Nos. 08-887 and 08-897

In the Supreme Court of the United States

COUNTY OF SAN DIEGO, ET AL., *Petitioners,*

v.

SAN DIEGO NORML, ET AL., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF FOR THE STATE OF CALIFORNIA AND SANDRA SHEWRY IN OPPOSITION

EDMUND G. BROWN JR.
Attorney General of California
DAVID S. CHANEY
Chief Assistant Attorney General
GORDON B. BURNS
Deputy Solicitor General of California
JONATHAN K. RENNER
Supervising Deputy Attorney General
PETER A. KRAUSE
Deputy Attorney General
Counsel of Record
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5328
Fax: (916) 324-8835
E-mail: peter.krause@doj.ca.gov
Counsel for Respondents State of California and Sandra Shewry

QUESTION PRESENTED

Whether the federal Controlled Substances Act preempts California laws that allow medical marijuana patients and their caregivers to obtain identification cards.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

In the Supreme Court of the United States

COUNTY OF SAN DIEGO, ET AL., *Petitioners,*

v.

SAN DIEGO NORML, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF FOR THE STATE OF CALIFORNIA AND SANDRA SHEWRY IN OPPOSITION

OPINIONS BELOW

The Supreme Court of California's denial of review (Pet. App. 68)[1] is unreported. The opinion of the California Court of Appeal, Fourth Appellate District (*id.* at 1-47) is reported at 165 Cal. App. 4th 798. The ruling of the Superior Court of California, County of San Diego (*id.* at 48-61) is unreported.

JURISDICTION

The Court of Appeal's opinion was filed on July 31, 2008. The Supreme Court of California denied review on October 16, 2008. The petitions for a writ of certiorari were filed on January 12, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

[1] All record citations are to petitioner County of San Diego's Appendix, unless otherwise noted.

STATEMENT

1. Adopted in 1970, the federal Controlled Substances Act, 21 U.S.C. §§ 801-971 ("CSA"), is a regulatory system designed to combat recreational drug abuse by prohibiting the manufacture, distribution, or possession of any controlled substance, including marijuana. *Gonzales v. Oregon*, 546 U.S. 243, 271-272, 126 S. Ct. 904 (2006); Pet. App. 37. