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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

COUNTY OF SAN DIEGO,

Plaintiff,
v.

SAN DIEGO NORML, a California Corporation; SANDRA SHEWRY, Director of the California Department of Health Services in her official capacity; and DOES 1 through 50 inclusive,

Defendants.

COUNTY OF SAN BERNARDINO and GARY PENROD as Sheriff of the COUNTY OF SAN BERNARDINO,

Plaintiffs,
v.

STATE OF CALIFORNIA; SANDRA SHEWRY, in her official capacity as Director of California Department of Health Services; and DOES 1 through 50, inclusive,

Defendants.

Case No. GIC 860665

PATIENT-INTERVENORS' MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO MOTION FOR JUDGMENT ON THE PLEADINGS

Date: November 16, 2006
Time: 1:30 p.m.
Dept.: 64
Judge: Honorable William R. Nevitt, Jr.
Action Filed: February 1, 2006

COUNTY OF MERCED AND MARK PAZIN, as Sheriff of the COUNTY OF MERCED; and DOES 51 through 100 inclusive,

Intervenors.

WENDY CHRISTAKES; PAEMLASAKUDA; NORBERT LITZINGER; WILLIAM BRITT; YVONNE WESTBROOK; STEPHEN O'BRIEN; WO/MEN'S ALLIANCE FOR MEDICAL MARIJUANA; AND AMERICANS FOR SAFE ACCESS,

Third-Party Plaintiff-Intervenors.

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INTRODUCTION

The federal government criminalizes hundreds, if not thousands, of acts that the states do not criminalize. These instances of states exercising their sovereign powers to provide exemptions from criminal punishment are not preempted by federal law. The Counties have not identified a single case even suggesting that a state's withholding of criminal penalties can be preempted.

California has a sovereign right to except from criminal penalty the possession or use of marijuana for a small group of seriously ill individuals. The challenged State laws—including the identification-card program, which allows law enforcement officers to distinguish between law-abiding citizens and violators of State law—do not require anyone to violate federal law, and therefore are not preempted by federal law.

The Counties do not come close to rebutting the very heavy presumption that "the historic police powers of the States were not to be superseded by the Federal Act." (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1150 fn.7.) Rather, the Counties mount an untenable argument—one that, as discussed below, would result in thousands of State laws being preempted. The Counties' claims, with no logical stopping point and such sweeping results, must be rejected.

I. THE COUNTIES LACK STANDING TO CHALLENGE PROPOSITION 215 AND MOST PROVISIONS OF THE PROGRAM ACT.

Only San Diego has even attempted to explain how it could have standing, but its argument is baseless. Citing *Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 8, San Diego claims that public entities necessarily have standing to bring preemption challenges when others would not have standing to challenge state laws. (San Diego Oppos., at p. 5.)

However, *Star-Kist* simply holds that a county is not *per se* precluded from invoking the Supremacy Clause of the U.S. Constitution solely because it is a political subdivision of the State. (*Star-Kist*, *supra*, 42 Cal.3d at pp. 7-9; Order Denying Demurrer, at p. 2.) The opinion does not hold the converse—that there is a *per se* rule conferring standing on any county wishing to challenge state law on preemption grounds. Rather, *any* plaintiff must be injured by a statute in order to challenge its constitutionality. (See *In re Tania S.* (1992) 5 Cal.App.4th 728, 736-37.) Indeed, in *Star-Kist*, the Supreme Court held that the County of Los Angeles could challenge a statute that caused it to "experience[] significant revenue loss." (42 Cal.3d at p. 9.)

Here, none of the Counties could argue that they are injured by any of the challenged portions of Proposition 215. Without bringing into issue subdivision (d) of Proposition 215,[1] the Counties are left challenging the initiative's title [subd. (a)], purposes [subd. (b)], statement of encouragement [subd. (c)], and definition of "primary caregiver" [subd. (e)]—none of which the Counties argue is injurious to them.

