ALAN WILSON
ATTORNEY GENERAL

January 9, 2018

The Honorable Hugh Weathers
South Carolina Commissioner of Agriculture
P.O. Box 11280
Columbia, SC 29211

Dear Commissioner Weathers:

You have asked for an opinion "as to seek whether South Carolina Industrial Hemp Pilot Program permitted growers may obtain industrial hemp seeds domestically, from a qualifying industrial hemp program in another state which lawfully acquired or cultivated that seed. . . ." It is our opinion that they may do so.

You set forth what you believe to be the governing law in this area. Your analysis is as follows:

> The Agricultural Act of 2014 (Section 7606, codified at 7 U.S.C § 5940) authorizes state departments of agriculture and institutions of higher education, if authorized by their respective state's law, to grow or cultivate industrial hemp for research purposes.
>
> Section 46-55-10, et seq. of the South Carolina Code of Laws (hereinafter, the "South Carolina Industrial Hemp Act"), makes it legal for industrial hemp to be grown for research purposes in South Carolina. Under the South Carolina law, the South Carolina Department of Agriculture (SCDA) is the administrator of the industrial hemp program application and permitting process. Section 46-55-30(2) of the South Carolina Industrial Hemp Act provides:
>
> > Notwithstanding any other provision of law, except as subject to federal law, a person engaged in cultivating, processing, selling, transporting, possessing, or otherwise distributing industrial hemp, or selling industrial hemp products from industrial hemp, grown, processed, or produced pursuant to this chapter, is not subject to any civil or criminal actions under South Carolina law for engaging in these activities.
>
> The South Carolina Industrial Hemp Act sets forth that SCDA will issue permits and "[i]t is lawful for a permitted individual to cultivate, produce, or otherwise grow industrial hemp in this State to be used for any lawful purpose, including, but not limited to, the manufacture of industrial hemp products, and scientific, agricultural, or other research related to other lawful applications for industrial hemp." S.C. Code Ann. § 46-55-20(1 1).

Further, it should be noted that under South Carolina law, industrial hemp has a specific defined meaning, and is not marijuana. Industrial Hemp is defined as "the plant Cannabis sativa L. and any part of the plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dried weight basis." S.C. Code Ann. § 46-55- 10(2). Further, Section 46-55-50 of the South Carolina Industrial Hemp Act removes industrial hemp from the definition of marijuana as it is defined in South Carolina Code of Law Section 44- 53-110.

The key federal law enabling cultivation of industrial hemp is section 7606 of the Agricultural Act of 2014 (Section 7606, codified at 7 U.S.C § 5940). Section 7606, as amended, reads:

Legitimacy of industrial hemp research

(a) In general. Notwithstanding the Controlled Substances Act (21 U.S.C. 801 et seq.). chapter 81 of title 41, or any other Federal law, an institution of higher education (as defined in section 1001 of title 20) or a State department of agriculture may grow or cultivate industrial hemp if—

(1) the industrial hemp is grown or cultivated for purposes of research conducted under an agricultural pilot program or other agricultural or academic research; and

(2) the growing or cultivating of industrial hemp is allowed under the laws of the State in which such institution of higher education or State department of agriculture is located and such research occurs.

(b) Definitions. In this section:

(1) Agricultural pilot program. The term "agricultural pilot program" means a pilot program to study the growth, cultivation, or marketing of industrial hemp—

(A) in States that permit the growth or cultivation of industrial hemp under the laws of the State; and

(B) in a manner that—

(i) ensures that only institutions of higher education and State departments of agriculture are used to grow or cultivate industrial hemp;

(ii) requires that sites used for growing or cultivating industrial hemp in a State be certified by, and registered with, the State department of agriculture; and

(iii) authorizes State departments of agriculture to promulgate regulations to carry out the pilot program in the States in accordance with the purposes of this section.

(2) Industrial hemp. The term "industrial hemp" means the plant Cannabis sativa L. and any part of such plant, whether growing or not, with a delta- 9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

(3) State department of agriculture. The term "State department of agriculture" means the agency, commission, or department of a State government responsible for agriculture within the State.

Agricultural Act of 2014 § 7606, as amended, codified at 7 U.S.C. § 5940 (emphasis added).

While Section 7606 does not use the word "seed" it defines "industrial hemp" to include "the plant Cannabis sativa L. and any part of that plant," § 7606(b)(2), which must include seeds. Further, obtaining seeds is a necessary part of "the growing or cultivating of industrial hemp," § 7606(a)(2), which is the core activity authorized by section 7606.

