No. _____

In The
Supreme Court of the United States

COUNTY OF BUTTE, ET AL.,
Petitioners,

v.

THE SUPERIOR COURT OF BUTTE COUNTY,
DAVID WILLIAMS, AND DOES 1-4,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Third Appellate District

PETITION FOR WRIT OF CERTIORARI

BRUCE S. ALPERT
BUTTE COUNTY COUNSEL
Counsel of Record
BRAD J. STEPHENS
DEPUTY COUNTY COUNSEL
OFFICE OF THE BUTTE COUNTY COUNSEL
25 COUNTY CENTER DRIVE, SUITE 210
OROVILLE, CA 95965
(530) 538-7621

Counsel for Petitioners

December 8, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Blank Page

QUESTION PRESENTED

Does the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, which defines marijuana as contraband per se, preempt the decision from California's Third District Court of Appeal, which held that California law provides a protected property interest in marijuana that can form the basis for a civil action against law enforcement officers for money damages?

PARTIES TO THE PROCEEDING

The Petitioners are the County of Butte, California, the Butte County Sheriff's Department, and Butte County Sheriff's Deputy Jacob Hancock. None of the Petitioners is a corporation.

The Respondents are the Superior Court of Butte County, David Williams, and DOES 1-4.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

REGULATIONS

RULES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioners the County of Butte, the Butte County Sheriff's Department, and Butte County Sheriff's Deputy Jacob Hancock (the "County") respectfully petition for a writ of certiorari to review the divided decision of the California Court of Appeal, Third Appellate District.

OPINIONS BELOW

The California Court of Appeal's decision is reported at 175 Cal.App.4th 729, and is reprinted in the Appendix to the Petition ("App.") at 2a-32a. The California Supreme Court's denial of the County's Petition for Review of the Court of Appeal's decision is available electronically at 2009 Cal. LEXIS 10302 (Cal. September 23, 2009), and appears in the Appendix at 1a. The order of the Butte County Superior Court, overruling the County's demurrer and motion to strike Respondent David Williams' Fourth Amended Complaint, appears in the Appendix at 33a-42a.

JURISDICTION

The Court of Appeal issued its decision on July 1, 2009. The County filed a timely Petition for Review asking the California Supreme Court to review the decision of the Court of Appeal. The California Supreme Court denied the Petition for Review by a vote of 4-2 on September 23, 2009.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The Court of Appeal affirmed the trial court's overruling of the County's demurrer on the basis that California law provides a right to

manufacture, distribute, and possess marijuana – a controlled substance that the federal government is seeking to eradicate. The Court of Appeal's decision was published, and now applies to every law enforcement officer and agency in the State of California. The decision was "final" within the meaning of 28 U.S.C. § 1257(a) because the Appellate Court finally determined that the creation of a protected property interest in marijuana would not violate the Supremacy Clause of the United States Constitution. Reversal by this Court would preclude any further proceedings, whereas allowing the decision to go unchallenged would seriously erode important federal policy in the area of controlled substances, and violate the United States' obligations under an international treaty. *Cox Broad. Corp. v. Cohn,* 420 U.S. 469, 486 (1975); *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 178-180 (1988); *Mississippi Power & Light Co. v. Mississippi Ex Rel. Moore, Attorney General of Mississippi,* 487 U.S. 354, 369, n.10 (1988).

CONSTITUTIONAL PROVISION INVOLVED

The Supremacy Clause of the United States Constitution, Article VI, Clause 2 provides as follows: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT OF THE CASE

1. In 1970, Congress passed the Controlled Substances Act (the "CSA"), 21 U.S.C. § 801 *et seq.*, in part to comply with the United States' obligations under an international treaty called the UN Single Convention on Narcotic Drugs (the "Single Convention"). 21 U.S.C. § 801(7); *National Org. for Reform of Marijuana Laws (NORML) v. DEA*, 559 F.2d 735, 737 n. 2 (D.C. Cir. 1977) (*"NORML"*). The main objectives of the CSA are to conquer drug abuse, control the legitimate and illegitimate traffic in controlled substances, and prevent the diversion of drugs from legitimate to illicit channels. 21 U.S.C. §§ 801(1)-(6); *Gonzales v. Raich*, 545 U.S. 1, 12-13, nn. 20-21 (2005). To effectuate its purposes, the CSA is a comprehensive and closed regulatory regime that makes it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. 21 U.S.C. §§ 841(a)(1), 844(a); *Raich* at 13.

The CSA categorizes all controlled substances into one of five "schedules." 21 U.S.C. § 812. "Schedule I" substances have a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and a lack of accepted "safety for use of the drug or substance under medical supervision." 21 U.S.C. § 812(b)(1)(A)-(C). At the time the CSA was enacted, Congress designated marijuana as a Schedule I drug. 21 U.S.C. § 812(c).

