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Via Facsimile Transmission
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Robert D. Tousignant
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Department of Health Services
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RE: *Department of Health Services's Questions Regarding Medical Marijuana
Identification Cards and Federal Law*

Dear Mr. Tousignant:

On July 8, 2005, the Department of Health Services (DHS) requested legal advice regarding the impact of *Gonzales v. Raich* on DHS's statutory obligation to establish and maintain a voluntary program for the issuance of identification cards to qualified patients using medical marijuana. (See, e.g., Health & Saf. Code § 11362.71.)¹ Immediately after requesting our advice, DHS issued a press release announcing that it had unilaterally suspended compliance with the Health and Safety Code, pending the receipt of legal advice from the Attorney General. For the reasons discussed below, we conclude that DHS must comply with the Health and Safety Code.

BACKGROUND

Proposition 215

As you know, Proposition 215 was approved by California voters on November 5, 1996, and exempts patients and their caregivers from state laws prohibiting the possession and cultivation of marijuana when the possession or cultivation is for personal medical purposes, and

¹ Citations are to the California Health and Safety Code unless otherwise indicated.

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the possession or cultivation is based on the recommendation of a physician. (§ 11362.5.) This law is titled the "Compassionate Use Act of 1996." (*Ibid.*) While Proposition 215 exempts qualified individuals from certain state marijuana laws, it does not grant an absolute immunity from arrest. (*People v. Mower* (2002) 28 Cal.4th 457, 468-470.) Instead, Proposition 215 provides a "limited immunity from prosecution [and] may serve as a basis for a motion to set aside an indictment or information prior to trial, as well as a basis for a defense at trial." (*Id.* at p. 470.)

The Medical Marijuana Program (Senate Bill 420)

On October 12, 2003, the Governor signed into law Senate Bill 420 (SB 420) which added Article 2.5, titled "Medical Marijuana Program," to Chapter 6 of Division 10 of the Health and Safety Code. (§ 11362.7, et seq.) The Medical Marijuana Program creates a voluntary system for qualified patients and caregivers to obtain an identification card that will insulate them from arrest for violations of state law relating to marijuana. (See §§ 11362.765 and 11362.775.) Under the Medical Marijuana Program, DHS is directed to "establish and maintain a voluntary program for the issuance of identification cards" to qualified patients and primary caregivers, and to provide a process through which state and local law enforcement officers may immediately verify a card's validity. (§ 11362.71, subd. (a); see also 11362.71, subd. (d)(3).)

Raich v. Ashcroft

On December 16, 2003, the Ninth Circuit Court of Appeals ruled that federal law enforcement officials could not enforce the federal Controlled Substances Act (CSA) against Californians who cultivate or use marijuana in compliance with Proposition 215. (*Raich v. Ashcroft* (9th Cir. 2003) 352 F.3d 1222.) The Ninth Circuit concluded that there was a strong likelihood that the CSA was unconstitutional and in excess of Congress's power under the Commerce Clause. (*Id.* at p. 1234.) Further, the Ninth Circuit found that medical marijuana users would suffer significant hardship if an injunction was not issued. (*Ibid.*)

Gonzales v. Raich

On June 6, 2005, the United States Supreme Court reversed the Ninth Circuit's ruling in *Raich v. Ashcroft* and held that the intrastate cultivation and use of marijuana for medical purposes authorized by California law may be prohibited by Congress as a valid exercise of federal authority under the Commerce Clause. (*Gonzales v. Raich* (2005) 545 U.S. ___ [125 S.Ct. 2195, 2201-2215].) While the Court's analysis focused on the scope of Congress's authority under the Commerce Clause, the practical significance of the decision is that federal law enforcement officers may continue to enforce federal drug laws against Californians who cultivate or use medical marijuana. This was the state of the law when the voters passed Proposition 215 and when the Legislature enacted SB 420. Most important with respect to

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DHS's questions is that *Raich* does not invalidate California's medical marijuana laws. We now turn to DHS's specific questions.

THE DEPARTMENT OF HEALTH SERVICES'S QUESTIONS

- (1) Would the implementation of a program required by Health and Safety Code section 11362.7 et seq. to provide medical marijuana identification cards for the purpose of facilitating the possession or cultivation of medical marijuana violate any federal criminal statute, including, but not limited to, aiding and abetting a federal crime?