In recent federal appropriations acts, Congress, President Obama, and President Trump have barred federal funds from being used to stop the transportation outside the State of industrial hemp grown under the Agricultural Act of 2014. The May 5, 2017, Appropriations Act's division concerning agriculture, rural development, and food and drug administration reads:

> Sec. 773. None of the funds made available by this Act or any other Act may be used-
>
> (1) in contravention of section 7606 of the Agricultural Act of 2014 (7 U.S.C. 5940); or
>
> (2) to prohibit the transportation, processing, sale, or use of industrial hemp that is grown or cultivated in accordance with section 7606 of the Agricultural Act of 2014, within or outside the State in which the industrial hemp is grown or cultivated.

Consolidated Appropriations Act, 2017, § 773 of Division A (May 5, 2017) (emphasis added). The Appropriations Act's division concerning commerce, justice, and science reads: "None of the funds made available by this Act may be used in contravention of section 7606 ("Legitimacy of Industrial Hemp Research") of the Agricultural Act of 2014 (Public Law 113-79) by the Department of Justice or the Drug Enforcement Administration." Id., § 538 of Division B. This provision also appeared in the first omnibus appropriations act passed by Congress after Section 7606 of the Agricultural Act became law. See Consolidated Appropriations Act, 2015, Pub. L. 1 13-235, § 539 of Division B, 128 Stat. 2130, 2217 (2014). Similar provisions were also present in other previous appropriations acts. See, e.g., Consolidated Appropriations Act, 2016, Pub. L. 1 14-1 13, § 763 of Title VII of Division A and § 543 of Division B, 129 Stat. 2242, 2285 and 2333 (2015).

Nonetheless, the U.S. Department of Agriculture, in consultation with the DEA and the U.S. Food and Drug Administration, issued a nonbinding "Statement of Principles on Industrial Hemp" with the purpose to "inform that public how Federal law applies to activities associated with industrial hemp that is grown and cultivated in accordance with Section 7606 of the Agricultural Act of 2014." 81 Fed. Reg. 53395, 53395 (Aug. 12, 2016). The Statement of Principles includes a provision which states, "Industrial hemp plants and seeds may not be transported across State lines." Id. This conclusion was not supported with any analysis, citations, or explanation. See id. The federal agencies' "Statement of Principles" was published in the Federal Register, but was not adopted as a rule. The federal agencies wrote, "This Statement of Principles does not establish any binding legal requirements." 81 Fed. Reg. at 53396.

> In the Agricultural Act of 2014 Congress included the following clause: "[notwithstanding the Controlled Substances Act (21 U.S.C. 801 et seq.), chapter 81 of title 41, or any other Federal law, an institution of higher education (as defined in section 1001 of title 20) or a State department of agriculture may grow or cultivate industrial hemp . . ." Agricultural Act of 2014 § 7606, as amended, codified at 7 U.S.C. § 5940(a). Congress's inclusion of the "notwithstanding" clause demonstrates congress's intent that the Agricultural Act allow industrial hemp to be transported across state lines as part of qualified industrial hemp cultivation programs.
>
> Further, Congressional intent to have a broad reading of the "notwithstanding" clause is supported by contemporaneous and current appropriations acts. Congress specifically prohibited agencies from expending funds "to prohibit the transportation ... of industrial hemp" grown or cultivated under the Agricultural Act. Consolidated Appropriations Act, 2017, § 773 of Division A (May 5, 2017). Further, this provision specifically cites transportation "within or outside the State in which the industrial hemp is grown or cultivated." Id. Another provision bars the Drug Enforcement Administration from using funds "in contravention" of section 7606 of the Agricultural Act." Id., § 543 of Division B.
>
> Ultimately, the "notwithstanding" clause and both appropriations act provisions are evidence that, when drafting section 7606 of the Agricultural Act, Congress intended to allow industrial hemp purposes to be transported outside the State of origin. Therefore, it seems, Industrial Hemp Pilot Program permitted growers may obtain industrial hemp seeds domestically, from a qualifying industrial hemp program in another state which lawfully acquired or cultivated that seed.

Law/Analysis

We agree with your analysis. Subsection 2 of Section 773 prohibits the use of federal funds for the "transportation, processing, sale, or use of industrial hemp that is grown or cultivated in accordance with Section 7606 of the Agricultural Act of 2014, within or outside the State in which the industrial hemp is grown or cultivated." (emphasis added). This provision is enacted pursuant to the "Spending Clause" of the federal Constitution. As the United States Supreme Court stated with respect to the spending power of Congress,

> [t]he Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general welfare of the United States." Art. I, § 8, c. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." Fullilove v. Klutznick, 448 U.S. 448, 474, 100 S.Ct. 2758, 2772, 65 L.Ed.2d 902 (1980) (Opinion of Burger, C.J.). See Lav v. Nichols, 414 U.S. 563, 569, 94 S.Ct. 786, 789, 39 L.Ed.2d 1 (1974); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295, 78 S.Ct. 1174, 1185, 2 l.Ed.2d 1313 (1958); Oklahoma v. Civil Service Comm'n, 330 U.S. 127, 143-44, 67 S.Ct. 544, 553-554, 91 L.Ed. 794 (1947); Steward Machine co. v. Davis, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, (1937).