The CSA and its implementing regulations set forth strict requirements that are designed to control the manufacture, distribution, and use of controlled substances in each of the five schedules. *Raich* at 12-

13. Schedule I substances like marijuana are highly regulated; the manufacture, distribution, or possession of marijuana is a criminal offense, and no physician may prescribe or dispense marijuana to any patient outside of a strictly controlled research project. 21 U.S.C. §§ 823(f), 841(a); see also *United States v. Oakland Cannabis Buyers' Cooperative*, 523 U.S. 483, 490 (2001).

Although Schedule II drugs also have a high potential for abuse, drugs that are classified in Schedules II through V do have a currently accepted medical use, and are allowed to be prescribed by physicians for therapeutic purposes. 21 U.S.C. § 812(b)(2). However, the CSA requires manufacturers, physicians, pharmacies, and other legitimate handlers of such drugs to comply with stringent statutory and regulatory provisions. 21 U.S.C. §§ 821-839; 21 C.F.R. Pts 1301-1306.

The CSA provides for the periodic updating of schedules, and delegates authority to the Attorney General to add, remove, or transfer substances to, from, or between schedules. 21 U.S.C. § 811. Congress's classification of marijuana as a Schedule I drug has been repeatedly challenged, but those challenges have all been rejected. *Raich,* 545 U.S. at 14-15, n. 23. Furthermore, in accordance with the United States' obligations under the Single Convention, marijuana can only be reclassified to a Schedule II drug. *NORML, supra,* 559 F.2d at 750-51, n. 68.

2. a. In November of 1996 California voters approved Proposition 215, known as the Compassionate Use Act of 1996 (the "CUA"). The CUA

did not provide a means for individuals to obtain marijuana. *People v. Mentch*, 45 Cal.4th 274, 286 (2008). Instead, it simply provided a potential defense to seriously ill individuals and their caregivers, who cultivated their own marijuana, or obtained it from the illicit market, if they could prove that the possession or cultivation was for personal use and pursuant to a physician's recommendation. Cal. Health & Saf. Code § 11362.5. The official ballot pamphlet informed voters that "[p]olice officers can still arrest anyone for marijuana offenses. Proposition 215 simply gives those arrested a defense in court, *if they can prove they used marijuana with a doctor's approval." Ross v. Ragingwire Telecomms., Inc.*, 42 Cal.4th 920, 929 (2008) (Emphasis in the original.)

b. In 2003 the California Legislature enacted the Medical Marijuana Program (the "MMP") to "clarify" the CUA. Cal. Health & Saf. Code § 11362.7-11362.83; *People v. Urcizeanu,* 132 Cal.App.4th 747, 783 (2005). The MMP established a voluntary identification card program whereby individuals could apply for a card that would identify the bearer as someone who uses or possesses marijuana for medical purposes. Cal. Health & Saf. Code §§ 11362.71, 11362.72.

To promote the consistent application of the CUA among the counties within California, the MMP established threshold amounts of marijuana that can be possessed and cultivated; eight ounces of dried marijuana, and either six mature or twelve immature plants. Cal. Health & Saf. Code § 11362.77(a). However, doctors can recommend any amount, Cal. Health & Saf. Code § 11362.77(b), and cities and

counties have full discretion to increase those amounts as well. Cal. Health & Saf. Code § 11362.77(c)[1].

In an effort to "enhance access" to marijuana, the MMP encouraged the collective cultivation of marijuana by providing individuals who do so with an exemption to several additional criminal charges, including the possession of marijuana for sale, transporting or furnishing marijuana, and maintaining a location for unlawfully selling, giving away, or using controlled substances. *Cal. Health & Saf. Code* § 11362.775; *People v. Urcizeanu*, 132 Cal.App.4th at 783.

c. The California Supreme Court has repeatedly confirmed that California law does not, and cannot, provide a right to marijuana, but only a defense to criminal charges. See *People v. Mower*, 28 Cal.4th 457, 473 (2002) (the CUA decriminalizes "conduct that would otherwise be criminal."); *People v. Wright*, 40 Cal.4th 81, 90 (2006) ("The CUA provides a defense for physician-approved possession and cultivation of marijuana."); *People v. Mentch*, 45 Cal.4th 274, 286 (2008) ("The Act is a narrow measure with narrow ends.")

Recently, in *Ross v. Ragingwire*, the Supreme Court rejected the plaintiff's claim that the CUA provided a "right to marijuana" that could support a civil action against his former employer. *Ross, supra*, 42 Cal.4th at

---

[1] The California Constitution prohibits the Legislature from amending the CUA. Whether the amounts set forth in Health & Safety Code § 11362.77 are an unconstitutional amendment of the CUA is currently being reviewed by the California Supreme Court in *People v. Kelly*, review granted August 13, 2008, S164830.

