No. 08-887 JAN 12 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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether California's Medical Marijuana Law, which authorizes individuals to use, possess and cultivate marijuana for medical purposes, is pre-empted under the Supremacy Clause by the federal Controlled Substances Act, which prohibits the same conduct?

Whether the Controlled Substances Act's express preemption clause precludes a court from considering whether California's Medical Marijuana Law is an obstacle to the accomplishment of the purposes and objectives of the federal law in deciding whether the California law is preempted?

PARTIES TO THE PROCEEDING

Petitioner is the County of San Diego.

Respondents are the State of California, Dr. Mark Horton, in his official capacity,[1] San Diego NORML, Wo/men's Alliance for Medical Marijuana, Dr. Stephen O'Brien, Wendy Christakes, Norbert Litzinger, William Britt, Yvonne Westbrook, Americans For Safe Access,[2] County of San Bernardino and Gary Penrod, Sheriff of San Bernardino County.[3]

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[1] Dr. Mark Horton is substituted in place of prior officeholder Sandra Shewry, who was sued in her official capacity. See Fed. R. App. P. 43(c)(2).

[2] The San Diego County Superior Court allowed the Wo/men's Alliance for Medical Marijuana, Dr. Stephen O'Brien, Wendy Christakes, Norbert Litzinger, William Britt, Yvonne Westbrook, and Americans For Safe Access to intervene into this case as defendants. (Clerk's Transcript ("C.T."), Vol. III, at 479-483).

[3] The County anticipates that the County of San Bernardino and Mr. Penrod will file a separate Petition for a Writ of Certiorari.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner County of San Diego ("the County") respectfully petitions for a Writ of Certiorari to review the judgment of the California Court of Appeal, Fourth Appellate District, Division One.

OPINIONS BELOW

The California Court of Appeal's decision is reported at 81 Cal. Rptr. 3d 461, and is reprinted in the Appendix to the Petition ("App.") at 1-47. The California Supreme Court's decision denying the County's Petition for Review of the California Court of Appeal's decision is available electronically at 2008 Cal. LEXIS 12220 (Cal. October 16, 2008), and appears in the Appendix at 68. The San Diego County Superior Court's order granting defendants' motion for judgment on the pleadings, which the California Court of Appeal reviewed and affirmed, appears in the Appendix at 48-60.

JURISDICTION

The California Court of Appeal issued its decision on July 31, 2008. The County of San Diego, the County of San Bernardino and Mr. Penrod filed timely Petitions for Review asking the California Supreme Court to review the judgment of the California Court of Appeal. The California Supreme Court denied the Petitions for Review on October 16, 2008.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

Article VI, Clause 2 of the United States Constitution 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

California is one of thirteen states that have legalized marijuana use. California's Medical Marijuana Law specifically authorizes individuals and "caregivers" to use, possess, cultivate and transport marijuana for medical purposes.[1] The Law also requires counties to issue cards identifying those individuals who California has authorized to use marijuana for medical purposes ("identification

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

cards"). The Medical Marijuana Law is preempted because it is an obstacle to the accomplishment of the purposes and objectives of the federal Controlled Substances Act ("CSA"), which bans marijuana use for any purpose.

A. Factual/Legal Background

In 1970, Congress passed the CSA, in part to comply with the United States' obligations under an international treaty called the Single Convention on Narcotic Drugs (the "Single Convention"). 21 U.S.C. § 801(7).

In the CSA, Congress designated marijuana as a Schedule I drug and determined that it has "no currently accepted medical use in treatment in the United States." 21 U.S.C. §§ 812(b)(1)(B), 812(c) (sched. I)(c)(10).[2] Therefore, Congress criminalized the manufacture, possession and distribution of marijuana for any purpose. 21 U.S.C. §§ 841(a), 844(a).

In addition, as authorized by the Single Convention, the United States decided to allow cultivation of limited amounts of marijuana for research purposes. The United States designated the National Institute on Drug Abuse ("NIDA") as the agency responsible for overseeing the cultivation of marijuana according to

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[2] Congress' classification of marijuana as a Schedule I drug has been repeatedly challenged. Those challenges have consistently been rejected. *Gonzales v. Raich*, 545 U.S. 1, 15 n.23 (2005).

the terms of the Single Convention. NIDA entered into a contract with the University of Mississippi whereby NIDA has the option in any given year of growing 1.5 or 6.5 acres of marijuana, or none at all, depending on the research demand. NIDA is the only legal source for marijuana in the United States. http://www.drugabuse.gov/about/organization/nacda/marijuanastatement.html; http://grants.nih.gov/grants/guide/notice-files/not99-091.html.

In 1996, California voters sought to override Congress' judgment and the Single Convention by passing Proposition 215, an initiative which added Section 11362.5 to the California Health and Safety Code. Proposition 215 declares that "Californians have the right to obtain and use marijuana for medical purposes. . . ." Cal. Health & Safety Code § 11362.5(b)(1)(A). Contrary to the CSA, Proposition 215 also declares that "patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction." *Id.* at subd. (b)(1)(B).