> The breadth of this power was made clear in United States v. Butler, 297 U.S. 1, 66, 56 S.Ct. 312, 319, 80 L.Ed. 477 (1936), where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Thus, objectives not thought to be within Article I's "enumerated legislative fields," id. at 65, 56 S.Ct. at 319, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

South Dakota v. Dole, 483 U.S. 203, 206-207 (1987). See also National Federation of Ind. Business v. Sebelius, 567 U.S. 519, 585 (2012) ["Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care and requiring that states accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize states that choose not to participate in the new program by taking away their existing Medicaid funding."].

Moreover, we stated in Op. S.C. Att'y Gen., 2009 WL 959646 (March 31, 2009), that Dole "held that the spending power, while broad, and that great deference is given to Congress, is not unlimited." We noted that Dole "established four criteria which must be met for a Congressional spending requirement to pass muster under the Tenth Amendment." (referencing Dole, 483 U.S. at 207-208) ["expenditure must serve general public purposes; the condition must be unambiguous; the expenditure must be related 'to the federal interest in particular national projects or programs' and the condition must not be otherwise unconstitutional."]. In our view, the "Spending Clause" limitations set forth in subsection 2 of 773 are valid.

Further, your letter correctly notes that "[i]n the Agricultural Act of 2014 Congress included the following clause: 'notwithstanding the Controlled Substances Act (21 U.S.C. 801 et seq.), Chapter 81 of Title 41, or any other Federal law, an institution of higher education (as defined in Section 1001 of title 20) or a state department of agriculture may grow or cultivate industrial hemp. . . . '" Agricultural Act of 2014 § 7607, as amended, codified at 7 U.S.C. § 5940(a). A recent opinion of the North Carolina Attorney General reads this "notwithstanding clause" broadly, as "an override of any conflicting provisions of the Controlled Substances Act or any other federal law." Op. N.C. Att'y Gen., May 11, 2017. We agree. Such analysis is persuasive and is set forth as follows:

> [t]he U.S. Supreme Court has remarked,
>
> > As we have noted previously in construing statures, the use of such a "notwithstanding" clause clearly signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of any other section. Likewise, the Courts of Appeals generally have "interpreted similar 'notwithstanding' language to supersede all other laws, stating that a 'clearer statement is difficult to imagine. '"

Cisneros v. Alpine Ridge Group, 508 U.S. 10, 12-13, 113 S.Ct. 1898, 1903, 123 L.Ed.2d 572, 580 (1993) (internal citations omitted, quoting Liberty Maritime Corp. v. U.S., 928 F.2d 413, 416 (D.C. Cir. 1991). In the Cisneros case, a "notwithstanding" clause in a contract prevented adjustment of rents, even though "other provisions of the contracts might seem to require" the opposite result. 508 U.S. at 18-19, 113 S.Ct. at 1903, 123 l.Ed.2d at 581.

A "notwithstanding" clause in a federal law generally overrides not only specifically listed laws, but also other provisions that would restrict the action permitted by the "notwithstanding" clause. For example, the Mandatory Victims Restitutions Act, which applies "Notwithstanding any other federal law," 18 U.S.C. § 3613(a), has been held to override the anti-alienation provisions of ERISA. See, e.g., U.S. v. Novak, 476 F.3d 1041,1046-48 (9th Cir. 2007) (en banc); U.S. v. James, 312 F.Supp.2d 802, 805-806 (E.D. Va. 2004). See also Liberty Maritime Corp., 928 F.2d at 416-17 (holding that a "notwithstanding" clause not only overrode "laws relating generally to the sale of property by the United States," but also "provisions in the Merchant Marine Act relating specifically to the sale of vessels").

B. In Appropriations Acts, Congress Has Demonstrated that It Intended the Agricultural Act to Allow Transport Across State Lines for Qualified Industrial Hemp Cultivation Programs.

Congressional intent to have a broad reading of the "notwithstanding" clause is supported by contemporaneous and current appropriations acts. Congress specifically prohibited agencies from expending funds "to prohibit the transportation ... of industrial hemp" grown or cultivated under the Agricultural Act. Consolidated Appropriations Act, 2017, § 773 of Division A (May 5, 2017). Further, this provision specifically cites transportation "within or outside the State in which the industrial hemp is grown or cultivated." Id. Another provision bars the Drug Enforcement Administration from using funds "in contravention" of section 7606 of the Agricultural Act. Id., § 543 of Division B. This provision appeared in the first omnibus appropriations act passed by Congress after Section 7606 of the Agricultural Act became law. See Consolidated Appropriations Act, 2015, Pub. L. 113-235, § 539 of Division B, 128 Stat. 2130, 2217 (2014). Ultimately, both appropriations act provisions are evidence that, when drafting section 7606 of the Agricultural Act, Congress intended to allow industrial hemp grown for research purposes to be transported outside the State of origin.