As for the remaining provisions at issue here—the statutes comprising the Medical Marijuana Program Act (§§ 11362.7 - .83)—San Diego suggests that it may challenge any provision of a statute so long as it has standing to challenge other provisions of the statute. (San Diego Oppos. Br., at p. 3.) However, the Counties, like all plaintiffs, may challenge only those specific statutory provisions that cause them harm. (See *In re Tania S.*, *supra*, 5 Cal.App.4th at p. 737 ["It is incumbent upon a party . . . who assails a law . . . to show that the provisions of the statute . . . are applicable to him and that he is injuriously affected thereby."].) Aside from those sub-sections requiring the Counties to provide identification cards to qualifying patients, the

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[1] Cal. Health & Safety Code § 11362.5, subd. (d). Unless otherwise specified, all subsequent references to statutory provisions are to California's Health and Safety Code.

Counties have been unable to identify how any provision of the Program Act actually injures them. Accordingly, the Court should grant Patient-Intervenors' motion for judgment on the pleadings as to all of these provisions.

II. THE CHALLENGED STATUTES ARE NOT PREEMPTED BY THE CSA BECAUSE THEY DO NOT REQUIRE ANY CONDUCT THAT THE CSA PROSCRIBES.

Congress was crystal clear that the CSA would preempt only those state laws that are in "positive conflict" with the federal statute. The CSA's anti-preemption provision explicitly contemplates this type of preemption—and only this type of preemption—and any contrary interpretation runs counter to the express wishes of Congress.

The parties agree that congressional intent guides the analysis regarding the scope or extent of federal preemption. (See, e.g., *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955.) Furthermore, it is a basic tenet of statutory interpretation that "to ascertain the Legislature's intent, we turn initially to the words of the statute, and if the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it." (*People v. Brock* (2006) 49 Cal.Rptr.3d 879, 890 [internal quotation marks omitted].) Such is the case with the CSA, where the anti-preemption provision is clear that the statute will preempt state law only in the event of a positive conflict between the two. (21 U.S.C. § 903 [providing that the CSA will not preempt state law "**unless there is a positive conflict** between [the CSA] and that State law so that the two cannot consistently stand together"] [emphasis added].)

The Counties are simply wrong to the extent they argue that precedent requires courts to apply every conceivable type of preemption to a Supremacy Clause claim, regardless of the federal law at issue. To be sure, there are forms of preemption other than positive-conflict

preemption (e.g., obstacle preemption), but Congress of course has the freedom to decide which type(s) of preemption will apply to its statutes, and, in enacting the CSA, it decided that only positive-conflict preemption shall apply. Because the CSA's "statutory language is clear" that it will preempt state laws only where there is a positive conflict with those laws, the court "should not indulge" in reading any other type of preemption into the federal statute. (*Brock*, *supra*, 49 Cal.Rptr.3d at p. 890.)

Further, the challenged State statutes do not require anyone to violate the CSA, and therefore they are not in positive conflict with the CSA. Positive-conflict preemption means that state law will be preempted only when compliance with both federal and state law "is a physical impossibility." (*Southern Blasting Servs. v. Wilkes County* (4th Cir. 2002) 288 F.3d 584, 591.)[2] Withdrawing certain conduct from criminal liability under state law, like the challenged statutes, does not make compliance with the CSA a "physical impossibility." (See *United States v. Cannabis Cultivators Club* (N.D. Cal. 1998) 5 F.Supp.2d 1086, 1100 ["Proposition 215 does not conflict with federal law because on its face it does not purport to make legal any conduct prohibited by federal law; it merely exempts certain conduct by certain persons from the California drug laws."].)

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[2] San Diego argues that *Southern Blasting* recognizes the applicability of obstacle preemption because it references obstacle preemption. However, the Fourth Circuit mentions obstacle preemption only at the beginning of the opinion, when it lays out all the conceivable types of preemption. (*Southern Blasting*, *supra*, at p. 590.) Then, when it comes time to analyzing the preemptive effect of 18 U.S.C. § 848—which is materially identical to the CSA's Section 903—it applies only positive-conflict preemption. (*Ibid.*, pp. 590-92.)

San Diego further contends that *Southern Blasting* supports its position because the opinion notes that a state law is more likely to be preempted when it "provides that compliance with a federal standard is not mandated." (*Ibid.*, at p. 591.) However, California does not encourage the violation of federal law or purport to insulate individuals from *federal* criminal liability. In fact, the State's application for an identification card cautions that State law "does not protect marijuana plants from seizure nor individuals from federal prosecution under the [CSA]." (State's Req. for Jud. Notice in Oppos. to Counties' Mot., Exh. 1.)

Simply put, the State of California does not require anyone to possess or use marijuana. Not criminalizing the possession of marijuana by a very small group of sick individuals does not require anyone to violate the CSA. (§ 11362.775.) Issuing identification cards that allow law enforcement officers to distinguish between (1) a qualifying patient and (2) someone who is not a patient and thus is violating State law by possessing marijuana does not require anyone to violate federal law. (§§ 11362.71 - 11362.76.) Codifying the amount of marijuana above which a qualifying patient may be prosecuted likewise does not require a violation of federal law.[3] None of the challenged provisions requires anyone to violate federal law.

Grasping to find a State marijuana statute that might violate the CSA, San Bernardino posits two futile arguments. First, it maintains that there is a positive conflict between California's laws and the CSA because law enforcement officers are sworn to uphold State law, which does not allow the conviction of a qualifying patient for possessing a limited amount of medical marijuana, and federal law, which makes such possession illegal. However, State and local police are *not required* to arrest people who possess medical marijuana in breach of federal law. State law clearly gives law enforcement officers such discretion. (Penal Code § 836, subd. (a)(1) [providing that a peace officer "may" arrest a person if he or she "has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence"]. See also *Town of Castle Rock v. Gonzales* (2005) 545 U.S. 748, --, 125 S.Ct. 2796, 2806 [noting

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[3] The Program Act provides a ceiling for the amount of medical marijuana that a qualifying patient may possess without facing criminal penalties. (§ 11362.77, subd. (a).) While this sub-section employs the language "may possess," the Legislature was clear that this simply provides the amount of medical marijuana for which a qualifying patient cannot be prosecuted under State law, and does not require any individual to possess marijuana. (Sen. Rules Comm., Analysis of Senate Bill No. 420, at p. 6 ["The limits set forth in Section 11362.77(a) only serve to provide immunity from arrest for patients taking part in the voluntary ID card program . . . ."] [attached to State's Req. for Jud. Notice in Oppos. to Counties' Mot., Exh. 2].)

that peace officers have wide discretion regarding whether to make an arrest and referencing the "deep-rooted nature of law-enforcement discretion"].)[4] Accordingly, state and local law enforcement officers face no irreconcilable conflict. Rather, the Counties have attempted to manufacture a false dilemma for the purposes of this litigation.

Second, San Bernardino quotes a statute (§ 11362.9) that may actually be in positive conflict with the CSA because it appears to require conduct that the CSA proscribes. While this statute is, in some ways, irrelevant to this case—it was not challenged in the causes of action—it is illustrative for its contrast with the statutes that the Counties actually challenge. Section 11362.9 *requires* the State Attorney General to provide marijuana to the University of California for research purposes if the University's application to federal agencies for such marijuana is rejected. If the Attorney General's mandatory provision of this marijuana would violate the CSA, then this State law could be in positive conflict with the CSA. The challenged statutes, however, unlike § 11362.9, do not require any such conduct. Accordingly, the challenged statutes are not in positive conflict with the CSA.