926. The Supreme Court explained that no state law "could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users." *Id.* (Internal citations omitted.) "Instead of attempting the impossible," California's voters "merely exempted medical users and their primary caregivers from criminal liability under two specifically designated statutes." *Id.*

3. a. In September of 2005, Butte County Sheriff's Deputy Jacob Hancock investigated 41 marijuana plants growing outdoors on property owned by Respondent David Williams (herein "Williams"). App. 6a. Williams provided Deputy Hancock with seven physician's recommendations, and contended that he was cultivating the plants as part of a "lawful collective." App. 6a.

Deputy Hancock's investigation revealed that Williams was not cultivating the marijuana as part of a collective, but rather than arrest Williams and seize all of the marijuana, he gave Williams the option of removing 29 of the 41 plants. App. 6a. Williams agreed to do so, and based on that decision he was not arrested, and criminal charges were never filed. App. 6a.

Williams then filed suit against Deputy Hancock in civil court. App. 6a. The complaint alleges that Deputy Hancock violated Williams' "constitutional, statutory, and common law" rights to possess, cultivate, and distribute marijuana, and contains five separate causes of action – including a claim for the tortious conversion of his marijuana plants. App. 6a.

The complaint seeks compensatory damages for the 29 plants that Williams destroyed. App. 6a.

The County filed a demurrer to every cause of action on the basis that California law did not provide Williams with a property interest in marijuana, but only a potential defense to criminal charges. App. 6a-7a. The County argued that allowing Williams' lawsuit to proceed would improperly convert the limited defense approved by voters into an affirmative right. App. 7a. In addition, the County filed a motion to strike Williams' request for money damages. App. 7a.

The trial court overruled the County's demurrer by reasoning that "if plaintiff could show that he had a legal right to possess the marijuana in question, and that his rights were violated, he may bring his action based on generally applicable legal principles." App. 7a-8a. The trial court overruled the County's motion to strike as well. App. 9a.

b. The County then filed a petition for a writ of mandate in California's Third District Court of Appeal[2]. In an unprecedented decision, a divided panel of the Court of Appeal concluded that California law provides a protected property interest in marijuana, and that Williams' due process, conversion, and related causes of action could therefore proceed. The County filed a timely Petition for Review with the

---

[2] In its writ petition, the County did not argue that the trial court's ruling was preempted by federal law, but only that it was inconsistent with California law. However, the federal preemption issue was fully briefed by counsel for amici curiae, App. 43a-74a, and discussed at length in the dissenting opinion.

California Supreme Court, which was denied by a 4-2 vote on September 23, 2009. App. 1a.

The Court of Appeal did not cite to any language in the CUA or MMP to support its creation of a protected property interest in marijuana, but relied entirely on "considerations of due process and fundamental fairness" that were first espoused by California's Fourth District Court of Appeals in *City of Garden Grove v. Superior Court* 157 Cal.App.4th 355 (2007) (*"Garden Grove"*).[3] App. 11a.

In *Garden Grove,* the Real Party in Interest, Felix Kha, was charged with possessing less than one ounce of marijuana while driving. *Garden Grove, supra*, 157 Cal. App. 4th. at 363. In the criminal proceedings, Mr. Kha presented the prosecutor with a physician's recommendation for his use of marijuana; and after the prosecutor was able to confirm that the recommendation was valid, and that the amount of marijuana Mr. Kha possessed was consistent with his recommendation, he agreed to dismiss the charge. *Id.* Mr. Kha then petitioned the criminal court for the return of his marijuana, and the trial court ordered its return. *Id.*

In affirming the trial court's order, *Garden Grove* interpreted the California Supreme Court's statement in *People v. Mower*, 28 Cal.4th 457, 482 (2002) – that the CUA "renders possession and cultivation of

---

[3] The City of Garden Grove's petition for a writ of certiorari, Docket No. 07-1569, was denied on December 1, 2008. See *City of Garden Grove v. Superior Court of California*, 2008 U.S. LEXIS 8568 (U.S., Dec. 1, 2008).

marijuana noncriminal for a qualified patient or primary caregiver" – to mean that the possession and cultivation of marijuana is "lawful" under the terms and conditions set forth in the CUA. *Id.* at 389. Based on that "translation," *Garden Grove* reasoned that because the criminal court had determined that Mr. Kha was in "lawful" possession of his marijuana, "considerations of due process and fundamental fairness" provided him with a "right" to have it returned. *Id.* at 388-89.