In 2003, the California Legislature enacted a statutory scheme implementing Proposition 215. Cal. Health & Safety Code §§ 11362.7-11362.83. This statutory scheme requires the County to issue identification cards to "a person authorized to engage in the medical use of marijuana and the person's designated primary caregiver. . . ." *Id.* at §§ 11362.7(g), 11362.71(b)(5). Despite the provisions of the CSA, California's statutory scheme declares that "[n]o person or designated

primary caregiver in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article. . . ." *Id.* at § 11362.71(e).

The California Legislature also authorized patients and caregivers to cultivate "six mature or 12 immature marijuana plants per qualified patient" even though under the Single Convention only NIDA may license individuals to cultivate marijuana. *Id.* at § 11362.77(a). If a doctor so recommends, those quantities can be increased to an amount "consistent with the patient's needs." Cal. Health & Safety Code § 11362.77(b). Moreover, cities and counties may enact guidelines that allow patients and caregivers to exceed the statutory quantities. Cal. Health & Safety Code § 11362.77(c); *Raich*, 545 U.S at 31 n.41 ("[C]ities and counties are given *carte blanche* to establish more generous limits. . . . For example, patients residing in the cities of Oakland and Santa Cruz and in the counties of Sonoma and Tehama are permitted to possess up to 3 pounds of processed marijuana. Putting that quantity in perspective, 3 pounds of marijuana yields roughly 3,000 joints or cigarettes.") (emphasis in original).

Additional provisions within the Medical Marijuana Law[3] expressly state that individuals are

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[3] Collectively, California Health and Safety Code sections 11362.5(a)-(c) and (e), and sections 11362.7 through 11362.83 are

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authorized to use, possess and cultivate marijuana for medical purposes. Cal. Health & Safety Code §§ 11362.7(g); 11362.5(b)(1)(A); 11362.765(a); 11362.77(a); 11362.77(b); 11362.77(f); 11362.795(a)(1); 11362.795(a)(3); and 11362.795(b)(2).

B. Litigation History

In late 2005, defendant and respondent San Diego NORML sent the County a letter threatening to file a lawsuit if the County did not begin issuing the identification cards required by the Medical Marijuana Law. (C.T., Vol. I, at 9). Rather than wait for San Diego NORML's lawsuit, the County filed this action against the State of California, the Director of the Department of Health Services (collectively the "State") and San Diego NORML in San Diego County Superior Court, seeking a declaration that the Medical Marijuana Law is preempted under the Supremacy Clause by the CSA. (*Id.* at 1-11).

The County sought a declaration that the provisions of the Medical Marijuana Law authorizing individuals to use marijuana for medical purposes are preempted. (*Id.*). Since California cannot authorize individuals to use marijuana for medical purposes, the County also sought a declaration that California cannot require counties to issue identification cards to individuals authorized to use marijuana. (*Id.*).

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referred to herein as the Medical Marijuana Law. Those sections appear at pages 75-97 of the Appendix.

The State filed a demurrer, asserting in part that the County did not have standing to challenge any of the provisions of the Medical Marijuana Law. (*Id.* at 27-43). The Superior Court overruled the State's demurrer, finding that the County had standing to challenge the Medical Marijuana Law in its entirety on preemption grounds. (*Id.*, Vol. II, at 368-371).

Thereafter, the parties filed cross-motions for judgment on the pleadings. (*Id.*, Vols. III, IV & V, at 514-975; Vol. V, at 1030-1049, 1058-1117). The County argued that the Medical Marijuana Law is an obstacle to the accomplishment of the purposes and objectives of the CSA, and is therefore preempted under the Supremacy Clause. Specifically, by authorizing individuals to use, possess and cultivate marijuana for medical purposes, the Medical Marijuana Law made it significantly more difficult to achieve Congress' goal of eradicating marijuana use. Since California cannot authorize individuals to use marijuana, it also cannot require counties to issue identification cards to individuals authorized to use marijuana.

The State repeated its argument that the County did not have standing to challenge any portion of the Medical Marijuana Law, and that even if it did, the Medical Marijuana Law was not preempted by the CSA.

The Superior Court again rejected the State's standing argument and reached the merits of the County's position. (App. at 53). However, the Superior

Court concluded that no part of the Medical Marijuana Law is preempted by the CSA. Therefore, the Superior Court granted judgment on the pleadings in favor of the defendants. (*Id.* at 53-58).

The County filed an appeal. In a published opinion, the Court of Appeal affirmed the judgment of the Superior Court, but on different grounds.

The Court of Appeal first concluded that the County had standing to challenge the provisions of the Medical Marijuana Law that require counties to issue identification cards, but did not have standing to challenge the provisions that actually authorize individuals to use marijuana – conduct that violates federal law. The Court of Appeal acknowledged that, as to those provisions, "California's decision to enact statutory exemptions from state criminal prosecution for such persons[4] arguably ***undermines the goals of or is inconsistent with the CSA***. . . ." (*Id.* at 37) (emphasis added).

Nonetheless, the Court of Appeal refused to officially decide whether California could authorize individuals to use marijuana for medical purposes, even though resolution of this question was integral to determining whether the County could be required to issue the identification cards. It is plain that if California cannot authorize individuals to use

[4] The Court of Appeal was referring to medical marijuana users and caregivers.

marijuana for medical purposes, it cannot require counties to issue cards identifying those individuals authorized to use marijuana. Thus, the Court of Appeal erred in refusing to consider whether the provisions of the Medical Marijuana Law authorizing individuals to use marijuana are preempted.

