



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

June 17, 2005

Susan M. Allan, M.D.
Public Health Director
Department of Human Services
Health Services
Portland State Office Building
800 NE Oregon Street
Portland, OR 97232

Re: *Gonzales v. Raich*; Oregon Medical Marijuana Act

Dear Dr. Allan:

You have asked several questions regarding the affect of the recent United States Supreme Court decision, *Gonzales v. Raich*, on the operation of the Oregon Medical Marijuana Program. Your questions and our responses follow.

1. *Does Gonzales v. Raich, 545 U.S. ____ (2005), 125 S. Ct. 2195, Slip Op. 03-1454, invalidate the Oregon statutes authorizing the operation of the Oregon Medical Marijuana Program?*

No. *Raich* addresses a narrow constitutional question concerning the power of the federal government to regulate intrastate activity under the Commerce Clause. It does not invalidate the Oregon Medical Marijuana Act (Act), ORS 475.300 to 475.346.

Raich holds that Congress has the authority to prohibit the wholly local cultivation of marijuana even if it is used for medicinal purposes pursuant to California law. Precipitating the lawsuit, federal law enforcement officials in California had seized and destroyed an individual's cannabis plants, after county officials had concluded that her cultivation of the plants and use of marijuana was lawful under California's medical marijuana law. The plaintiffs in *Raich* sued to have enforcement of the Controlled Substances Act (CSA), 21 USC § 801 *et seq.*, the law under which the federal officials had acted, declared unconstitutional when applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law. *Raich*, slip op at 12. Because the CSA classifies marijuana as a Schedule 1 controlled substance, with no "currently accepted medical use," its manufacture, distribution or possession is a federal crime.¹ *Id.* at 11.

¹ The CSA categorizes all controlled substances into five schedules. Schedules II through V regulate the production, distribution and possession of substances that "have a useful and legitimate medical purpose." *Raich*, slip op. at 21

The Court concluded that the CSA, as applied to the circumstances of the case, is a valid exercise of Congress' power under the Commerce Clause because Congress had a rational basis upon which to conclude that production of marijuana for local, personal consumption "has a substantial effect on supply and demand in the national market." *Raich*, slip op at 16, 19. According to the Court's analysis, there being a number of states authorizing the medical use of marijuana only strengthens its conclusions as to congressional power: "Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial."² *Id.* at 30.

However, *Raich* does *not* hold that state laws regulating medical marijuana are invalid nor does it require states to repeal existing medical marijuana laws. Additionally, the case does not oblige states to enforce federal laws. Because these issues of the relationship between federal and state authority were not relevant to the case, they are not addressed in the Court's opinion.

The United States Constitution created a system in which state and federal governments share authority with a dual system of separate laws. The U.S. Supreme Court currently holds that the federal government may not coerce a state to enforce federal law nor to adopt or repeal state laws. These acts would be considered unconstitutional infringements upon state sovereignty. *Printz v. United States* 521 US 898, 935 (1997); *New York v. United States* 505 U.S. 144 (1992). Also see *Conant v. Walters* 309 F.3rd 629 (9th Circuit 2002), *cert. den.* 540 US 946 (2003). *Conant* involved a federal attempt to discourage physicians from recommending the use of medical marijuana by revoking their ability to prescribe controlled substances. The concurring opinion stated that the federal government may not force a state "to criminalize conduct it has chosen to make legal." *Conant*, 309 F3rd at 647.

The practical effect of *Raich* in Oregon is to affirm what we have understood to be the law since the adoption of the Act. The Act protects medical marijuana users who comply with its requirements from state criminal prosecution for production, possession, or delivery of a controlled substance. *See, e.g.*, ORS 475.306(2), 475.309(9) and 475.319. However, the Act neither protects marijuana plants from seizure nor individuals from prosecution if the federal government chooses to take action against patients or caregivers under the federal CSA. The Act is explicit in its scope: "Except as provided in ORS 475.316 and 475.342, a person engaged in or assisting in the medical use of marijuana [in compliance with the terms of the Act] is excepted from the criminal laws *of the state* for possession, delivery or production of marijuana, aiding and abetting another in the possession, delivery or production of marijuana or any other criminal offense in which possession, delivery or production of marijuana is an element * * *." ORS 475.309(1) (emphasis added).

quoting 21 U.S.C. § 801(1). On the other hand, with the exception of use in federally approved research programs, the CSA entirely prohibits the possession or use of Schedule I substances, including marijuana. *Id.* at 11, 21.