Although the allegations in Williams' civil complaint were significantly different than the facts adjudicated by the criminal court in *Garden Grove*, the Court of Appeal relied on the same "considerations of due process and fundamental fairness" to reach the unprecedented conclusion that California law provides a protected property interest in marijuana that can form the basis for a civil action against law enforcement officers for money damages. App. 11a.

c. Judge Morrison dissented. App. 17a-32a. He recognized that "[i]n this case the CUA is not raised as a shield against criminal charges; it is used as a sword in an attempt to impose civil liability against a peace officer." App. 19a. Judge Morrison disagreed with the majority's reliance on *Garden Grove* because in his view *Garden Grove* was erroneously decided. App. 20a-21a. ("The point where *Garden Grove* goes astray is when it pronounces the possession of marijuana under the CUA was 'legal under state law, but illegal under federal law.' The marijuana was not 'legal' under state law, because California cannot make 'legal' that which Congress makes illegal.")

Judge Morrison determined that *Garden Grove's* mistake on that fundamental issue was based on its mischaracterization of the California Supreme Court's decision in *Mower*:

> The California Supreme Court instead said 'the possession and cultivation of marijuana [under the CUA] *is no more criminal* – so long as its conditions are satisfied – than the possession and acquisition of any prescription drug with a physician's prescription. *Garden Grove* used 'lawful' as a synonym for noncriminal, but there is a difference. That difference was confirmed by the California Supreme Court in *Ross*, holding that the CUA did *not* give 'marijuana the same status as any legal prescription drug.' Instead, 'it merely exempted [persons complying with the CUA] from criminal liability under two specifically designated state statutes.' This mistake by *Garden Grove* influenced its analysis and lead to an erroneous result, authorizing the return of marijuana to a private person, in violation of federal law.

App. 21a (Internal citations omitted). The dissent concluded that "[u]nder the laws of the United States, as interpreted by *Raich*, the *only* effect of the CUA is as its terms state: It provides a defense to California *criminal* charges. It does not make marijuana 'legal' in any sense." App. 19a.

Judge Morrison also disagreed with the Court of Appeal's creation of a property interest in marijuana because the CSA expressly states that "no property right shall exist" in marijuana, and this Court confirmed in *Raich* that all marijuana is contraband

per se, even if it is "grown in the backyards of very ill Californians acting on the advice of their doctors." App. 20a. The dissent cited a legion of cases, spanning over a century, which all confirmed the basic principle that "neither tort liability nor due process rights arise from the seizure or destruction of contraband per se." App. 24a-26a. To get around those cases, and this Court's decision in *Raich*, the Court of Appeal declared that because Deputy Hancock was acting under color of California law, and not federal law, the "numerous federal authorities cited by the dissent" did not apply. App. 17a.

REASONS FOR GRANTING THE PETITION

California's Third District Court of Appeal has held that California law provides a right to manufacture, distribute, and possess marijuana, and that any state law enforcement officer who interferes with those rights can be sued in civil court for money damages. The Court of Appeal's unprecedented decision presents an absolute conflict with the CSA, as interpreted by this Court in *Raich*, and the fundamental principle – universally recognized by all other courts – that individuals cannot have a property right in items that are contraband per se. In addition to an absolute conflict, the Court of Appeal's decision stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, and obstructs the United States' ability to satisfy its obligations under the Single Convention as well.

A. THE COURT OF APPEAL ERRED IN DECLARING THAT CALIFORNIA LAW PROVIDES A RIGHT TO MANUFACTURE, DISTRIBUTE AND POSSESS MARIJUANA.

1. The Supremacy Clause of Article VI of the United States Constitution mandates that federal law supercede state law where there is a conflict between such laws. *Gibbons v. Ogden*, 22 U.S. 1, 210 (1824); *Free v. Bland*, 369 U.S. 663, 666 (1962); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). A state law conflicts with a federal law, and is therefore preempted under the Supremacy Clause, if either "it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. Gen. Elec. Co.,* 496 U.S. 72, 79 (1990) (Internal quotation marks and citations omitted).

The CSA is a comprehensive and closed regulatory regime that makes it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. 21 U.S.C. §§ 841(a)(1), 844(a); *Raich*, 545 U.S. at 13. Since the time the CSA was enacted, marijuana has been classified as a Schedule I drug. *Raich* at 14-15, n. 23. Therefore, the manufacture, distribution, or possession of marijuana is a criminal offense, and no physician may prescribe or dispense marijuana to any patient outside of a strictly controlled research project. 21 U.S.C. §§ 812(c), 823(f), 841(a); see also *United States v. Oakland Cannabis Buyers' Cooperative, supra,* 523 U.S. at 490. The CSA applies to all citizens, including seriously ill Californians who

possess or cultivate marijuana on the advice of a physician. *Raich,* 545 U.S. at 26-27.