In considering whether the identification card requirement was preempted, the Court of Appeal concluded that the CSA's preemption clause expresses Congress' intent that a state law is preempted only where it is impossible to comply with both the state law and the CSA simultaneously. (*Id.* at 34). The CSA's express preemption clause states that preemption will occur where "there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." 21 U.S.C. § 903. The Court of Appeal offered no persuasive support for its conclusion that the phrase "positive conflict" means "impossibility."

Further, contrary to this Court's decisions in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 871 (2000), *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 352 (2001), and *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002), the Court of Appeal concluded that the express preemption clause precluded it from applying the obstacle preemption test in deciding whether the identification card requirement is preempted by the CSA. (App. at 32-34). Under the obstacle preemption test, a state law is preempted if it is an obstacle to the accomplishment of the purposes and objectives of Congress. *Crosby v.*

Nat'l Foreign Trade Council, 530 U.S. 363, 372-373 (2000). In effect, the California Court of Appeal concluded that the CSA's preemption clause expresses Congress' intent to allow states to pass laws that conflict with the purposes and objectives of the CSA.

Applying the "impossibility" test, the Court of Appeal stated that the

> [c]ounties do not identify any provision of the CSA necessarily violated when a county complies with its obligations under the state identification laws. The identification laws obligate a county only to process applications for, maintain records of, and issue cards to, those individuals entitled to claim the exemption. ***The CSA is entirely silent on the ability of states to provide identification cards to their citizenry***, and an entity that issues identification cards does not engage in conduct banned by the CSA.

(App. at 34-35) (footnote omitted) (emphasis added). The Court of Appeal, however, failed to consider the fact that the cards at issue identify those individuals authorized to use marijuana. Since the CSA declares that marijuana has no medically accepted use, Congress effectively banned states from issuing cards officially recognizing individuals authorized to use marijuana in violation of the CSA.

Although holding that only the "impossibility" preemption test should be applied, the Court of Appeal also concluded that, if the obstacle preemption test were applied, the identification card requirement

would not be preempted because it is not an obstacle to the accomplishment and execution of the purposes and objectives of the CSA. (*Id.* at 36-41).

In reaching this conclusion, the Court of Appeal relied, in part, on this Court's decision in *Gonzales v. Oregon*, 546 U.S. 243 (2006), asserting that the "purpose of the CSA is to combat recreational drug use, not to regulate a state's medical practices." (App. at 37). However, the use of marijuana for a purported medical purpose is by definition recreational drug use because Congress has declared that marijuana has no acceptable medical use. 21 U.S.C. §§ 812(b)(1)(B), 812(c)(sched. I)(c)(10). Moreover, by declaring it unlawful for any individual to use, possess or cultivate marijuana for any purpose, Congress has displaced state laws that allow (1) individuals to use marijuana for medical purposes and (2) doctors to provide recommendations that patients can use to obtain marijuana.

In finding that the identification cards are not an obstacle to the accomplishment of the purposes and objectives of the CSA, the Court of Appeal also concluded that

> 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. . . . [However,] any alleged "obstacle" to the federal goals is presented by those California statutes that *create the exemptions*, not by the statutes providing a system for rapidly

> identifying exempt individuals. The identification card statutes impose no significant *added* obstacle to the purposes of the CSA not otherwise inherent in the provisions of the exemptions. . . .

(App. at 37-38) (emphasis in original).

As discussed above, the Court of Appeal should have decided whether the provisions of the Medical Marijuana Law authorizing individuals to use marijuana are an obstacle to the accomplishment of the purposes and objectives of Congress. This is true because if those provisions pose such an obstacle, California cannot require counties to issue the identification cards.[5]

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[5] The California Court of Appeal invoked the Eleventh Amendment's Anti-Commandeering Doctrine to address an argument that the County never made. According to the court, "[c]ounties also appear to assert [that] the identification card laws present a significant obstacle to the CSA because the bearer of an identification card will not be arrested by California's law enforcement officers despite being in violation of the CSA. However, the unstated predicate of this argument is that the federal government is entitled to conscript a state's law enforcement officers into enforcing federal enactments, over the objection of that state, and this entitlement will be obstructed to the extent the identification card precludes California's law enforcement officers from arresting medical marijuana users." (App. at 38-39).

The Court of Appeal misconstrued the County's position. The County noted that the Medical Marijuana Law is silent on the issue of whether California law enforcement officials may arrest individuals for violating the CSA. Therefore, the County never argued that the identification card requirement is an

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Following the Court of Appeal's decision, the County as well as the County of San Bernardino and Mr. Penrod filed timely Petitions for Review asking the California Supreme Court to review the judgment of the California Court of Appeal. The California Supreme Court denied the Petitions for Review on October 16, 2008. (*Id.* at 68).

Because the provisions of California law authorizing individuals to use marijuana for medical purposes are an obstacle to the accomplishment of the purposes and objectives of the CSA, this Court should grant this Petition and find the entire Medical Marijuana Law preempted.