² There are currently ten other states that have legalized the use of marijuana for medical purposes: Alaska, California, Colorado, Hawaii, Maine, Maryland, Montana, Nevada, Vermont and Washington.

2. *Should there be operational changes to the program in light of Raich?*

Since the *Raich* case does not invalidate the Act, the state has no legal mandate to change the program.

(a) *May the program resume issuing registry identification cards?*

Yes. Because the Act remains valid state law, DHS continues to be responsible for maintaining a program for the issuance of the cards pursuant to the terms of ORS 475.309(2) - (6). For individuals who have applied for, but not yet received, a card from DHS, the Act makes the submitted application materials, in conjunction with proof of the date of their transmission to DHS, the legal equivalent of a card until DHS makes a determination on the application. ORS 475.309(9). Also, for individuals meeting the Act's substantive requirements for the issuance of a card, but who do not possess one, the Act provides grounds for affirmatively defending against charges involving possession or production of marijuana under the state's controlled substances laws. ORS 475.319. Thus, the temporary suspension of card issuance has not affected the legal status of individuals whose applications DHS has not yet adjudicated.

(b) *Does the decision require alteration of the program's current procedures for communicating with local, state and federal law enforcement?*

No. As stated above, since the Act remains valid there is no reason to alter current procedures. ORS 475.331(1) mandates that the list of cardholders and designated primary caregivers compiled by DHS "be confidential and not subject to public disclosure."³ The only two exceptions to this prohibition are for disclosure to authorized employees of both DHS and state and local law enforcement agencies under specified circumstances.⁴ ORS 475.331(2). It is our understanding that almost all contact with state and local law enforcement is initiated by law enforcement representatives asking whether a particular grow site is protected by the Act or whether a copy of a registry application or a registration card shown to an officer is valid.⁵ We understand that the program utilizes standard procedures to answer these inquiries including efforts to verify the identity of the caller.

³ "The Department of Human Services shall create and maintain a list of the persons to whom the department has issued registry identification cards pursuant to ORS 475.309 and the names of any designated primary caregivers. *Except as provided in subsection (2) of this section, the list shall be confidential and not subject to public disclosure.*" ORS 475.331(1) (emphasis added).

⁴ In regard to law enforcement, ORS 475.331(2)(b) permits the release of names and other identifiers to "Authorized employees of state or local law enforcement agencies, only as necessary to verify that a person is a lawful possessor of a valid registry identification card or that person is the designated caregiver of such a person."

⁵ ORS 475.309(9) provides that a completed registration application submitted to the program has the "same legal effect as a registration identification card until such time as the person receives notification that the application has been approved or denied." The program responds similarly to state and local law enforcement concerning validity of applications or registration cards.

We are aware that the program receives subpoenas for program records from individuals and from government entities, including law enforcement entities, and is also subject to court orders and subpoenas issued by judges and by grand juries. Depending upon the person or entity issuing the subpoena or the search warrant, the information that is sought and the actual text of the subpoena or search warrant, the information sought may be subject to full disclosure, partial disclosure or no disclosure. DHS routinely seeks legal advice on such issues, and the *Raich* decision should not alter that practice.

(c) Does the program have a legal duty to communicate to registrants or applicants that state law does not protect patients from potential federal prosecution?

We have not identified any such obligation imposed upon DHS by either state or federal law. We understand that program representatives, as well as patient advocates, have publicly stated on numerous occasions that Oregon law cannot protect medical marijuana patients or caregivers from federal prosecution. It is our belief that the vast majority of patients and caregivers already knew, before *Raich* was decided, that the Act did not protect against possible federal prosecution.

Although no legal obligation exists, in consultation with this office, DHS may want to consider again communicating to registrants and applicants that federal law continues to treat the manufacture, distribution and possession of marijuana as a crime and that compliance with the Act does not immunize individuals against possible federal prosecution. While individual written notification to the 10,500 current cardholders may not be feasible, one option may be to post information on the program website. In addition, we recommend including a statement in the program's application packets, if you have not already done so.

Sincerely,

Donald C. Arnold
Chief Counsel
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