No. 08-887

APR 27 2009

In The

Supreme Court of the United States

COUNTY OF SAN DIEGO, et al.,

Petitioners,

vs.

SAN DIEGO NORML, et al.,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division One

REPLY BRIEF OF PETITIONER COUNTY OF SAN DIEGO

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REPLY BRIEF OF PETITIONER COUNTY OF SAN DIEGO

Respondents do not dispute the critical points raised in the County of San Diego's (the "County") Petition. The following points remain unrebutted:

- Congress' goal in enacting the Controlled Substances Act ("CSA") was to eradicate the use of certain drugs, including marijuana;
- In the CSA, Congress declared that marijuana has no medically accepted use;
- Under the CSA, Congress created a "closed system" in order to prevent drugs from being diverted from legitimate medical users into the hands of recreational drug users;
- California's Medical Marijuana Law authorizes individuals to engage in conduct – the use[1] of marijuana – that violates the CSA;
- The Medical Marijuana Law requires the County to issue identification cards that facilitate the use of marijuana – conduct that violates the CSA;

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[1] Unless otherwise indicated, references to the "use" of marijuana should also be read to include the possession, cultivation, and transportation of marijuana.

- Since California has authorized individuals to use marijuana for medical purposes, more people will use marijuana in violation of federal law; and
- It is inevitable that marijuana grown for "medical" use will fall into the hands of recreational drugs users.

Given these undisputed facts, the Court should grant this Petition to decide whether California can (1) authorize individuals to engage in conduct that violates the CSA, and (2) require the County to issue identification cards that facilitate such conduct.

Rather than dispute the critical facts, Respondents' briefs[2] primarily attempt to downplay the importance of the issues raised in this Petition and to distort the County's position. Respondents' efforts fail.

Respondents argue that this case is not important enough for this Court to review because the County does not challenge the narrow provision of the Medical Marijuana Law where California declined to criminalize medical marijuana use. However, the County does challenge all of the remaining provisions of the Law that specifically

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[2] Respondents have filed two briefs. One brief has been filed by the State of California and the Director of the Department of Health Services (collectively the "State"). The other brief has been filed by San Diego NORML and various parties who were allowed to intervene into the action (collectively "NORML").

authorize individuals to use marijuana and require counties to issue identification cards to facilitate the marijuana use that California authorized. Whether a state can authorize individuals to engage in conduct that violates federal law is an important issue that warrants this Court's review.

Respondents also argue that the County does not have standing. NORML asserts – contrary to the Court of Appeal's determination – that the County does not have standing to challenge the identification card requirement. NORML's assertion is baseless. According to NORML, since the County is authorized to collect fees from applicants to cover the administrative costs of issuing the identification cards, the County will not be harmed by being forced to issue cards under a state law that is preempted by the CSA. A public entity that is required by a state law to engage in an illegal act (issuing identification cards under a preempted law) suffers a cognizable injury addressable by the courts even if the public entity does not have to spend the taxpayers' money in order to comply with the state law. Being forced to engage in an illegal act is sufficient harm by itself to confer standing.

Since the County had standing to challenge the identification card requirement, the Court of Appeal erred when it failed to consider the primary reason why the County cannot be required to issue the identification cards – because California cannot authorize individuals to engage in conduct – using

marijuana – that violates federal law. Respondents' briefs do not address this argument.

As expected, NORML argues that under the CSA's express preemption clause, a state law is preempted only when it is impossible to comply with both the CSA and the state law. The cases cited by NORML, however, do not support this proposition and its interpretation of the preemption clause would lead to absurd results.

In addition to being expressly preempted, the Medical Marijuana Law is preempted because it conflicts with the CSA. NORML argues that no conflict exists because the federal government can still enforce the CSA against California medical marijuana users. NORML does not dispute, however, that the purpose of the CSA is to eradicate marijuana use, not to prosecute violators. It is apparent that the Medical Marijuana Law will lead to additional marijuana use and for this reason alone it is an obstacle to Congress' true purpose of eradicating such use.

I.

THIS CASE RAISES IMPORTANT QUESTIONS THAT THE COURT SHOULD RESOLVE

In the Petition, the County noted that California has gone well beyond decriminalizing the use of marijuana for "medical" purposes. The Medical Marijuana Law specifically ***authorizes*** individuals

to use marijuana and requires counties to issue identification cards to ***facilitate*** the marijuana use that California has authorized. In their opposition briefs, Respondents do not dispute the broad reach of California's law. Instead, Respondents assert that the Petition should be denied because the County did not challenge a narrow provision of the Medical Marijuana Law that decriminalizes the use of marijuana for medical purposes under California law. Cal. Health & Safety Code § 11362.5(d).[3] Respondents' position is without merit.