California and thirteen other states have enacted laws that exempt individuals who use marijuana for medicinal purposes from penalties under their states' criminal laws. However, the constitutionality of such laws remains in doubt. See, for example, *San Diego County v. San Diego NORML*, 165 Cal.App.4th 798, 827 (2008) ("California's decision to enact statutory exemptions from state criminal prosecution for such persons arguably undermines the goals of or is inconsistent with the CSA....") Nevertheless, the laws enacted in all fourteen states are premised on the idea that although marijuana remains contraband per se under federal law, states can create an exemption to their own criminal laws. See *Ross, supra*, 42 Cal. 4th at 927 ("Although California's voters had no power to change federal law," they were free to "view the possibility of beneficial medical use as a sufficient basis for exempting from criminal liability under state law patients whose physicians recommend the drug.").

In this case, David Williams was never arrested or criminally prosecuted because he agreed to remove 29 of the 41 plants growing on his property. In his civil lawsuit, he claims that he had a right to cultivate all 41 marijuana plants, and that Deputy Hancock violated his rights when he informed Williams that he would be arrested if he did not remove a portion of the plants. App. 19a (Morrison, J., dissenting) ("In this case the CUA is not raised as a shield against criminal charges; it is used as a sword in an attempt to impose civil liability against a peace officer.")

In allowing Williams' lawsuit to proceed, the Court of Appeal concluded that in addition to a defense to criminal charges, California law also provides a protected property interest in marijuana. This unprecedented decision presents an absolute conflict with federal law. The CSA expressly states that "no property right shall exist" in marijuana, 21 U.S.C. § 881(a), and this Court has confirmed that the CSA applies to all marijuana, even if it is cultivated or possessed for medicinal purposes. *Raich* at 26-27. There can be no doubt that a state law that provides individuals with a property interest in a strictly controlled substance that the federal government defines as contraband per se presents an absolute conflict.

a. In a deliberate effort to avoid the application of federal law, the Court of Appeal stated that because Deputy Hancock was operating under color of state law, the CSA and *Raich* did not apply. App. 17a. However, the decision was published, and now applies to every peace officer and law enforcement agency in the State of California. The Court of Appeal's attempt to segregate state and federal law enforcement officers, solely for the purpose of creating a property right to marijuana, is a fundamentally flawed standard.

Like judges, California's peace officers swear to uphold the constitution and laws of California and the United States, and certainly, in exercising their daily duties, California's peace officers must comply with the provisions of both California and federal law. Furthermore – particularly in the area of drug enforcement – state law enforcement officers routinely work with federal law enforcement officers and prosecutors, either formally through joint task forces,

or on an informal basis. See *Raich*, *supra*, 545 U.S. at 7 (Deputies from the Butte County Sheriff's Department and agents from the federal Drug Enforcement Administration came to Monson's home); *People v. Nord*, 377 F.Supp.2d 945 (2005) (Narcotics task force included DEA agents as well as local law enforcement personnel who work full time on the task force); *United States v. Rosenberg* 515 F.2d 190, n. 2 (9th Cir. 1975) (State law enforcement officers who investigated a doctor for unlawfully prescribing controlled substances in violation of the CSA turned their information over to the United States Attorney for prosecution). Therefore, determining an individual's property rights based solely on the employer of a law enforcement officer is offensive to law enforcement, and leads to inconsistent and even whimsical results.

b. The idea of segregating state and federal law enforcement officers, solely for the purpose of determining individuals' "rights" with respect to marijuana, first began in *Garden Grove*, which held that state law enforcement officers are required to return seized marijuana, in violation of the CSA, to individuals determined by California's criminal courts to be acting in compliance with state law. However, *Garden Grove* involved a small amount of processed marijuana that, on a practical basis, was able to be maintained by law enforcement, whereas the vast majority of marijuana that is seized by law enforcement officers is not processed, and uprooted plants quickly lose their value. Furthermore, as was demonstrated in *Garden Grove*, whether an individual can successfully assert a defense to criminal charges is generally established, if at all, well after marijuana is seized.

The Appellate Court's creation of a right to marijuana advances this hypocrisy dramatically further. Individuals who are determined by criminal courts to be in compliance with California law, but in violation of federal law, can not only seek the return of seized marijuana, but they can seek compensation if their seized marijuana plants are damaged or destroyed. Therefore, California's law enforcement officers are required to nurture and tend to seized marijuana plants pending the outcome of criminal and civil trials and appeals, in further violation of the CSA, lest they be sued for money damages. Furthermore, by creating a property interest in marijuana, individuals who are merely *claiming* to be in compliance with California's criminal laws now have the ability to file suit for money damages, regardless of whether criminal charges are filed.