REASONS FOR GRANTING THE PETITION

This Petition should be granted because this case presents an important question – whether state laws that authorize individuals to use marijuana for

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obstacle to the accomplishment of the purposes and objectives of the CSA because it prohibits state law enforcement officials from arresting California medical marijuana users for violating the CSA. Moreover, the Court of Appeal never found that under the Medical Marijuana Law, a holder of an identification card cannot be arrested by a state law enforcement officer for violating the CSA. Rather, the Court of Appeal concluded that "the fact that California has decided to exempt the bearer of an identification card from arrest ***by state law enforcement for state law violations*** does not invalidate the identification laws under obstacle preemption." (*Id.* at 40) (emphasis added). Accordingly, the Anti-Commandeering Doctrine is inapplicable.

medical purposes are preempted by the CSA, which prohibits marijuana use for any reason. This important question has not been decided – but should be decided – by this Court. Supreme Court Rule 12(c).

If the Court of Appeal's decision is allowed to stand, it will have a profound impact on the federal government's war on illegal drugs. States containing a significant portion of the population of the United States have enacted laws that authorize individuals to use marijuana for medical purposes – conduct that violates federal law. If these laws remain in place, individuals will be more likely to use marijuana and this will severely undermine Congress' goal of eradicating marijuana use. Moreover, it is inevitable that marijuana originally grown for medicinal use will fall into the hands of recreational drug users. In addition, recreational drug users will exploit the Medical Marijuana Law in order to obtain a marijuana recommendation from a doctor when such a recommendation is not warranted. This will make it even more difficult to achieve Congress' goal of eliminating the use of illegal drugs.

This Court is no stranger to California's Medical Marijuana Law. On two prior occasions, it has considered the interplay between the CSA and the Medical Marijuana Law. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001) and *Raich*. On both of those occasions, the Court specifically recognized that under the CSA, marijuana has no medically acceptable use. In these cases, the Court

rejected challenges to Congress' power to make this determination.

In *Oakland Cannabis Buyers' Cooperative*, groups formed "medical cannabis dispensaries" after the passage of Proposition 215. 532 U.S. at 486. In 1998, the United States sued one of the dispensaries – Oakland Cannabis Buyers' Cooperative – seeking to enjoin the Cooperative from distributing and manufacturing marijuana. *Id.* at 486-487. The United States "argued that, whether or not the Cooperative's activities are legal under California law, they violate federal law." *Id.* at 487. Specifically, the United States argued that the Cooperative's activities violated the CSA. The district court agreed, and issued a preliminary injunction enjoining the Cooperative from distributing and manufacturing marijuana. The district court also denied the Cooperative's request to modify the injunction to allow the distribution of marijuana when it was medically necessary. The United States Court of Appeals for the Ninth Circuit reversed the district court's order refusing to modify the injunction, concluding that medical necessity was a "legally cognizable defense" under the CSA and that this defense would likely apply. *Id.* at 488.

This Court reversed. The Court noted that the only exception to the prohibitions contained in the CSA for Schedule I drugs is for "Government-approved research projects." *Id.* at 490 (citing 21 U.S.C. § 841(f)). However, the Cooperative argued "that notwithstanding the apparently absolute language of § 841(a), the statute is subject to additional,

implied exceptions, one of which is medical necessity." *Id.* The Court flatly rejected the Cooperative's argument.

According to the Court, the CSA

> reflects a determination that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project). Whereas some other drugs can be dispensed and prescribed for medical use, the same is not true for marijuana. Indeed, for purposes of the Controlled Substances Act, marijuana has "no currently accepted medical use" at all.

Id. at 491 (citations omitted). The Court concluded that

> [i]t is clear from the text of the Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception. The statute expressly contemplates that many drugs "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people," § 801(1), but it includes no exception at all for any medical use of marijuana.

Id. at 493.

In *Raich*, the plaintiffs filed a lawsuit against the United States Attorney General and the federal Drug Enforcement Agency, seeking to prohibit those officials from enforcing the CSA "to the extent it

prevents them from possessing, obtaining, or manufacturing cannabis [marijuana] for their personal medical use." *Raich,* 545 U.S. at 7. The plaintiffs claimed that "enforcing the CSA against them would violate the Commerce Clause. . . ." *Id.* at 8.

The issue before the Court was

> whether the power vested in Congress by Article I, § 8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution its authority to regulate Commerce with foreign Nations, and among the several States" ***includes the power to prohibit the local cultivation and use of marijuana in compliance with California law***.

Id. at 5 (emphasis added). Early in its analysis, the Court noted that

> [b]y classifying marijuana as a Schedule I drug [under the CSA], as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study.

Id. at 14 (citations omitted).

The plaintiffs in *Raich* argued that the CSA's "categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical

purposes pursuant to California law exceeds Congress' authority under the Commerce Clause." *Id.* at 15. The Ninth Circuit had accepted the plaintiffs' argument, concluding that "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law" is "beyond the reach of federal power." *Id.* at 26 (internal quotation marks and citation omitted). The Ninth Circuit "characterized this class [of medical marijuana users authorized by state law] as different in kind from drug trafficking." *Id.* (internal quotation marks and citation omitted).