C. Seeds Are Covered by the Agricultural Act.

Federal agencies could argue that the "notwithstanding" clause is not broad enough to allow obtaining seeds. Section 7606 does not use the word "seed." However, Section 7606 defines "industrial hemp" to include "the plant Cannabis sativa L. and any part of that plant," § 7606(b)(2), which must include seeds. Further, obtaining seeds is a necessary part of "the growing or cultivating of industrial hemp," § 7606(a)(2), which is the core activity authorized by section 7606.

D. Applicability of Agricultural Act § 7606 to North Carolina's Industrial Hemp Cultivation Program.

This advisory letter assumes that North Carolina's industrial hemp pilot program meets the requirements necessary for section 7606 of the Agricultural Act to apply. North Carolina's program was specifically designed to comply with section 7606 of the Agricultural Act. See 02 N.C. Admin. Code 62.0109 (2017) (adopting the Act by reference, along with all subsequent amendments). The North Carolina program authorizes growth or cultivation solely "for research purposes," N.C. Gen. Stat. § 106-568.53(2), which parallels the requirement in Agricultural Act § 7606(a)(1) that the growth or cultivation be "for purposes of research conducted under an agricultural pilot program or other agricultural or academic research." This opinion is premised on North Carolina's program being conducted for research purposes.

Federal agencies could argue that § 7606 of the Agricultural Act authorizes only industrial hemp cultivation carried out directly by the State, rather than cultivation by State licensees under State supervision and management. This interpretation of the Act, however would make one provision of § 7606 meaningless, and the courts generally "reject constructions that render a term redundant." Psinet, Inc. v. Chapman, 362 F.3d 227, 232 (4th Cir. 2004). Section 7606(b)(1)(B)(ii), defining a qualifying agricultural pilot program, assumes that individual farmers will carry out cultivation under the Act at a variety of sites. The provision reads:

> The term "agricultural pilot program" means a pilot program to study the growth, cultivation, or marketing of industrial hemp ...
>
> (B) in a manner that...
>
> (ii) requires that sites used for growing or cultivating industrial hemp in a State be certified by, and registered with, the State department of agriculture.

Agricultural Act of 2014 § 7606(b)(l)(B)(ii), codified at 7 U.S.C. § 5940(l)(B)(ii). There would be no purpose to this site registration provision if the state department of agriculture, which is the agency empowered to grow or cultivate industrial hemp, also had to lease or hold physical title to each site where industrial hemp is being grown. The more reasonable reading of this provision is that state departments of agriculture will license individual farms to grow industrial hemp at a variety of sites, and each site will be registered with the department of agriculture. This is consistent with North Carolina law. See N.C. Gen. Stat. § 106-568.53(2), 02 N.C. Admin. Code 62.0107(a)(4), and 02 N.C. Admin. Code 62.0108, which implement the site registration requirement in Agricultural Act § 7606(b)(1)(b)(ii) for licensees.

In our view, the North Carolina Attorney General's analysis is correct.

Conclusion

We agree with you, as well as the North Carolina Attorney General, that the South Carolina Industrial Hemp Pilot Program permitted growers may obtain industrial hemp seeds

domestically, from a qualifying industrial hemp program in another state. We see no prohibition in federal law for this activity. The "Statement of Principles," referenced by you, cannot control acts of Congress. As you note, the broad "notwithstanding" clause in the Agricultural Act of 2014 allows industrial hemp to be transported across state lines as part of qualified industrial hemp cultivational programs. Congress' power to regulate interstate activities is particularly broad. Gonzales v. Raich, 545 U.S. 1 (2005). Moreover, the power of Congress to specify conditions for the spending of federal funds pursuant to the "Spending Clause" is likewise exceedingly broad. Here, Congress has specified that federal funds may not be expended to "prohibit the transportation, processing, sale, or use of industrial hemp that is grown or cultivated in accordance with Section 7606 of the Agricultural Act of 2014, within or outside the State in which the industrial hemp is grown or cultivated." Like the North Carolina Attorney General, we believe that seeds are covered by the Agricultural Act.

Accordingly, it is our opinion that permitted growers who are participating in the South Carolina Industrial Hemp Pilot Program may obtain seeds from a qualifying industrial hemp program in another state.

Sincerely,

Robert D. Cook
Solicitor General