III. THE SINGLE CONVENTION PROVIDES NO SUPPORT FOR THE COUNTIES' CLAIMS.

In its opposition, San Diego makes the surprising suggestion that the Single Convention on Narcotic Drugs ("Single Convention") (18 U.S.T. 1407) provides potentially greater preemptive effect than the CSA because the treaty is partly self-executing. However, this unexpected claim is contradicted by San Diego's own pleadings, let alone all authority on the subject. (See Compl. of San Diego, at ¶ 14 ["The Single Convention is not self-executing"]. See,

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[4] Of course, the federal government could not *require* state officials to enforce federal law. (See *Printz v. United States* (1997) 521 U.S. 898.)

e.g., *United States v. Feld* (E.D.N.Y. 1981) 514 F. Supp. 283, 288 ["The Single Convention is not self-executing, but works through the constitutional and legal systems of its signatory nations."].)[5] In fact, Congress, in enacting the CSA, explicitly disagreed with San Diego's new contention:

> The [Single] Convention is not self-executing, and the obligations of the United States thereunder may only be performed pursuant to . . . legislation. It is the intent of the Congress that the [CSA] . . . will enable the United States to meet all of its obligations under the Convention . . . .

(21 U.S.C. § 801a, subd. (2).) Given this clear authority, the Court must reject San Diego's belated suggestion that the Single Convention is partly self-executing.

IV. THE COURT SHOULD REJECT THE COUNTIES' CLAIMS IN ORDER TO AVOID A VIOLATION OF THE TENTH AMENDMENT.

In seeking to strike down California's medical marijuana laws, the Counties ask this Court to rule that federal law *requires* California to prohibit medical marijuana. The Counties cannot escape the serious Tenth Amendment difficulties raised by this argument.

In an attempt to avoid such problems, the Counties rely on cases holding that Congress has the power to enact laws that offer States the *choice* of regulating an activity according to federal standards or having state law preempted by federal regulation. (See San Diego's Oppos., at p. 18.) Although this is true, the problem with the Counties' approach is that the CSA is plainly *not* such a law.

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[5] The cases that San Diego cites in support of its argument that the Single Convention may afford a preemption claim broader than that under the CSA are inapposite because they either do not involve a treaty at all (see, e.g., *Bud Antle, Inc. v. Barbosa* (9th Cir. 1994) 45 F.3d 1261; *Qwest Corp. v. City of Santa Fe* (10th Cir. 2004) 380 F.3d 1258) or involve a self-executing treaty (see *Trans World Airlines, Inc. v. Franklin Mint Corp.* (1984) 466 U.S. 243, 252 [noting that the Warsaw Convention "is a self-executing treaty"]).

Congress may, consistent with the Tenth Amendment, force states to choose between regulating to federal standards or not regulating at all. (See, e.g., 16 U.S.C. § 1535, subd. (f) ["Any State law or regulation respecting the taking of an endangered species . . . may be more restrictive than [federal law] but not less restrictive than [federal law]."].) Such statutes stand in stark contrast to the CSA, which *does not require state law to be at least as restrictive as federal law*. Therefore, none of the cases cited by the Counties explains how the Counties' position is consistent with the Tenth Amendment, which would be violated if the CSA were interpreted to preempt California's medical marijuana laws. (Cf. *Central Delta Water Agency v. State Water Res. Control Bd.* (1993) 17 Cal.App.4th 621, 639 ["[A] statute must be found constitutional if there is any reasonable way to construe it which avoids constitutional infirmity."].)

V. THE COUNTIES' ARGUMENTS, IF ADOPTED, WOULD LEAD TO FAR-REACHING AND ABSURD RESULTS.

The Counties urge the Court to make a radical and unprecedented ruling by holding that a state's decision to withdraw its own criminal penalties is preempted by federal law. A decision in favor of the Counties would undermine core principles of federalism. Further, such a ruling would send nationwide shockwaves, as it would imply the preemption of thousands of state criminal laws around the country.

For starters, a ruling in favor of the Counties would disrupt the identification-card programs that, in the few months since California counties have begun implementing the

programs, have *already* been adopted in twenty-three counties.[6] While the three Plaintiff-Counties may not wish to implement the identification-card scheme, more than seven-times as many California counties have already done so, with this number growing by the month. The twenty-three counties' efforts to conserve their scarce law enforcement resources, as the voters intended, will be unnecessarily disrupted if these three Plaintiff-Counties have their way.

Moreover, the Counties' argument has far-reaching, nationwide implications. The Counties maintain that California must punish the possession and use of marijuana at least as strictly as the federal government, or else find its laws preempted. An identical argument could be posited against *every* decision by a state to make its drug laws more lenient than the counterpart federal law. This is why the Counties maintain that states "are free to . . . impose *harsher* sentences for marijuana offences," but are conspicuously silent regarding the possibility of state law being more lenient than federal law. (San Diego's Oppos., at p. 10 [emphasis added].) Once it is accepted, as it must be, that state criminal drug laws may be more lenient than the CSA and that states are not required to criminalize the same conduct as the CSA, the Counties' argument falls apart.

Countless laws would fall prey to the Counties' misguided argument. For example, federal law provides for a custodial sentence of up to one year for a first marijuana possession offense (21 U.S.C. § 844), while ten states, including California, do not provide for custodial

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[6] See http://www.dhs.ca.gov/hisp/ochs/MMP/County_Programs_&_Business_Hours/CoProgBusHrs.pdf (reporting that twenty-three California counties have followed State law by already implementing an identification-card program); see also Patient-Intervenors' Req. for Jud. Not. in Supp. of Reply Br., Exh. MMM.

sentences for possession of small amounts of marijuana.[7] In many of these states, a first-time marijuana possession incident is not even a crime. (See, e.g., Or. Rev. Stat. § 475.864 subd., (3).) All of these laws would be preempted under the Counties' novel preemption argument.

It is difficult to understate the implications of a ruling for the Counties in this case. *Every single state* has at least some drug laws that are more lenient than federal law (see *United States v. Angelos* (D. Utah 2004) 345 F. Supp. 2d 1227, 1259 [noting that federal drug laws required a mandatory sentence that was "longer than [the defendant] would receive in any of the fifty states"]), and therefore the validity of all of these state laws would be called into question if California's medical marijuana laws were struck down.[8]

The Counties' preemption argument would extend beyond the drug context to other criminal laws, such as state firearms statutes. This is because many states have firearms laws that criminalize a much narrower range of conduct than that prohibited by federal law.[9] Under

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[7] See § 11357 subd. (b); Colo. Rev. Stat. § 18-18-406, subd. (1); Me. Rev. Stat. tit. 22, § 2383, subd. (1); Minn. Stat. § 152.027, subd. (4); Miss. Code § 41-29-139, subd. (c)(2); Neb. Rev. Stat. § 28-416, subd. (13); Nev. Rev. Stat. § 453.336, subd. (4); N.Y. Penal Law § 221.05; Ohio Rev. Code § 2925.11, subd. (C)(3); Ohio Rev. Code § 2929.21, subd. (D); Or. Rev. Stat. § 475.864, subd. (3)). California has adopted a lenient approach for *all* non-violent drug possession offenses. Proposition 36 (which was approved overwhelmingly by California's voters in 2000) provides that most non-violent drug-possession offenders shall receive probation rather than a custodial sentence for their first two such offenses. (Penal Code § 1210.1, subd. (a).)

[8] If accepted, the Counties' arguments might even limit the ability to give effect to certain state constitutional protections. For example, in *Ravin v. State* (Alaska 1975) 537 P.2d 494, 511, the Alaska Supreme Court held that "possession of marijuana by adults at home for personal use is constitutionally protected" by the State Constitution's privacy clause. As with California's medical marijuana laws, the *Ravin* decision withdraws state criminal penalties for a subset of marijuana offenses. Nevertheless, nobody has ever suggested that the Alaska Supreme Court's constitutional interpretation is preempted by federal law.