This Court rejected the Ninth Circuit's conclusion. The Court stated that

> [t]he differences between the members of a class so defined and the principal traffickers in Schedule I substances might be sufficient to justify a policy decision exempting the narrower class from the coverage of the CSA. The question, however, is whether Congress' contrary policy judgment, *i.e.*, its decision to include this narrower "class of activities" within the larger regulatory scheme, was constitutionally deficient. We have no difficulty concluding that Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA. . . .

Id.

The Court also indicated that

> the fact that marijuana is used for personal medical purposes on the advice of a physician cannot itself serve as a distinguishing factor. The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses.

Id. at 27 (internal quotation marks and citation omitted).

The Court further concluded that

> limiting the activity to marijuana possession and cultivation in accordance with state law cannot serve to place respondents' activities beyond congressional reach. ***The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is superior to that of the States to provide for the welfare or necessities of their inhabitants, however legitimate or dire those necessities may be.***

Id. at 29 (internal quotation marks and citations omitted) (emphasis added).

This Petition should be granted to answer the question left open in *Oakland Cannabis* and *Raich* – whether California's Medical Marijuana Law is preempted by the CSA because it is an obstacle to the

accomplishment of the purposes and objectives of the CSA.

ARGUMENT

I. CALIFORNIA'S MEDICAL MARIJUANA LAW IS AN OBSTACLE TO THE ACCOMPLISHMENT OF THE PURPOSES AND OBJECTIVES OF THE CSA, AND IS THEREFORE PREEMPTED

"[I]t has been settled that state law that conflicts with federal law is without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks and citation omitted). 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. General Electric Co.*, 496 U.S. 72, 79 (1990) (internal quotation marks and citations omitted).

A. The Medical Marijuana Law Is An Obstacle.

The Medical Marijuana Law is preempted because it is an obstacle to the accomplishment of the purposes and objectives of the CSA.

When it enacted the CSA, Congress sought to eradicate the use of certain drugs, including marijuana, and made an explicit determination that marijuana has "no currently accepted medical use in treatment in the United States." 21 U.S.C. §§ 812(b)(1)(B), 812(c)(sched. I)(c)(10).

In 1996, California became the first state to authorize individuals to use marijuana for medical purposes – conduct that violates the CSA. Since then, twelve other states have passed laws legalizing marijuana use. Those states are Alaska, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont and Washington. Andrew King, Comment, *What the Supreme Court Isn't Saying About Federalism, the Ninth Amendment, and Medical Marijuana*, 59 Ark. L. Rev. 755, 756 n.11 (2006); http://www.mlive.com/politics/index.ssf/2008/11/michigan_voters_approve_medica.html.

There can be no doubt that the Medical Marijuana Law virtually guarantees that more individuals will use marijuana, severely hampering Congress' goal of eradicating all marijuana use. If a state government authorizes a citizen to use marijuana to treat a medical condition, that citizen will be more likely to ignore the federal government's dictate that marijuana cannot be used for any reason.

The Medical Marijuana Law also virtually guarantees that more individuals will use marijuana for purely recreational use. It is inevitable that marijuana originally grown for medicinal use will fall into

the hands of recreational drug users. As this Court discussed in *Raich*, in enacting the CSA "Congress was particularly concerned with the need ***to prevent the diversion of drugs from legitimate to illicit channels.***" 545 U.S. at 12-13 (footnotes omitted) (emphasis added). See also H.R. Rep. No. 91-1444, *reprinted in* 1970 U.S.C.C.A.N. 4566 at 4572 ("Such a closed system should significantly reduce ***the widespread diversion of these drugs out of legitimate channels into the illicit market.***. . .") (emphasis added). To effectuate its objectives, "Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Raich,* 545 U.S. at 13 (citation omitted).

Thus, even if the "medicinal" use of marijuana did not conflict with Congress' goal of eradicating marijuana use, it is inevitable that the Medical Marijuana Law will result in marijuana cultivated and possessed for medical purposes being diverted and used for recreational purposes. *Id.* at 31-32 ("The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. 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.***") (footnotes omitted) (emphasis added).

Further, unscrupulous caregivers and patients will give or sell marijuana to non-patients who will use marijuana for recreational use. In addition, dried marijuana or live marijuana plants may be stolen and used for recreational purposes. The large supply of marijuana available under the Medical Marijuana Law conflicts with Congress's goal to "prevent the diversion of drugs from legitimate to illicit channels." *Id.* at 12-13.

In addition, recreational drug users will exploit the Medical Marijuana Law in order to obtain a marijuana recommendation from a doctor when such a recommendation is not warranted. This further undermines the accomplishment of the purposes and objectives of the CSA.

1. The CSA Regulates The Medicinal Use Of Marijuana.

The California Court of Appeal concluded that "the identification card laws do not pose a significant impediment to specific federal objectives embodied in the CSA [because] [t]he purpose of the CSA is to combat recreational drug use, not to regulate a state's medical practice." (App. at 37) (*citing Oregon*, 546 U.S. at 270-272). The Court of Appeal relied on a false dichotomy.

The CSA clearly regulates the ability of doctors and patients to use marijuana for "medical" purposes. Congress has declared that marijuana has no acceptable medical use. 21 U.S.C. §§ 812(b)(1)(B), 812(c)

(sched. I)(c)(10). Therefore, "patients" cannot use, and doctors cannot prescribe marijuana for "medical" purposes. To the extent that state laws provide otherwise, Congress intended to displace those laws when it enacted the CSA.