Respondents argue that section 11362.5(d) is the "key" provision of the Medical Marijuana Law. However, the remaining provisions of the Medical Marijuana Law – provisions that authorize individuals to use, possess and cultivate marijuana for medical purposes and require counties to issue identification cards facilitating the violation of federal law – are no less "key" than section 11362.5(d). It is undisputed that the County has asserted from the very beginning that all of those provisions are

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[3] Respondents' position is ironic because they argue that the County would not have standing to challenge section 11362.5(d). Indeed, Respondents suggest that no one would have standing to challenge this provision. (NORML Brief, at 9.) Nonetheless, Respondents assert that "the Court should wait for a case in which the parties properly litigate the question and the lower courts have construed the key provisions of the state statutes." (State Brief, at 7.) If Respondents' position were accepted, however, no party would ever have standing to challenge section 11362.5(d) and no lower court would ever decide on the merits whether that section was preempted.

preempted by the CSA.[4] Indeed, even if states have the authority to decide what conduct to criminalize, they do not have the authority to authorize individuals to engage in conduct that violates federal law. The Court should grant this Petition to make it clear that states may not authorize individuals to engage in conduct that violates federal law and may not facilitate illegal conduct. This is an important issue that warrants this Court's attention.

Respondents also erroneously assert that the County is asking the Court to consider the validity of section 11362.5(d). According to the State, "[t]his case does not present any reason to depart from the general rule against review of undecided questions." (State Brief, at 7; *see also* NORML Brief, at 5.) However, the County is not asking the Court to consider whether section 11362.5(d) is preempted. The County is asking the Court to consider whether the remaining provisions of the Medical Marijuana Law that specifically authorize individuals to use marijuana and require counties to issue identification cards to facilitate marijuana use are preempted. This is an important question that should be decided by this Court.

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[4] The County alleged in its complaint and throughout this litigation that California Health and Safety Code sections 11362.5(a)-(c) and (e), and sections 11362.7 through 11362.83, are preempted by the CSA.

II.

THE COUNTY HAS STANDING

The Court of Appeal held that the County has standing to challenge the provisions of the Medical Marijuana Law requiring it to issue identification cards to medical marijuana users and caregivers. NORML argues that because the County is authorized by the Medical Marijuana Law to collect fees from applicants to cover the administrative costs of issuing the identification cards, "this Court must look to a difficult issue of unresolved state law" to determine whether the County has standing to challenge the identification card requirement. (NORML Brief, at 11.) NORML argues that the California Supreme Court may hold that the County is not harmed by issuing the identification cards because it can collect fees from applicants. (*Id.*) NORML's argument is meritless for several reasons. First, the issue is not "unresolved" – the Court of Appeal held that the County had standing to challenge the identification card requirement. Second, whether the County has suffered a sufficient injury to confer standing under Article III is a question of federal law, not state law. Third, it cannot seriously be argued that the County will not be harmed if it is required to issue identification cards under a state law that is preempted by federal law. The County could be found liable for issuing identification cards that violate federal law. Moreover, requiring an entity to provide a service (even if that service is paid for by a third party) that

is illegal is alone a sufficient injury to confer standing.

Since the County has standing to challenge the identification card requirement, the Court of Appeal erred when it failed to consider the County's argument why it cannot be required to issue the identification cards – because California cannot authorize individuals to use marijuana for medical purposes. The County made this point in its Petition. Respondents do not even address this point in their briefs.

Indeed, the State does not contend that if the provisions of the Medical Marijuana Law authorizing individuals to use marijuana for medical purposes were declared preempted that California could require the County to issue identification cards to medical marijuana users and caregivers. This is a tacit admission that the County has standing to challenge the provisions of California law authorizing individuals to use marijuana for medical purposes because, if those provisions are preempted, the identification card provisions are necessarily invalid.

As part of its standing argument, NORML resorts to the tactic discussed above – confusing the narrow provision decriminalizing marijuana use (section 11362.5(d)) with the remaining provisions of the Medical Marijuana Law authorizing individuals to use marijuana and requiring counties to issue identification cards to facilitate the marijuana use that California has authorized. NORML argues that

the County would not have standing to challenge section 11362.5(d),[5] but does not explain why the County does not have standing to challenge the remaining provisions of the Medical Marijuana Law that specifically authorize individuals to use marijuana – conduct that violates federal law.

III.

THE CSA'S EXPRESS PREEMPTION CLAUSE DOES NOT SAVE THE MEDICAL MARIJUANA LAW

Respondents' assertion that the CSA's express preemption clause (21 U.S.C. § 903)[6] supports their position that the Medical Marijuana Law is not preempted is without merit. Section 903 preempts state laws when there is a "positive conflict" between the CSA and the state law "so that the two cannot consistently stand together." 21 U.S.C. § 903. NORML asserts that a "positive conflict" only occurs when it is physically impossible to comply with both the CSA and the state law. NORML contends that the Court reached this conclusion in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143

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[5] The County's standing to challenge section 11362.5(d) is not an issue because the County does not argue that this provision is preempted.

[6] Respondents refer to section 903 as an "anti-preemption" clause. This Court, however, has referred to section 903 as a "pre-emption provision." *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006).

(1963) and *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992). NORML is simply wrong.

The *Paul* case did not involve interpretation of an express preemption clause, much less an express preemption clause that contained the phrase "positive conflict." The *Gade* case also did not involve the interpretation of an express preemption clause or "positive conflict" language. Indeed, the Court found that the state law at issue in that case was preempted.

