



**DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION**

June 14, 2010

Grant Higginson, M.D., Administrator
DHS/Public Health Division
Office of Community Health & Health Planning
800 NE Oregon St., Ste. 930
Portland, OR 97323

Re: Opinion Request OP-2010-2

Dear Doctor Higginson:

You asked two questions concerning Oregon's Medical Marijuana Act, which were prompted by a recent decision of the Oregon Court of Appeals, *State v. Berringer*, 234 Or App 665, 229 P3d 615 (2010) (April 14, 2010). Your questions concern whether the Oregon Health Authority must issue medical marijuana registry identification cards to non-Oregon residents.

FIRST QUESTION PRESENTED

Does the Oregon Medical Marijuana Act limit the issuance of registry identification cards to Oregon residents?

SHORT ANSWER

No. Residency is not a requirement for obtaining a registry identification card under the Oregon Medical Marijuana Act.

SECOND QUESTION PRESENTED

Could the Oregon legislature limit eligibility for Oregon registry identification cards to Oregon residents without violating the right to travel guaranteed by the United States Constitution?

SHORT ANSWER

Yes.

DISCUSSION

1. Background

The Oregon Medical Marijuana Act (OMMA), ORS 475.300 to 475.346, allows a person who possesses a registry identification card to engage (as delimited by the Act) in the medical use of marijuana without being subjected to state criminal or civil penalties. ORS 475.306(1); ORS 475.300(2). ORS 475.309 establishes the requirements that an applicant must fulfill to receive a card. The Oregon Health Authority (OHA) is responsible for establishing and maintaining a program to issue cards “to persons who meet the requirements of [ORS 475.309].” ORS 475.309(2).

The Oregon Court of Appeals recently discussed those requirements in *State v. Berringer*. Some people have informed the OHA that they interpret that opinion to require the OHA to issue Oregon registry identification cards to non-residents. In light of that contention, you ask whether non-residents are eligible to receive Oregon cards under OMMA, and whether it would violate the United States Constitution to deny cards to non-residents.

2. *State v. Berringer*

In *State v. Berringer*, the defendant, a California resident, was arrested in Oregon and convicted under Oregon law for unlawful possession of marijuana. The defendant had a written statement by a California licensed physician recommending defendant’s medical use of marijuana. Under California law, that document, if authentic, would allow the defendant to possess marijuana. 23 Or App at 668. Defendant appealed his Oregon conviction, raising two federal constitutional challenges, only one of which is relevant.

Defendant argued that in enforcing Oregon’s criminal law against him for possessing marijuana, the state violated his federal constitutional right to travel from state to state, because Oregon “provides its own residents with an immunity from some possession of marijuana prosecutions, while withholding that immunity from nonresidents.” *Id.* at 671. The court observed that, although the right to travel is well established, its source in the United States Constitution has never been definitively identified. *Id.* at 672. Several United States Supreme Court cases have located the right in the Privileges and Immunities Clause of Article IV, section 2, guaranteeing the right to enjoy the “Privileges and Immunities of Citizens in the several states.” *Id.* at 672. But another Supreme Court case relied on the Equal Protection Clause, and still another case concluded that there was no need to identify the particular constitutional provision for the right to travel interstate. *Id.*

While the source of the right is not completely clear, the court noted that it is clear that access to medical treatment is among the interstate traveler’s protected rights based on two cases. In the first case, the United States Supreme Court invalidated a state law that imposed a one-year durational residence requirement to obtain access to publicly funded non-emergency hospitalization and medical care. *Memorial Hospital v. Maricopa County*, 415 US 250, 94 S Ct 1076, 39 L Ed2d 306 (1974). In the second case, the Court invalidated a state law that imposed a

residence requirement to obtain an abortion. *Doe v. Bolton*, 410 US 179, 200, 93 S Ct 739, 35 L Ed2d 201 (1973).