Indeed, if there is a presumption against preemption because states have traditionally regulated the practice of medicine and determined which substances to make illegal, that presumption has been overcome by the plain terms of the CSA and its legislative history. This Court indicated in *Raich* and *Oregon* that when it comes to the medicinal use of marijuana, Congress has set uniform national standards that displace contrary state laws.

In *Oregon*, this Court stated that "[e]ven though regulation of health and safety is primarily, and historically, a matter of local concern, ***there is no question that the Federal Government can set uniform national standards in these areas***." *Id.* at 271 (internal quotation marks and citation omitted).[6] In support of this statement, the Court cited

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[6] In *Oregon*, the Court also stated that "we have not considered the extent to which the CSA ***regulates medical practice*** beyond prohibiting a doctor from acting as a drug pusher instead of a physician." 546 U.S. at 269 (internal quotation marks and citation omitted) (emphasis added). Following this statement, the Court cited two cases, *United States v. Moore*, 423 U.S. 122 (1975) and *Oakland Cannabis Buyers' Cooperative*. As to the second case, the Court stated that "[i]n *United States v. Oakland Cannabis Buyers' Cooperative*, ***Congress' express determination that marijuana had no***

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Raich, where the Court concluded that Congress' decision to prohibit the possession, cultivation and transportation of marijuana for medical purposes was constitutional, even though California's Medical Marijuana Law authorized individuals to engage in this conduct. According to the Court in *Raich*,

> [t]he fact that marijuana is used for personal medical purposes on the advice of a physician cannot itself serve as a distinguishing factor. The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses.

545 U.S. at 27 (internal quotation marks and citation omitted).

Under the Supremacy Clause, California must follow the uniform national standards set by Congress regarding the medical use of marijuana. Because California has not followed those standards, its Medical Marijuana Law is preempted.

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accepted medical use foreclosed any argument about statutory coverage of drugs available by a doctor's prescription." *Oregon*, 546 U.S. at 269 (emphasis added). Thus, the Court indicated that it did consider how the CSA regulates ***medical practice*** in *Oakland Cannabis* and determined that Congress' express determination that marijuana has no medically accepted use "foreclosed any argument" that states could authorize doctors to prescribe marijuana because of the direct conflict with the CSA.

2. Retention Of Federal Authority To Prosecute Is Not Enough To Avoid A Conflict.

The fact that federal officials can still charge California residents who use marijuana for medical purposes with violating the CSA does not eliminate the conflict. The purpose of the CSA is not to prosecute individuals for violating the Act, but to prevent individuals from engaging in certain conduct – unauthorized use of specific drugs. The fact that California has authorized individuals to use marijuana for medical purposes makes it more likely that individuals will engage in conduct (using marijuana) that Congress sought to prevent.

3. The Medical Marijuana Law Goes Beyond Merely Decriminalizing Conduct Under State Law.

The State has argued that the Medical Marijuana Law merely exempts individuals from prosecution under California's criminal laws. The Medical Marijuana Law does much more. It specifically authorizes individuals to use marijuana for medical purposes and requires counties to issue identification cards that facilitate the use of marijuana.[7]

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[7] Only one provision of the statute actually exempts individuals from prosecution under California law, and the County does not challenge that provision. Cal. Health & Safety Code § 11362.5(d).

It is one thing for a state to indicate that certain conduct does not violate state law even though that conduct violates federal law. It is quite another thing for a state to specifically authorize individuals to engage in conduct that violates federal law and to require local governments to issue cards that facilitate the federal law violations.

For these reasons, California's Medical Marijuana Law is an obstacle to the accomplishment of the purposes and objectives of the CSA and is therefore preempted.

II. THE COURT OF APPEAL ERRED IN CONCLUDING THAT THE OBSTACLE PREEMPTION TEST DOES NOT APPLY

The California Court of Appeal held that the Medical Marijuana Law is preempted only if it is impossible to comply with both the CSA and the Medical Marijuana Law at the same time. Nonetheless, the court also indicated that if the "obstacle" preemption test were applied, the County's challenge would still fail.

The Court of Appeal erred in holding that there is a conflict warranting invalidation of the Medical Marijuana Law under the Supremacy Clause only if it is impossible to comply with both the Medical Marijuana Law and the CSA simultaneously. The Court of Appeal's ruling was based primarily on the CSA's express preemption clause, which provides that state laws are preempted if "there is a positive

conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." 21 U.S.C. § 903.[8]

It is apparent that the plain meaning of "positive conflict" is not "impossibility." Indeed, the Court of Appeal cited no legislative history supporting its interpretation of the CSA's express preemption clause. Moreover, it defies logic to assume that Congress included the preemption clause because it was concerned that states would enact laws ***requiring*** their citizens to use controlled substances banned by the CSA. However, this is the only circumstance under which a state law would be preempted under the Court of Appeal's analysis.

