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U.S. SUPREME COURT RULES ON MEDICINAL MARIJUANA CASE

In the April 2005 edition of the *Messenger*, we discused the use of marijuana for medicinal purposes in the context of evictions for possession of controlled dangerous substances. Many of your leases make possession of illegal drugs, like marijuna, a material breach of the lease. We reported on the Ninth Circuit decision of ***Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003),** which involved two seriously ill women living in California who used marijuana as a last resort treatment for pain, on the advice of their physicians. Medicinal use of marijuana is officially sanctioned by California state and applicable local law. Note that Alaska, Arizona, Colorado, Hawaii, Maine, Montana, Nevada, Oregon, and Washington join California in statutorily authorizing the use of medicinal marijuana.

The plaintiffs challenged the application of the federal Controlled Substances Act, 21 U.S.C. §801 (CSA), to their medicinal use of marijuana, arguing that enforcing the CSA against them violated their rights under the Commerce Clause. They also claimed violations of other constitutional amendments and the doctrine of medical necessity, which arguments were not addressed.

Overturning a trial court decision that denied the plaintiffs' claims, a divided Ninth Circuit held that the CSA was an unconstitutional exercise of Congress' Commerce Clause authority when applied to ***intrastate, noncommercial, cultivation, possession and use of marijuana for medicinal purposes on the advice of a physician, where permitted under state law.*** On that basis, the Ninth Circuit distinguished other Commerce Clause challenges to the CSA, all of which involved drug trafficking. The Court directed the trial court to enter a preliminary injunction. The Government appealed to the U.S. Supreme Court.

On June 6, 2005, the U.S. Supreme Court overruled the Ninth Circuit, ***Raich v. Ashcroft*, 125 S.Ct. 2195, __ U.S. __ (June 6, 2005**). In a 39-page opinion, Justice Stevens wrote for a 6-3 majority of the Court (Stevens, Kennedy, Souter, Ginsburg, Breyer, JJ). Justice Scalia wrote a concurring opinion, and Justices O'Connor, Rehnquist and Thomas dissented (not discussed herein). The majority held that Congress' Commerce Clause power included the power to "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce," even where the activity is local and may not be regarded as commerce, and even where done in accordance with state law.

The Supreme Court's decision heavily relies on ***Wickard v. Filburn*, 317 U.S. 111 (1942)**(permitting regulation of a farmer's wheat production for personal consumption), rejecting the application of more recent Commerce Clause cases. The Court found the *Wickard* and *Raich* facts to be strikingly similar, both involving the supply and demand of controlled substances in both lawful and unlawful markets, and the government's control of each market. Specifically, the Court found that the diversion of homegrown marijuana substantially frustrates the federal interest in eliminating commercial transactions in the interstate market in their entirety. It further held that considering the effect of the individual person's consumption on interstate commerce was unnecessary. The opinion concludes with the suggestion that the reclassification of marijuana and/or the political process may eventually provide plaintiffs the relief they seek.

The effect of this case is that PHAs may continue to enforce lease provisions prohibiting the possession of marijuana and other controlled substances in accordance with the CSA, irrespective of state law.