[9] To take but one example, many states do not criminalize the sale of handguns to persons aged 18 to 21. (See, e.g., Ind. Code § 35-47-2-7, subd. (a); Idaho Code Ann. § 18-3302A; Tex.

the Counties' tortured preemption analysis, the state gun laws would be preempted by federal law.[10] The State's and Patient-Intervenors' analysis, however, would appropriately allow the separate sovereigns of the federal and state governments to set their own criminal laws. If the federal government would like to prosecute individuals for violating federal firearms statutes, it may do so; but the states need not criminalize such conduct.

The Counties ask the Court to take the radical step of striking down California's medical marijuana laws. This unprecedented move would undermine hundreds, if not thousands, of state criminal laws around the nation. When these far-reaching consequences are considered, it is easy to understand why, ten years after states began enacting medical marijuana laws, these laws have never been held preempted by federal law.

VII. THE PROGRAM ACT DOES NOT UNCONSTITUTIONALLY AMEND PROPOSITION 215 BECAUSE, AS MERCED ADMITS, THE LEGISLATION ENACTS MEASURES THAT PROPOSITION 215 DID NOT CONTEMPLATE.

For the reasons stated in Patient-Intervenors' and the State's previously-filed briefs, the Program Act does not "amend" Proposition 215 pursuant to Article II, § 10(c) of the California Constitution. Rather, the Program Act merely touches on the subject matter of Proposition 215 without adding to or subtracting from the initiative.

Merced, as the party seeking to strike down a State statute, bears a heavy burden to succeed on its claim. (See *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1253.) As

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Penal Code Ann. § 46.06). Federal law, in contrast, prohibits gun dealers from selling handguns to persons less than 21 years of age. (18 U.S.C. § 922 subd., (b)(1).)

[10] The federal firearms statutory scheme includes an anti-preemption provision (18 U.S.C. § 927) that is materially identical to that of the CSA.

with the Counties' preemption claims, it must point to specific provisions—as opposed to a statutory scheme *in toto*—that allegedly amend Proposition 215. It has not—and cannot—meet its heavy burden.

Merced's entire claim rests on two contentions: (1) the Legislature listed "clarifying the scope" of Proposition 215 as one of the many purposes of the Program Act (see Merced's Oppos. Br., at p. 15), and (2) the Program Act includes provisions that "Proposition 215 did not contemplate" (*ibid.*, at pp. 15-16). As for the first contention, Patient-Intervenors fully agree with the State that the "clarification" intended by the Program Act is not the type of clarification that is unconstitutional pursuant to Section 10(c). (State's Oppos. Br., at pp. 21-23.) Rather, as is entirely permissible under the State Constitution, the Program Act "address[es] issues that were not included in the Act and that must be resolved in order to promote . . . implementation of the Act." (S.B. 420 § 1, subd. (c).)

Merced's second contention is a perfect illustration of why its claim must fail. Legislation can permissibly deal with the subject of an initiative in any manner that the initiative "does not specifically authorize or prohibit." (*People v. Cooper* (2002) 27 Cal.4th 38, 47 [emphasis omitted]; *Knight v. Superior Court* (2005) 128 Cal.App.4th 14.) Patient-Intervenors agree with Merced that the Program Act is full of provisions, such as the voluntary identification card program, that "Proposition 215 did not contemplate." (Merced's Oppos. Br. at pp. 15-16.) Accordingly, the Program Act does not amend Proposition 215, but, rather, is entirely consistent with the initiative.

CONCLUSION

For the foregoing reasons, Patient-Intervenors respectfully request that the Court grant their motion for judgment on the pleadings.

Dated: November 3, 2006

Respectfully Submitted,

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