We believe the answer is no. First, the State of California, and state officials acting in their official capacity to implement a valid state law, cannot be "persons" within the meaning of federal criminal statutes relating to marijuana. A conclusion to the contrary would undermine the system of "dual sovereignty" created by the United States Constitution. Second, even if state actors were persons under federal criminal laws, the marijuana identification cards simply clarify a cardholder's status under state law. And, as far as we know, the mere issuance or possession of the state identification cards does not satisfy the elements of any federal criminal offense.

Federal criminal law provides, subject to limited exceptions, that it is "unlawful for any person [to] knowingly or intentionally" manufacture, distribute dispense or possess any controlled substance. (21 U.S.C. § 841.) Federal law treats marijuana as a controlled substance. (21 U.S.C. § 812(c).) Additionally, and as DHS has pointed out, it is illegal to aid and abet in the manufacture, distribution or possession of marijuana. (18 U.S.C. § 2.) Further, any attempt or conspiracy to manufacture, distribute or possess marijuana would also be a crime. (21 U.S.C. § 846.)

The federal government's decision to criminalize the use and possession of marijuana – for all purposes – does not require California to do the same. It is well-settled that the "Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." (*Printz v. United States* (1997) 521 U.S. 898, 925; *New York v. United States* (1992) 505 U.S. 144, 161 [Congress may not commandeer the legislative processes of the states].) These principles reflect the system of "dual sovereignty" created by the United States Constitution. (*Printz v. United States, supra*, at pp. 918-919.)

Congress may not avoid the limits on federal power over states by attempting to control the actions of individual state employees:

We have observed that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office As such, it is no different from a suit against the State itself." And the same must be said of a

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directive to an official in his or her official capacity. To say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance. Indeed, it merits the description "empty formalistic reasoning of the highest order."

(*Printz v. United States*, *supra*, at pp: 930-931 [citations omitted].)

The logical extension of the Supreme Court's holding in *Printz* is that if the federal government cannot affirmatively force state officials to implement federal regulatory programs, then the federal government cannot criminalize the non-enforcement of a federal program. A conclusion to the contrary would obliterate the Supreme Court's holding in *Printz* and allow the federal government to accomplish, through criminal prosecution, that which it cannot do through legislation. For this reason, we believe the federal government cannot enforce federal criminal laws against state officials who merely implement valid state law – or choose not to enforce federal law. State law enforcement officers who accept a state medical marijuana identification card, and decline to arrest a cardholder who is in possession of marijuana, are not subject to criminal prosecution for failure to enforce federal marijuana laws. To conclude otherwise would effectively force all state officials to commence enforcing federal criminal laws.

DHS's actions in implementing the Medical Marijuana Program are free from criminal prosecution not only because of federalism, but also because the activity itself fails to satisfy the elements of a federal crime. DHS is not manufacturing, distributing, dispensing or possessing marijuana. (21 U.S.C. §§ 812(c) and 841.) Moreover, the obligation of DHS to establish and maintain a *voluntary* program for the issuance of identification cards to qualified patients and primary caregivers, and to provide a process through which state and local law enforcement officers may immediately verify a card's validity, does not constitute aiding and abetting. (18 U.S.C. § 2.)

In a case that presented an issue similar to DHS's current question, the Ninth Circuit held that California doctors who recommend that their patients use marijuana are not guilty of aiding and abetting or conspiracy under federal law. (*Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 636.) The Court found that even though a doctor may suspect that a patient may heed the doctor's recommendation to use marijuana, such a suspicion is too nebulous to satisfy the intent element for aiding and abetting or conspiracy:

A doctor's anticipation of patient conduct, however, does not translate into aiding and abetting or conspiracy. A doctor would aid and abet by acting with the specific intent to provide a patient with the means to acquire marijuana. Similarly, a conspiracy would require that a doctor have knowledge that a patient intends to acquire marijuana, and intend to help the patient acquire

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marijuana. Holding doctors responsible for whatever conduct the doctor could anticipate a patient *might* engage in after leaving the doctor's office is simply beyond the scope of either conspiracy or aiding and abetting.

(*Id.* at p. 636 [citations omitted; emphasis in original].)