NORML asserts that under the CSA, "Congress intended to preempt only state laws in positive conflict with the CSA, and no others." (NORML Brief, at 17.) The County agrees that Congress intended to preempt state laws that are in positive conflict with the CSA. Respondents offer no persuasive reason, however, why a state law that authorizes individuals to engage in conduct that the CSA prohibits does not create a positive conflict with the CSA. Neither do Respondents explain why a state law that is an obstacle to the accomplishment of the purposes and objectives of the CSA does not create a "positive conflict" with the CSA.

Indeed, Respondents' contention that the CSA's express preemption clause precludes a court from considering whether a state law is an obstacle to the accomplishment of the purposes and objectives of the CSA is meritless. In order to accept this position, the Court would have to conclude that Congress intended

to allow states to pass laws that conflict with the CSA. Respondents offer no reason why Congress would have wanted this absurd result.

NORML also argues that the Medical Marijuana Law is not an obstacle to the accomplishment of the purposes and objectives of the CSA because the federal government can still enforce the CSA. However, as discussed in detail in the Petition, the purpose of the CSA is to prevent the use of illegal drugs such as marijuana – not to prosecute individuals for violating the CSA. Respondents do not even try to refute the County's position that under the Medical Marijuana Law (1) marijuana use will increase and (2) marijuana grown for medical purposes will be diverted to recreational drug users. These undisputed facts establish that the Medical Marijuana Law is an obstacle to the accomplishment of the real purposes and objectives of the CSA and is therefore preempted.

NORML's assertion that the Court of Appeal's decision is consistent with this Court's recent decision in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) is mistaken. In finding that the state tort law at issue in *Wyeth* was not preempted, the Vermont Supreme Court decided that the federal Food, Drug and Cosmetic Act's savings clause precluded it from considering whether Vermont's law was an obstacle to the accomplishment of the purposes and objectives of the federal law. *Levine v. Wyeth*, 944 A.2d 179, 190-191

(Vt. 2006). Relying on *Southern Blasting Services, Inc. v. Wilkes County*, 288 F.3d 584 (4th Cir. 2002)[7] the Vermont court concluded that the savings clause, which requires a "direct and positive conflict" for preemption, expressed Congress' intent to only preempt laws when it is impossible to comply with both the state and federal law. *Id.* This Court rejected that argument, specifically considering whether the Vermont law was an obstacle to the accomplishment of the purposes and objectives of the federal law. *Wyeth*, 129 S. Ct. at 1199-1204.

Further, Vermont's tort laws regulated prescription drug warning labels more stringently than did the federal law. Therefore, Vermont's laws were consistent with the purpose of the federal law "to bolster consumer protection against harmful products." *Id.* at 1199 (citations omitted). Here, however, California has authorized individuals to use marijuana. This is inconsistent with Congress' goal of eradicating marijuana use.

For these reasons, the Medical Marijuana Law is expressly preempted because it "positively conflicts" with the CSA and is impliedly preempted because it is an obstacle to the accomplishment of the purposes and objectives of the CSA.

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[7] The Court of Appeal relied on *Southern Blasting* for the same proposition and NORML cites this case in its brief for this proposition.

IV.

THERE IS NO TENTH AMENDMENT ISSUE

Respondents argue that an order declaring the Medical Marijuana Law preempted would violate the Tenth Amendment. Respondents' argument is based on a mischaracterization of the County's position and a misreading of this Court's Tenth Amendment jurisprudence.

Respondents incorrectly assert that if the Medical Marijuana Law were found preempted, it "would force States to enact criminal prohibitions that mirror those of federal law." (NORML Brief, at 19-20.) Respondents are incorrect. If this Court were to find the Medical Marijuana Law preempted, California would not be "forced" to enact any law. An easy example demonstrates this point. If Congress passed a law requiring oranges to be transported in red trucks and California passed a law requiring oranges to be transported in blue trucks, the California law would be preempted because it conflicts with the federal law. An order declaring the California blue truck law preempted ***would not require the Legislature to pass a law providing, as does the federal law, that oranges must be transported in red trucks***. California would be free to pass no legislation at all dealing with this area, but it could not pass a law that conflicts with the federal law. The same is true for California's Medical Marijuana Law. An order finding the Medical Marijuana Law preempted would not require California to pass a

law declaring the medicinal use of marijuana illegal. The Legislature can choose not to enact any law dealing with the medicinal use of marijuana, but cannot enact a law that authorizes individuals to use marijuana for medical purposes in conflict with the CSA.

Moreover, this Court has held that the Tenth Amendment does not limit congressional power to preempt state laws that regulate private conduct affecting interstate commerce. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289-290 (1981) ("To object to this scheme, however, ***appellees must assume that the Tenth Amendment limits congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce. This assumption is incorrect.***") (emphasis added).

Accordingly, an order finding the Medical Marijuana Law preempted would not violate the Tenth Amendment.

V.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

DATED: April 27, 2009

Respectfully submitted,

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