It makes a mockery of federal law if state law enforcement officers – many of whom work jointly with federal law enforcement officers – are required to tend to seized marijuana plants, or compensate individuals who manufacture, distribute, and possess marijuana in violation of federal law. Rather than condone illegal conduct, and attempt to assign a value to contraband per se, every other court who has dealt with this issue has correctly concluded that "neither tort liability nor due process rights arise from the seizure or destruction of contraband per se." App. 24a-26a (Morrison, J., dissenting); *U.S. v. Bagley*, 899 F.2d 707, 708 (8th Cir. 1990) ("[T]o allow [Bagley] to reap the economic benefit from ownership of weapons [] which it is illegal for him to possess would make a mockery of the law.")

2. a. The CUA never intended to place such an impossible and hypocritical burden on California's law

enforcement officers. Prior to the vote on Proposition 215, voters were told that "[p]olice officers can still arrest anyone for marijuana offenses" because the CUA would only provide *individuals* with a defense to charges; it would not create a property interest in the substance itself. *Ross, supra,* 42 Cal.4th at 929. In fact, arrests and prosecutions were the only intended means of ensuring that the extensive amounts of marijuana contemplated by the CUA were truly being used for medicinal purposes.

The Appellate Court's decision is significant because it changes that dynamic. By creating a property interest in marijuana, and imposing liability on law enforcement officers and agencies, it is now the responsibility of law enforcement officers to determine, in the field, and on pain of potential liability, whether marijuana is truly being used, or will be used, for a legitimate medical purpose. In *Raich,* this Court recognized the "impossible" task of attempting to determine whether marijuana is being manufactured or distributed for "medical" purposes, particularly because marijuana is a "fungible" commodity that is "never more than an instant away" from the illicit market. *Raich,* 545 U.S. at 39 (Scalia, J., concurring in the judgment). The Appellate Court's decision makes an "impossible" task even more difficult.

The Petitioners are already aware of three lawsuits that have been filed in the wake of the Appellate Court's ruling, by individuals who have invoked the decision to claim that their rights to manufacture, distribute and possess marijuana have been violated, and that they are entitled to money damages and

injunctive relief[4]. In addition, the Petitioners are aware of several government tort claims – the prerequisite to filing an action against a public agency in California – that have been filed against law enforcement officers and agencies in several other counties[5]. It is very likely that cities throughout California are receiving such claims as well. This increasing litigation – coupled with the threat of money damages, and the impossible task of maintaining seized marijuana plants – has naturally caused many law enforcement officers and agencies to be extremely reluctant to arrest individuals who are believed to be in violation of the law. In short, the Appellate Court's decision has effectively chilled the only real means of controlling the massive amount of marijuana being produced in California, and distributed across state lines as well[6].

---

[4] *Parnell et al v. County of Del Norte*, Del Norte County Superior Court Case No. CV UJ 09-1271, filed August 3, 2009; *Stewart v. County of Del Norte*, Del Norte County Superior Court Case No. CV UJ 09-1001, filed August 17, 2009; *Littlefields et al v. County of Humboldt*, Humboldt County Superior Court Case No. DR090888, filed October 6, 2009.

[5] *Claimant Ryan Booker and Ethnobotanica Patients Cooperative v. Santa Cruz County*, filed September 2, 2009, seeking compensatory damages for the seizure of over 1,000 plants; *Claimant Joseph Reiter v. Sonoma County*, amended claim filed July 15, 2009, seeking damages in excess of $10,000 for destroyed marijuana plants; *Claimant Cody Bly Ungles v. Nevada County*, filed November 5, 2009, seeking damages in excess of $15,000 for the destruction of approximately 5 pounds of marijuana.

[6] See L.A. to Crack Down on Marijuana Stores, *New York Times*, October 18, 2009 ("No state has gone further than California, often described by drug-enforcement agents as a 'source nation' because of the vast quantities of marijuana grown here.")

b. The absolute conflict between California and federal law also leads to rulings that violate the "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transactions." *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). For example, in support of its demurrer to Williams' complaint, the Petitioners requested that the trial court take judicial notice of the case file in *People v. Rasmussen*, which was a criminal case pending at the time in Butte County Superior Court's criminal division.[7] Rasmussen had been arrested in April of 2007 and charged with unlawfully cultivating marijuana. In his defense, he contended that he was cultivating the marijuana as part of a "lawful" collective.

The purpose of the request for judicial notice was to demonstrate to the trial court that if individuals who have been charged with unlawfully possessing or cultivating marijuana are allowed to simultaneously file civil actions, and have civil courts determine in the abstract whether the individuals involved could successfully assert a defense to criminal charges – while the same issues are being decided in criminal courts, under a different standard of proof – then there is a very real risk that inconsistent rulings will result.