The Oregon Court of Appeals distinguished the OMMA from both of those laws, interpreting it to impose the same requirements on residents and non-residents. The court reached that conclusion despite “findings” in ORS 475.300 that the Act is intended to allow “Oregonians” to make medical use of marijuana without fear of penalty:

It is true that the “findings” section of the OMMA refers to “Oregonians” with debilitating medical conditions and states that they “should be allowed to use small amounts of marijuana without fear of civil or criminal penalties,” ORS 475.300(2), and “discuss freely with their doctors the possible risks and benefits of medical marijuana,” ORS 475.300(3). Those provisions are merely hortatory. The operational provisions of the OMMA and its implementing regulations apply with equal rigor to residents and nonresidents. Residents and nonresidents alike must either possess or have applied for an OMMA registration card. ORS 475.309(1) (a). Both must have documentation from the attending physician, attesting that the person has “a debilitating medical condition and that the medical use of marijuana may mitigate the symptoms or effects” of the condition. ORS 475.309(2). Both must pay the same registration fee. *Id.*

234 Or App at 673.

But the court acknowledged that OMMA makes it more difficult for nonresidents to obtain a registry card because an applicant must submit documentation from a physician licensed under Oregon laws. *Id.* The court pointed out that the difficulty that this placed on non-residents was somewhat mitigated by the fact that Oregon physician licensing laws contain reciprocity provisions allowing nonresident physicians to obtain Oregon licenses and that under OHA rules, a nonresident need not have a long-term relationship with an Oregon physician. *Id.* In any event, the court concluded that “we have found no authority for the proposition that the difficulty a nonresident might encounter in finding an Oregon attending physician could be considered an impediment of constitutional magnitude.” *Id.*

The court then examined OAR 333-008-0020(1), which sets out the forms of identification that the OHA will accept from an applicant:

In order for an application to be considered complete, an applicant must submit the following:

* * *

(b) Copies of legible photographic identification * * *. The following are acceptable forms of identification:

(A) Oregon Driver's License;

(B) Oregon Identification Card with photo;

(C) Voter Registration Card with photo[.]

The court stated that:

[I]f the list of documents in OAR 333-008-0020(1)(b) is exhaustive-that is, if the documents in (A), (B), and (C) are the only acceptable photographic identification documents-then it is easier for an Oregon resident to submit a complete application than for a nonresident, because the resident has three options while the nonresident has only one, and even then, only if he or she lives in a state that has a voter registration card with photo. However, nothing in the text of OAR 333-008-0020(1)(b) establishes that the list is exhaustive. The language is ambiguous, and, in order to avoid even the possibility of constitutional infirmity, *State v. Rodriguez*, 217 Or. App. 24, 34, 175 P3d 471 (2007), we interpret the list as nonexhaustive, that is, as a list of documents that are *conclusively* acceptable but not as a complete list of all photo identification cards that *can be* acceptable.

234 Or App at 674.

Last, the court stated that:

[E]ven if Oregon law made access to medical marijuana more difficult for nonresidents, that would not violate defendant's right to travel. As the Supreme Court has explained:

Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally.. *Baldwin*, 436 U.S. at 383, 98 S.Ct. 1852.

Although access to publicly funded medical care, *Memorial Hospital*, and abortion services, *Doe*, have been held to fall into the latter category, we conclude that access to a particular form of treatment-in this case, access to a particular drug-is not a privilege "bearing upon the vitality of the Nation as a single entity."

Id. at 674-75. Accordingly, the court rejected the defendant's constitutional claim.

3. ORS 475.309

You ask whether ORS 475.309 denies nonresidents eligibility for Oregon registry identification cards. As discussed, the court in *Berringer* interpreted ORS 475.309 to allow

nonresidents to obtain registry identification cards. Although that part of the opinion may have been *dicta*, (the court ultimately concluding that access to a particular drug was not a privilege protected by the Constitution), we agree with the interpretation. See *Stephens v. Bohlman*, 314 Or 344, 350, 838 P2d 600 (1992) (when the Oregon Supreme Court has construed the text of a statute, that construction is considered part of the text of the statute itself); *SAIF Corp. v. Allen*, 320 Or 192, 204, 881 P2d 773 (1994) (prior Supreme Court interpretation that appears in *dictum* does not have the same effect); *Younger v. City of Portland*, 305 Or 346, 350 n 5, 752 P2d 262 (1988) (Court of Appeals interpretations do not have the same effect as Supreme Court interpretations).

In construing statutes, we first examine the text in context. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-611, 859 P2d 1143 (1993). In doing so, we apply statutory and judicial rules for reading text and context, such as not to omit what has been inserted or to insert what has been omitted. *Id.*, ORS 174.010. Statutory context includes other provisions of the same statute and related statutes. *PGE*, 317 Or at 610. Courts also examine the legislative history if it is useful to the analysis. *State v. Gaines*, 346 Or 160, 171-172, 206 P3d 1042 (2009). If a statute remains ambiguous after examining the text, context, and legislative history, courts will resort to relevant canons of construction, such as to assume that the legislature would have intended the construction that would avoid potential constitutional problems. See, e.g., *State v. Stoneman*, 323 Or 536, 540 n 5, 920 P2d 535 (1996).

ORS 475.309 provides, in pertinent part:

(2) The Oregon Health Authority shall establish and maintain a program for the issuance of registry identification cards ***to persons who meet the requirements of this section. Except as provided in subsection (3) of this section, the authority shall issue a registry identification card to any person who pays a fee in the amount established by the authority and provides the following:***

(a) Valid, written documentation from the person's attending physician stating that the person has been diagnosed with a debilitating medical condition and that the medical use of marijuana may mitigate the symptoms or effects of the person's debilitating medical condition;^[1]

(b) The name, address and date of birth of the person;

(c) The name, address and telephone number of the person's attending physician;

(d) The name and address of the person's designated primary caregiver, if the person has designated a primary caregiver at the time of application; and

(e) A written statement that indicates whether the marijuana used by the cardholder will be produced at a location where the cardholder or designated primary caregiver is present or at another location.

* * *

(5)(b) ***In addition to the authority granted to the authority under ORS 475.316 to deny an application, [ORS 475.316 grants OHA the discretion to deny an application for up to six months if it finds that the applicant has “willfully violated the provisions of ORS 475.300 to 475.346, or rules adopted under ORS 475.300 to 475.346”] the authority may deny an application for the following reasons:***

(A) The applicant did not provide the information required pursuant to this section to establish the applicant’s debilitating medical condition and to document the applicant’s consultation with an attending physician regarding the medical use of marijuana in connection with such condition, as provided in subsection (2) and (3) of this section;

(B) The authority determines that the information provided was falsified; or

(C) The applicant has been prohibited by a court order from obtaining a registry identification card.

* * *

(6)(a) If the authority has verified the information submitted pursuant to subsections (2) and (3) of this section and none of the reasons for denial listed in subsection (5)(b) of this section is applicable, the authority shall issue a serially numbered registry identification card within five days of verification of the information.

Emphasis added.

In sum, ORS 475.309 requires the OHA to issue cards to “persons” who meet its requirements. Those requirements are paying a fee and providing the listed documents and information. None of those documents or required information includes proof of residency. Nor do any definitional terms contain a residency requirement. *Cf* RCW 69.51A.010(3) (defining a “qualifying patient” for purposes of Washington’s medical marijuana law as, among other things, “a resident of the state of Washington at the time of such diagnosis”).

In addition, ORS 475.309 and 475.316 specify the grounds on which the OHA may deny an application. Lack of Oregon residency is not one of those grounds. Based on the plain text of ORS 475.309 and 475.316, Oregon residency is not a requirement to obtain an Oregon registry identification card and lack of residency is not a ground for denial.

But text must be read in context. Statutory statements of general policy can provide context for particular substantive provisions. *See, e.g., Havi Group, L P v. Fyock*, 204 Or App 558, 131 P3d 793 (2006). As the court discussed in *Berringer*, ORS 475.300 states that “ORS 475.300 to 475.346 are intended to allow Oregonians” to discuss medical marijuana use with their doctors and that “Oregonians” should be allowed to use medical marijuana without fear of

penalty. The Court of Appeals declared those provisions to be merely “hortatory” and to have no substantive effect.

We agree. Although general policy statements can be useful context, they should not be relied on as authority to insert a requirement that specific and unambiguous substantive provisions do not contain. *See Astleford v. SAIF Corp*, 319 Or 225, 234, 874 P2d 1329 (1994) (general hortatory policy statements did not overcome the statutory definition of “party” or say anything about statutory rights); *Pharma v. Oregon Dept of Human Services ex rel Office of Medical Assistance Programs*, 199 Or App 199, 208, 110 P3d 657 (2005) (statement of policy by its terms “imposes no requirement that the agency do anything.”); *Northwest Natural Gas Co. v. PUC*, 195 Or App 547, 556, 99 P3d 292 (2004) (statutory statements of policy may serve as useful context for a statute, but courts should be cautious about reading more into them); *School Dist. No. 1 v. Teachers' Retirement*, 30 Or App 747, 752, 567 P2d 1080 (1977), *rev. den.*, 281 Or 1 (1978) (“hortatory” phrasing of statutory purpose “does not appear to mandate anything that is justiciable”); *see also* ORS 174.010 (office of judge is not to insert what has been omitted); ORS 174.020 (a particular intent controls over a general intent).