Here, the staff of DHS acting under the Medical Marijuana Program are less likely to be engaged in federal criminal activity than doctors who recommend marijuana. First, DHS staff are not recommending that anyone use marijuana. DHS staff are carrying out their obligation to administer a voluntary system that provides clarification of an individual's rights under state law. Second, and as discussed above, because DHS staff are state actors they, like the State of California itself, are also entitled to protection under the system of dual sovereignty outlined in the Constitution. (*Printz v. United States, supra*, at pp. 930-931.)

- (2) If the answer to the first question is affirmative, does Article III, section 3.5, of the California Constitution require that the Department of Health Services implement the medical marijuana identification card program required by state law even if doing so would constitute a federal crime?

As discussed above, we do not believe that compliance with Health and Safety Code section 11362.7 *et seq.*, violates any federal criminal statute. But a continued failure by DHS to comply with the Health and Safety Code, would likely amount to a violation of the California Constitution. Article III, section 3.5 of the California Constitution provides, in pertinent part, that:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

[¶] . . . [¶]

(c) To declare a statute unenforceable, or to *refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.*

(Cal. Const., art. III, § 3.5 [emphasis added].)

Presently, DHS is refusing to enforce or comply with the program for issuing medical marijuana identification cards as provided for in the Health and Safety Code. (§ 11362.7 *et seq.*) A unilateral decision not to comply with state law, on the ground that it may be prohibited by

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federal criminal law, without first receiving the guidance of an appellate court, is barred by the California Constitution. (See also *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068 [San Francisco lacks authority to disregard the state law prohibition on same-sex marriage].) Accordingly, we advise DHS to resume compliance with the Health and Safety Code.²

- (3) If the answer to the first question is affirmative, would the provision of a disclaimer to identification card applicants and holders, advising them that the identification card will not protect them from federal prosecution, eliminate the potential criminal liability of the Department or its staff?

Again, we do not believe that the statutory duties imposed on DHS by the Health and Safety Code subject DHS to federal criminal liability. Thus, whether DHS should provide the public with additional information regarding the implications of federal law is a policy question for DHS. Having said that, we believe that such a provision would be a correct statement of the law.

- (4) Would the information obtained from applicants for the MMP identification cards be subject to subpoena by federal authorities and, if so, could this information, if subpoenaed by federal authorities, be used to locate, arrest, or prosecute medical marijuana patients and/or primary caregivers?

This question does not provide sufficient detail for us to answer it fully. The hypothetical does not indicate what specific information is subpoenaed. And it is unclear whether the question is referring to the detailed medical information about cardholders that would be in the possession of county health officials, or the more limited information that will be received by DHS. (See, e.g., §§ 11362.715 [detailed information ID card applicants shall provide the county]; 11362.72 [counties shall transmit limited information to DHS].) Further, the hypothetical does not indicate the reason why the federal authorities subpoenaed the information.

Notwithstanding the limited information provided by this question, it appears that the information received from applicants for marijuana identification cards may indeed be subject to a federal subpoena. (*United States v. White* (E.D. Va. 2004) 342 F.Supp.2d 495 [Virginia unsuccessful in quashing federal subpoena for state records regarding child support payments].) It is also possible that this information could be used in a criminal prosecution. And as detailed above, Proposition 215 has never provided a defense to federal prosecution.

² In the event that DHS is unwilling to implement the Medical Marijuana Program, the California Supreme Court has left open the possibility that a state official, who believes state law is in conflict with federal law, may seek declaratory relief from the courts. (*Lockyer v. City and County of San Francisco, supra*, 33 Cal.4th at p. 1099, fn. 27.)

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CONCLUSION

The actions that DHS is required to take under the Health and Safety Code do not violate federal criminal laws for two reasons: (1) under the Constitutional principles of dual sovereignty, the federal government cannot force state officials to enforce federal laws; and (2) the steps involved in implementing the Medical Marijuana Program do not satisfy the elements of any federal crime. Notwithstanding the absence of a violation of federal law, the California Constitution prohibits DHS from refusing to enforce a state statute without an appellate court order.

We are optimistic that this analysis fully addresses your questions.

Sincerely,



JONATHAN K. RENNER
Deputy Attorney General

For BILL LOCKYER
Attorney General

JKR:pg

cc: James Humes, Chief Assistant Attorney General