Due to the practical realities of law enforcement, the risk of incompatible rulings is by no means limited to California's courts. At the conclusion of

---

[7] The docket for *People v. Rasmussen*, Butte County Superior Court Case No. CM026484, is available online at:

http://www.buttecourt.ca.gov/online_index/CMSCaseDisplay.cfm?URLCaseNumber=CM026484

Rasmussen's preliminary hearing in July of 2007, he was held to answer both criminal counts. However, Rasmussen was also being investigated by federal law enforcement officers, and in October of 2007 an indictment was filed in the U.S. District Court for the Eastern District of California *for the exact same marijuana*[8]. The state law charges against Rasmussen were dismissed in the interests of justice, but the federal charges are still pending.

At the time the County filed its demurrer to Williams' complaint, *Rasmussen* was one of numerous cases pending in Butte County's criminal courts that involved the collective cultivation of marijuana. The County chose the *Rasmussen* case at random to demonstrate a simple point. Based on the Appellate Court's decision, and the practical realities of law enforcement, an individual in California can now file suit for money damages against state law enforcement officers who interfere with his right to marijuana, while he is being prosecuted at the federal level, *or subject to future prosecution*, for the exact same activity.

As discussed above, California is now one of fourteen states that have passed laws that allow for the medicinal use of marijuana. However, all fourteen states' laws are premised on the idea that although marijuana remains contraband per se under federal law, states can provide a defense or exemption to their own criminal statutes. California's Third District Court of Appeal has gone dramatically further, and is

---

[8] *United States v. Rasmussen*, U.S. District Court for the Eastern District of California, Case No 2:07-cr-00464-JAM-1.

the first court in any of the fourteen states to find that states can also provide a legally protected property interest in marijuana. The decision presents an absolute conflict with federal law. The two systems cannot consistently stand together, and therefore, the offending state law must yield.

B. THE COURT OF APPEAL'S DECISION WARRANTS THIS COURT'S REVIEW BECAUSE IT CONFLICTS WITH *RAICH*, AND STANDS AS AN OBSTACLE TO THE FULL ACCOMPLISHMENT OF CONGRESS'S GOALS AND OBLIGATIONS.

1. a. The Court of Appeal's decision warrants review by this Court because, in addition to presenting an irreconcilable conflict with the CSA, the decision substantially undermines Congress's ability to accomplish its goals and obligations.

In *Raich*, this Court determined that California's exemptions for the possession and cultivation of marijuana undermine the goals of the CSA. *Gonzales v. Raich*, 545 U.S. 1 (2005). The plaintiffs in *Raich* sought an injunction against the United States Attorney General and the federal Drug Enforcement Agency, to prohibit those officials from enforcing the CSA "to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use." *Id.* at 7. The plaintiffs' central argument was that their possession and cultivation of marijuana was "in accordance with state law," and was effectively "isolated" and "policed by the State of California," such that it was "entirely separated from the interstate market." *Id.* at 30. The plaintiffs therefore contended that applying the CSA to their

conduct exceeded "Congress' authority under the Commerce Clause." *Id.* at 15, 30.

The Court in *Raich* rejected the plaintiffs' argument on two related grounds. First, the Court determined that plaintiffs' use of marijuana for "personal medical purposes on the advice of a physician" could not serve as a distinguishing factor because the "CSA designates marijuana as contraband for *any* purpose." *Id.* at 27.

Second, and more importantly, the Court recognized that the CSA was not a single-subject statute that simply makes it a crime to manufacture, distribute, or possess marijuana, but a lengthy and detailed framework that seeks to "conquer drug abuse," "control the market in controlled substances," and "prevent the diversion of controlled substances to illicit channels." *Id.* at 12-13. The Court emphasized that to effectuate its broad objectives, Congress created a comprehensive, uniform, and closed system that prohibits the manufacture, distribution or possession of any controlled substances except in a manner authorized by the CSA. *Id.* at 13-14. The Court determined that the failure to regulate the plaintiffs' activities would undercut and frustrate Congress's objectives, and leave a "gaping hole" in the CSA. *Id.* at 22.

Due to the comprehensive nature of the CSA, the *Raich* Court explained that whether the CUA's exemptions actually obstructed the CSA's objectives was irrelevant, because the Supremacy Clause "unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail," *Id.* at 29, and requiring Congress to rely on

other governments to carry out its designs is "incompatible with the language of the constitution." *Id.* at 29, n. 38; quoting *McCulloch v. Maryland*, 17 U.S. 316, 424 (1819). Nevertheless, the Court went on discuss the numerous ways in which the CUA's exemptions undermine the CSA's objectives.

The Court noted that California's policy allows individuals to possess and cultivate extremely large amounts of marijuana, and that doctors, as well as cities and counties, are given full discretion to allow for even more generous limits. *Id.* at 31-32, n. 41 (recognizing that the cities of Oakland and Santa Cruz and the counties of Sonoma and Tehama allow individuals to possess up to 3 pounds of marijuana, which is the equivalent of roughly 3,000 joints or cigarettes.) The Court found the "likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious." *Id.* at 31-32.