Finally, the legislative history does not support interpreting the OMMA to limit card eligibility solely to Oregon residents. The OMMA was enacted by the people through the initiative process. Or Laws 1999, ch 4. Relevant history of an initiative petition includes the ballot title and explanatory statement in the voters’ pamphlet. *See Shilo Inn v. Multnomah County*, 333 Or 101, 129-30, 36 P3d 954 (2001), *modified on recons.* 334 Or 11, 45 P3d 107 (2002). Neither the ballot title nor the explanatory statement in the voters’ pamphlet declare or imply that card eligibility is limited to Oregon residents. The ballot title makes no mention of “Oregonians,” but simply refers to “the medical use of marijuana” generally and the explanatory statement refers to eligible “persons,” not to eligible “Oregonians.” Official Voters’ Pamphlet, General Election, Volume 1, Measures, November 3, 1998 at 148, 151.

4. U.S. Constitution

You next ask, in light of *Berringer*, whether the Oregon legislature could limit the eligibility to receive an Oregon registry card to Oregon residents without violating the right to travel guaranteed by the United States Constitution. The court in *Berringer* did not address that question directly, because the defendant had not applied for or been denied an Oregon registry card on the basis that he was not an Oregon resident. The court did address the question indirectly when responding to defendant’s claim that Oregon provided immunity for medical marijuana use to its own residents, but not to the residents of other states. The court concluded that nonresidents would be eligible for Oregon cards under OMMA, but it did not hold that the U.S. Constitution *required* that result. Instead, it merely construed the language of the statutes and regulations as allowing nonresidents to obtain cards.

It is true that, in interpreting OHA’s rule concerning acceptable identification, the court applied the “avoidance canon” – a rule of statutory construction under which courts faced with an ambiguous statute (or in this case, regulation) will assume an intent to comply with constitutional mandates. The court applied that rule to avoid “even the possibility of constitutional infirmity[.]” *Berringer*, 234 Or App at 674. But the avoidance canon is a rule of

statutory construction and nothing more. Its application cannot be construed as a holding that a contrary interpretation would violate the federal constitution.

And, in the end, the court concluded that “access to a particular drug is not a privilege ‘bearing upon the vitality of the Nation as a single entity.’” *Id.* In other words, access to a particular drug is not a privilege that is protected by the federal constitutional right to travel. If there is no federal constitutional right to access to a particular drug, nonresidents have no federal constitutional right to an Oregon registry identification card. Thus, *Berringer* supports the conclusion that limiting eligibility for Oregon cards to Oregon residents would not violate the right to travel.

Another compelling ground supports that conclusion. The federal Controlled Substances Act prohibits possessing, manufacturing, dispensing, and distributing marijuana. 21 USC §§ 841(10), 844. Those prohibitions apply even when a person possesses, manufactures, dispenses, or distributes marijuana *for a medical use*. *United States v. Oakland Cannabis Buyers Cooperative*, 532 US 483, 494 and n 7, 121 S Ct 1711, 149 L Ed2d 722 (2001) (declining to find a medical necessity defense to prohibition on distributing marijuana; holding applies equally to other prohibited acts); *see also Gonzales v. Raich*, 545 US 1, 14, 125 S Ct 2195, 162 L Ed2d 1 (2005) (possession of marijuana is a proper subject of federal regulation because marijuana has a “high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment”). Given that possession of medical marijuana violates federal law and that the United States Supreme Court has upheld that law, access to medical marijuana is not a right protected by the United States Constitution. We conclude that the federal constitutional right to travel would not be violated by denying nonresidents eligibility for Oregon registry identification cards.

CONCLUSION

We conclude that: (1) The OMMA contains no Oregon residency requirement for obtaining an Oregon registry identification card; and, (2) the Oregon legislature could limit eligibility for Oregon registry identification cards to Oregon residents without violating the federal constitutional right to travel.

Sincerely,

David E. Leith
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^{1/} ORS 475.302(1) defines “attending physician” to mean “a physician licensed under ORS chapter 677 who has primary responsibility for the care and treatment of a person diagnosed with a debilitating medical condition.”