannabis card, whether they legitimately need it or not. Libertas again claims that law enforcement “retains the ability to identify, in the database, which physicians recommend cannabis for which patient” and that “concerns about abuse or malpractice can be resolved through existing investigatory procedures.” But this database cannot keep records beyond 60 days (section 26-60b-103) and the Initiative protects physicians who abuse the system from *any* legal liability under State law (section 26-60b-108).

- **“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.”** Libertas *agrees* but points out that physicians “who choose to recommend cannabis can seek continuing education” or “review ample medical literature that speaks to the benefits and risks of cannabis.” Indeed they can. Still, physicians—including dentists, optometrists, and podiatrists—can recommend marijuana without having any training or education on the subject. What is the proper dosage of marijuana for a particular ailment? How much is too much? What are the risks to particular patients? How does marijuana interact with other drugs? No one knows the full answers to these and many other questions. A recent study, for example, pointed out that use of marijuana by pregnant women has increased and that there may be substantial risks to unborn children.¹ Assuming it even exists, physicians without proper training might not be aware of this risk. Which points to another problem with the Initiative—nothing in the law requires any warning to patients about *any* possible risks, except whether the product may contain allergens. (Section 4-41b-602.) And those who grow their own medical marijuana will not be under the supervision of a physician at all.

Moreover, the Marijuana Initiative would allow the purchase and consumption of 2 ounces of marijuana every 14 days. That is a large amount of marijuana that can be used without any medical supervision. At .5 grams a marijuana joint, that is enough for 112 joints—56 a week or 8 per day. Some experts suggest the average joint has closer to .33 grams, so the number could even be greater. See <https://www.nytimes.com/2016/07/15/science/how-much-weed-is-in-a-joint-pot-experts-have-a-new-estimate.html>. While the Marijuana Initiative prohibits smoking cannabis, the point is that 2 ounces is a substantial amount of marijuana and enforcing the prohibition on smoking marijuana for medicinal purposes will be difficult, at best.

- **“The Marijuana Initiative Does Not Require a Prescription.”** Libertas *agrees* and points out that this is because if a physician goes too far in what he says to a patient he would “aid or abet commission of a federal crime.” In fact, the mere act of recommending a patient for a medical cannabis card could be considered aiding and abetting violation of federal drug laws. See 18 U.S.C. § 2 and 21 U.S.C. § 846.

¹ <https://www.cnn.com/2017/12/26/health/marijuana-pregnancy-statistics-study/index.html>

- **“The Marijuana Initiative Does Not Require Monitoring the Medical Effects of Marijuana Usage on Particular Patients.”** *Libertas agrees* but argues that such monitoring is not necessary because marijuana has been used for centuries. In reality, we know little about the effects of marijuana. It is not well known, for example, how marijuana affects someone with depression. “Views are mixed on whether marijuana can lead to depression or treat depression.”² “Studies show cannabis use is likely to increase the risk of developing schizophrenia, other psychoses, and social anxiety disorders.”³ “Marijuana has also been linked with other mental health conditions.”⁴ Marijuana “also poses enormous risks if you have asthma.”⁵ Marijuana use “can increase your heart rate by as much as two times for up to 3 hours. That’s why some people have a heart attack right after they use marijuana.”⁶ Marijuana certainly has risks, known and unknown, yet the Initiative allows physicians who know nothing about marijuana to recommend its use for conditions they are not trained to treat and does not require them to follow up with their patient to ensure safe use.

Of course, not all of the negative effects of marijuana are necessarily classified as “medical.” When marijuana is legalized, “increasingly potent options” become available, and much higher percentages of people use marijuana daily, resulting in such mundane conditions as lack of motivation. As one recent article reports, “For Keith Humphreys, a professor of psychiatry and behavioral sciences at Stanford University, the most compelling evidence of the deleterious effects comes from users themselves.” And these include “lost jobs, lost marriages, lost money, lost time.” See Annie Lowrey, *America’s Invisible Pot Addicts*, *The Atlantic*, Aug. 20, 2018, *available at* <https://www.theatlantic.com/ideas/archive/2018/08/americas-invisible-pot-addicts/567886/>. The medicinal use of marijuana, a mind and mood-altering drug, can have significant side effects.