Furthermore, given the "fungible" nature of marijuana, the "enforcement difficulties" in distinguishing marijuana truly grown for medicinal use, and the enormous demand for marijuana, the Court found it "readily apparent" that California's exemptions "would have a significant impact on both the supply and demand sides of the market for marijuana." *Id.* at 27, 30.

b. Although not discussed in *Raich,* there are several other aspects of California's marijuana laws that obstruct the accomplishment of the CSA's

objectives.[9] For example, the CUA was very narrowly drafted, and did not provide a means for individuals to obtain marijuana. *Mentch, supra* 45 Cal.4th at 286. Therefore, in an expressly stated effort to "enhance access to marijuana" – a controlled substance that the federal government is seeking to "eradicate" – the California Legislature has encouraged the collective cultivation and distribution of marijuana by providing additional criminal exemptions for those who do so, including exemptions for the possession of marijuana for sale, transporting or furnishing marijuana, and maintaining a location for unlawfully selling, giving away, or using controlled substances. Cal. Health & Saf. Code § 11362.775. In *People v. Urziceanu*, California's Third District Court of Appeal explained that this "new law represents a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana....Its specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana." *People v. Urziceanu*, 132 Cal. App. 4th 747, 783.

Many individuals in California are cultivating and distributing large amounts of marijuana. However, unlike the CSA's stringent controls on the manufacture and distribution of controlled substances that do have a medically accepted use, the California Legislature did not place any controls on the increased

---

[9] In accordance with Rule 29(4)(c), the Petitioners submit that 28 U.S.C. § 2403(b) may apply, and therefore, service of this Petition is being made on the California Attorney General.

amount of marijuana that it expected to enter the marketplace. Although the MMP established an identification card program, the program is purely voluntary, and due to the fact that marijuana remains illegal under federal law, only a small percentage of marijuana users participate.

In addition to the large amounts of marijuana being cultivated and distributed by collectives, marijuana is being sold throughout California by hundreds of "dispensaries," although nothing in California law allows for dispensaries to operate. *City of Claremont v. Kruse* 177 Cal.App.4th 1153, 1173 (2009). Some cities and counties have allowed dispensaries to operate openly and freely, while others have attempted to prohibit their operation. See L.A. to Crack Down on Marijuana Stores, *New York Times, supra* (discussing the "more than 800 dispensaries" in the City of Los Angeles alone, and the raids on dispensaries in San Diego by police officers and Sheriff's deputies, in conjunction with agents from the DEA). The massive increase in the amount of marijuana being manufactured, distributed, possessed and sold in California, coupled with the enforcement difficulties and lack of controls, undermines the CSA's primary goal of preventing the diversion of marijuana into illicit channels.

2. If there were any doubt as to whether California's marijuana laws frustrate the objectives of the CSA, the Appellate Court's creation of a property interest in marijuana forecloses that doubt. The decision will significantly decrease the amount of marijuana related investigations and seizures by law enforcement, while simultaneously increasing the amount of marijuana that is manufactured and

distributed. App. 27a. (Morrison, J., dissenting) ("Compensating Williams for the purported value of the destroyed marijuana would assure growers of marijuana that the courts of California will protect their crops."). The result will be a profoundly negative impact on the federal government's principal goal of preventing the diversion of marijuana into illicit channels, as well as the United States' ability to satisfy its obligations under the Single Convention.

3. Immediate review by this Court is warranted. Although the CSA provides a means to have marijuana rescheduled to a Schedule II narcotic, which would allow it to be prescribed for therapeutic purposes under an existing set of uniform controls, California has disregarded that process. It is clear that California's laws with respect to marijuana are directly at odds with the goals of Congress, and absent a ruling from this Court, that California's courts and Legislature will continue to expand California's marijuana laws, regardless of federal law.

The Court of Appeal's published decision leaves no factual or legal questions open, and therefore, further proceedings are not needed to clarify the issues presented. To the contrary, the decision leaves an unsustainable conflict between California and federal law, which seriously undermines the objectives of the CSA, violates the United States' obligations under the Single Convention, and makes a mockery of federal law. There is rapidly increasing litigation that invokes the decision, which creates an incentive for widespread violation of the CSA, and a major disincentive for law enforcement to make marijuana related arrests and seizures. The unnecessary conflict and confusion is

not going away, it is only increasing. Clarification on these important issues is urgently needed.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

Bruce S. Alpert
Butte County Counsel
Counsel of Record

Brad J. Stephens
Deputy County Counsel

Office of the Butte County Counsel
25 County Center Drive, Suite 210
Oroville, CA 95965
(530) 538-7621