The Court of Appeal also stated that the County's "proffered construction effectively reads the term 'positive' out of section 903, which transgresses the interpretive canon that we should accord meaning to every term and phrase employed by Congress." (App. at 33) (citation omitted). The Court of Appeal's statement is not accurate and its analysis does not withstand scrutiny. The phrases "positive conflict" and "direct conflict" have been used interchangeably with the word "conflict" and refer to the fact that state laws are preempted if either (1) "it is impossible for a private party to comply with both state and federal

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[8] Since California has authorized individuals to engage in conduct that violates the CSA, there is a "positive conflict" and the Medical Marijuana Law is also expressly preempted.

law" ***or*** (2) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby,* 530 U.S. at 372-373. Drafters often use two words to describe something when one word would have been sufficient. Drafters will say that something is "null and void" when one word or the other would have been sufficient. In the phrase "last, best and final," there is no difference between "last" and "final." There is simply no difference between a "positive conflict" and a "conflict" and the County's proffered interpretation does not alter the substance of section 903. Moreover, the County's interpretation is consistent with the rule of statutory construction that requires words to be read in context. The express preemption clause itself provides the definition of "positive conflict": the state and federal provisions "cannot consistently stand together." A state statute that sanctions and facilitates conduct cannot consistently stand together with a federal statute that directly prohibits the same conduct.

Further, in effect, the Court of Appeal determined that by including the express preemption clause, Congress intended for states to be able to enact laws that conflict with the accomplishment of the purposes and objectives of Congress. Strong evidence of congressional intent should be required before a court presumes that Congress had such an illogical goal in mind. *Geier*, 529 U.S. at 871-872 ("Why, in any event, would Congress not have wanted ordinary preemption principles to apply where an actual conflict

with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates. . . . Insofar as petitioners' argument would permit common-law actions that actually conflict with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect. . . . [Petitioners' argument] permits that law to defeat its own objectives, or potentially, as the Court has put it before, to destroy itself. We do not claim that Congress lacks the constitutional power to write a statute that mandates such a complex type of state/federal relationship. But there is no reason to believe Congress has done so here.") (citations and internal quotation marks omitted).

Moreover, this Court has held that even if a state law is not preempted by an express preemption provision it is preempted if it is an obstacle to the accomplishment of the purposes and objectives of Congress. For instance, in *Geier*, the Court found that the express preemption clause contained in a federal law did not preempt the state law at issue. Nonetheless, the Court held that the implied preemption doctrine must still be applied and therefore courts must determine whether the state law stands as an obstacle to the accomplishment of the purposes and objectives of the federal law. *Geier,* 529 U.S. at

869-874. The Court explained that an "express pre-emption provision imposes no unusual 'special burden' against pre-emption." *Id.* at 873. This Court found the state law preempted because it was an obstacle to the accomplishment of the purposes and objectives of the federal law. *Id.* at 874-886; *accord Buckman*, 531 U.S. at 352 ("To the extent respondent posits that anything other than our ordinary pre-emption principles apply under these circumstances, that contention must fail in light of our conclusion last Term in *Geier* . . . that ***neither an express pre-emption provision nor a saving clause bars the ordinary working of conflict pre-emption principles***.") (citation and internal quotation marks omitted) (emphasis added); *Sprietsma*, 537 U.S. at 65 ("Congress' ***inclusion of an express pre-emption clause does not bar the ordinary working of conflict pre-emption principles***, that find implied pre-emption where 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***.") (citation and internal quotation marks omitted) (emphasis added).

For these reasons, the Court of Appeal erred in concluding that the proper preemption test is

whether it is impossible to comply with both the CSA and the Medical Marijuana Law simultaneously.[9]

III. THE COURT OF APPEAL ERRED IN REFUSING TO OFFICIALLY DECIDE WHETHER THE PROVISIONS OF THE MEDICAL MARIJUANA LAW AUTHORIZING INDIVIDUALS TO USE MARIJUANA FOR MEDICAL PURPOSES ARE PREEMPTED BY THE CSA

The County has standing to challenge all of the provisions of the Medical Marijuana Law at issue in this lawsuit. In order to establish standing under Article III of the United States Constitution, there must be a "case or controversy." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). In order to show that a case or controversy exists, a plaintiff must first "demonstrate that he has suffered an 'injury in fact.'" *Id.* The Court of Appeal correctly recognized that if the County were required to issue identification cards pursuant to a state law that is preempted, the County would suffer injury in fact. However, 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

[9] The logic of this conclusion is further undermined by the fact that the only way to "comply" with both laws is to abstain from any conduct authorized by the Medical Marijuana Law.

purposes. Such authorization conflicts with the CSA, which prohibits marijuana use for any purpose.

Prior to the filing of this action, San Diego NORML sent a letter to the County threatening to file a lawsuit seeking a writ of mandate/injunction requiring the County to issue identification cards to medical marijuana users and caregivers as required by the Medical Marijuana Law. (C.T., Vol. I, at 9). Under a recent California Supreme Court decision, the County would not have been able to raise the unconstitutionality of the Medical Marijuana Law as a defense in a writ of mandate action seeking an order compelling the County to issue the identification cards. *Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055, 1086-1087 (2003) (holding that a local government cannot raise the unconstitutionality of a state law as a defense to a lawsuit seeking an order requiring the local government to comply with the state law; instead the local government must seek a declaration from a court that the state law is unconstitutional before refusing to obey it).