- **“The Marijuana Initiative Prohibits Accountability for Physicians.”** *Libertas agrees* that the Initiative “shield[s] physicians” from any kind of legal accountability for “recommending cannabis.” *Libertas* says “[m]edical boards” could still enforce “other things.” Still, unlike any other treatment, a patient who is seriously harmed would be denied the right to sue a doctor who negligently recommends cannabis use. And the State can take no action against a physician who abuses the power to refer patients for a medical cannabis card.
- **“The Marijuana Initiative Allows Minors to Use Medical Marijuana.”** *Libertas agrees* and says this “is one of the main goals of the initiative”

² <https://www.healthline.com/health/depression/medical-marijuana-for-depression#risks-and-warnings>

³ <https://www.nbcnews.com/health/health-news/report-marijuana-users-risk-schizophrenia-drug-helps-pain-n706196>

⁴ <https://www.healthline.com/health/depression/medical-marijuana-for-depression#risks-and-warnings>

⁵ <https://www.healthline.com/health/marijuana-and-asthma#marijuana-risks-for-asthma>

⁶ <https://www.webmd.com/mental-health/addiction/marijuana-use-and-its-effects#1>

- **“The Marijuana Initiative Will Make Marijuana More Accessible to Minors.”** Libertas does not dispute that legalizing marijuana for medical purposes will make it more accessible to minors. Nor does it dispute that marijuana use among people age 12 to 25 is generally significantly higher in states that have legalized recreational or medicinal marijuana. The studies cited by Libertas do not refute either point.
- **“If the Marijuana Initiative Passes, Most Users of Medical Marijuana Will Likely Be Younger People.”** Libertas offers no rebuttal. To Libertas, all that matters is that “those who actually need this option, no matter their age, have the legal ability to do so without fear of criminal punishment.” But one major problem is that many people who do not “actually need this option” will be able to take advantage of the law to get legal access to marijuana.
- **“The Marijuana Initiative Immediately Legalizes Marijuana Possession Before Medical Cannabis Cards Are Distributed.”** Libertas responds to other unnamed “opponents” and then agrees with what we said: once the Initiative is passed, anyone who is caught with marijuana before actually obtaining a medical cannabis card merely has to show that he or she is eligible for a card. In other words, as Libertas says, medical marijuana will effectively be legalized before the state can “set[] up the regulations, the licensure process, the permit process, the database, etc.” Is this the best approach?
- **“The Marijuana Initiative Immediately Legalizes Possession By a Person With a Medical Marijuana Card from Another State.”** Libertas agrees that people with a medical marijuana card from another state—regardless of why it was issued—are “given protection” in Utah once the Initiative passes.
- **“The Marijuana Initiative Prohibits Landlords from Refusing to Rent to Medical Marijuana Users.”** Libertas agrees and says this provision “is intended to be consistent with other anti-discrimination activities imposed upon landlords,” pointing out that “the LDS Church . . . supported anti-discrimination laws that prohibit landlords from evicting people because of their sexuality” Marijuana possession is a federal crime and landlords may not want such a crime occurring on their property. Marijuana possession is not akin to race or sexual identity and marijuana users have not faced a history of invidious discrimination.
- **“The Marijuana Initiative Prohibits Local Zoning Ordinances Targeted at Marijuana Dispensaries.”** Libertas agrees and admits that this is intentional because, in its view, marijuana dispensaries “should be treated as other drug stores and dispensaries.” Except they won’t be because they’ll be exempt from ordinary regulations that protect the public from harmful drugs. Drug stores don’t have the right to sell drugs that violate federal law.

- **“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.”** Libertas admits that this is “basically the whole purpose of the initiative” They do not want local or state law enforcement “spend[ing] any time attempting to investigate, arrest, or punish” someone for possessing or distributing medical marijuana.
- **“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.”** Libertas *agrees* and says they “think it inappropriate to ban dispensaries from any close proximity” to such locations.
- **“The Marijuana Initiative Could Weaken Penalties for Causing Serious Bodily Injury while Operating a Vehicle Under the Influence of Marijuana.”** Libertas says that “DUI laws remain enforceable,” which is true. But Libertas does not dispute that the Initiative limits penalties for causing an accident while under the influence of marijuana. So, yes, a person can still be charged with DUI for operating a vehicle under the influence of marijuana, but if he causes an accident resulting in serious bodily injury he can no longer be charged with a felony unless he ingested the marijuana “while operating” the vehicle. Why does the Initiative give favorable treatment to driving while under the influence of marijuana?
- **“The Marijuana Initiative Requires Science to Be Ignored.”** Libertas agrees that the Cannabinoid Product Board, tasked by the Legislature with creating guidelines after reviewing studies regarding the efficacy of medical marijuana, cannot limit the availability of cannabis no matter what the science shows.
- **“The Legislature May Choose Not to Remedy Unintended Consequences.”** Libertas does not disagree. Our point is simply that while the Legislature can repeal or amend an Initiative, they are generally reluctant to do so, which means voters could be stuck for years with the negative and unintended consequences of the Initiative.
- **“Marijuana Cultivation, Distribution, and Possession are Federal Crimes with Stern Penalties.”** Libertas *agrees* but says that “no federal crackdown on cancer patients (for example) is occurring.” Our point was to make voters aware that legalizing medicinal marijuana under state law does not change its illegality under federal law. Further, the risk is not so much that federal authorities will crack down on individual users—like cancer patients. (Though, if someone is being investigated for a different federal crime, federal authorities could arrest them and hold them for possessing marijuana.) The greater risk is to Utahans who in good faith rely on state law to establish a marijuana cultivation facility or dispensary. Because federal law deems this drug dealing, they run the risk that federal authorities and courts will shut them down, seize all proceeds

of their operation, prosecute them, impose substantial fines on them, and even send them to federal prison.

Medical marijuana advocates typically try to minimize these concerns, but the reality is that federal law has in fact been enforced, even under the previous administration. In one case in Montana, seven defendants operating a state-licensed marijuana operation were charged with offenses related to the manufacture and distribution of marijuana. The federal judge hearing their case assumed “that the Defendants’ conduct was in full compliance with the Montana Medical Marijuana Act” *United States v. Washington*, 887 F. Supp. 2d 1077, 1083 (D. Mont. 2012). The defendants explained that they relied not only on state law, but on statements by federal officials that they would “refrain from prosecuting participants in a state-authorized medical marijuana program” *Id.* at 1084. “They began cultivating and selling marijuana under the assumption they could become legitimate providers under state law and not be selectively prosecuted under federal law.” *Id.* But, as the judge explained, that choice “has now proven very costly for these providers ... whose medical marijuana businesses have been raided by federal agents, and who are now facing felony marijuana distribution charges, many of which carry mandatory minimum sentences of five years or more in federal prison, notwithstanding the fact that many of these same individuals have non-existent or minimal criminal histories.” *Id.* The court recognized the “unfairness” of this but explained that “marijuana remains illegal under federal law.” *Id.* at 1109.

In October 2009, several medical marijuana collectives operating in compliance with California law were raided by federal authorities and the defendants were charged with manufacturing and distributing marijuana. *See United States v. Stacy*, 734 F. Supp. 2d 1074 (S.D. Cal. 2010). The defendant argued that he had been “entrapped” and that the federal government should be prevented from enforcing the law because of statements that had been made, including by President Obama and Attorney General Eric Holder, about not enforcing such laws. The court refused to allow him to present this defense.

- **“The Marijuana Initiative Will Put Utahans at Serious Risk of Federal Prosecution.”** Both federal and state law currently “allow for medical cannabis users to be prosecuted and imprisoned” Changing state law does not affect the possible enforcement of federal law. There is nothing confusing about this. Libertas says “sick Utahans should be free to make a judgment call on their own. Let the federal government do whatever it’s going to do.” That’s easy to say, but voters need to be aware of the risk.
- **“Gun Owners Who Rely on the Marijuana Initiative May Face Severe Federal Sentences.”** Libertas does not disagree but says only that there is “uncertainty” about whether the federal government would actually enforce such laws. Neither Libertas nor anyone else can guarantee any medical marijuana user who possesses a gun that he or she will not be prosecuted under federal

law, and “mandatory” minimum sentences are called “mandatory” for a reason—the judge has no discretion to lower the penalty, even if the person possessed marijuana for medical purposes. Owners of dispensaries and others authorized under the Initiative to possess significant quantities of marijuana will face serious risks if they carry a firearm.

- **“Immigrants Who Rely on the Marijuana Initiative Could Harm Their Immigration Status.”** Libertas does not dispute this but says immigrants should be offered the “choice” to accept this risk. The problem is that the Marijuana Initiative will induce unsuspecting people to run risks with life-altering consequences.