Therefore, the County filed this action seeking a declaration that California's Medical Marijuana Law is preempted by the CSA and consequently, the County does not have a duty to issue the identification cards. The San Diego County Superior Court considered the merits of the County's argument. (App. at 53). The Court of Appeal correctly recognized that the County has standing to challenge the statutory provisions requiring the County to issue identification cards. Cal. Health & Safety Code

§ 11362.71(b)(5). However, the California Court of Appeal refused to consider the County's primary reason why it could not be required to issue the identification cards – because California cannot authorize individuals to engage in conduct – using marijuana – that violates federal law. The California Court of Appeal's determination was clear error.

It is apparent that the key issue presented in this case is whether the provisions of the Medical Marijuana Law, which authorize individuals to engage in conduct that violates the CSA, are preempted. It is equally apparent that the validity of the statutory provisions requiring counties to issue identification cards to medical marijuana users and caregivers is dependent on the answer to that key issue.

This is true because if a court were to determine that the Medical Marijuana Law's authorization of marijuana use is preempted by the CSA, no one could successfully argue that the State could require the County to issue cards identifying individuals authorized to use marijuana for medical purposes. The converse is also true. If a court were to decide that the State can legally authorize individuals to use marijuana, it would be virtually impossible for the County to successfully argue that the identification card requirement is illegal. Thus, the underlying question whether California can legally authorize individuals to use marijuana in violation of federal law is the key issue in determining whether the State can require the County to issue the identification

cards. The Court of Appeal should have answered that question.

The legality of the identification cards cannot be meaningfully analyzed in a vacuum. The cards have legal significance only in statutory context. By refusing to answer the question whether California can authorize individuals to use marijuana for medical purposes, the Court of Appeal virtually guaranteed that the identification card requirement would be found not preempted. The Court of Appeal effectively assumed – but refused to officially decide – that the provisions authorizing the use of marijuana for medical purposes were lawful. Therefore, it was easy for the Court of Appeal to conclude that the identification cards alone do not pose an obstacle to the accomplishment of the purposes and objectives of the CSA because the cards are plastic inanimate objects that merely identify individuals who the Court of Appeal assumed California could legally authorize to use marijuana.

However, the Court of Appeal should have officially answered the question whether California's authorization of individuals to use marijuana for medical purposes is preempted by the CSA. If the answer to this question is yes, then the counties cannot be required to issue the identification cards. If the answer is no, then the counties probably can be required to issue the cards.

Instead of answering the critical question, the Court of Appeal noted that the provisions authorizing

individuals to use marijuana for medical purposes "arguably undermine[ ] the goals of or [are] inconsistent with the CSA," but nonetheless effectively assumed that those provisions were valid. (App. at 37). This was error.

The County does have standing to challenge those provisions of the Medical Marijuana Law that authorize individuals to use marijuana for medical purposes because their validity necessarily determines whether the identification card requirement, which the Court of Appeal found the County has standing to challenge, is valid.

The error in the Court of Appeal's analysis can be demonstrated by a simple example. Congress could pass a law making it a federal crime to assassinate the President of the United States. California could pass a law authorizing certain citizens to assassinate the President. The same law could also require counties to issue cards identifying those individuals who California had authorized to assassinate the President. A court deciding a preemption challenge to the identification card requirement would logically have to first consider whether California law could authorize someone to assassinate the President when such conduct violates federal law. The answer to this question would determine the outcome of the preemption challenge to the identification card requirement. The same is true in this case.

A. If The County Does Not Have Standing To Challenge The Provisions That Authorize The Use Of Marijuana For Medical Purposes, These Provisions Will Go Unchallenged.

If the County does not have standing to challenge the provisions of the Medical Marijuana Law authorizing individuals to use marijuana, then no one will have standing to challenge these provisions.

No citizens adversely affected by California's unconstitutional Medical Marijuana Law would have a sufficient interest in the outcome of the litigation necessary to confer standing. Citizens claiming that the Medical Marijuana Law is preempted would not be able to show they personally are harmed by other people's use of marijuana for medical purposes.

Further, citizens who are arrested for possessing marijuana for medical purposes, or who are denied an identification card by the County, would not challenge the validity of the provisions of the Medical Marijuana Law authorizing marijuana use.

The State has previously asserted that the federal government could bring a preemption challenge to the Medical Marijuana Law. However, the United States is not required to take any action under the state law. The United States does not have to issue identification cards to those who want to use marijuana for medical purposes. Further, the United States can, and has, prosecuted individuals for violating the CSA despite California's conflicting laws.

United States v. Alden, 2005 U.S. App. LEXIS 15633 (9th Cir. 2005); *Raich,* 545 U.S. 1. Thus, the United States would not have a sufficient interest in the outcome of this litigation in order to confer standing.[10]

For these reasons, the Court of Appeal erred in not officially deciding whether the Medical Marijuana Law is preempted by the CSA.

CONCLUSION

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

DATED: January 12, 2009

Respectfully submitted,

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[10] If the federal government were the only entity with standing to challenge the Medical Marijuana Law, it would undermine democratic principles. Citizens and governments within California should have the right to challenge laws enacted by their own Legislature. Californians should be able to police the actions of their Legislature and not have to rely on the federal government to do so.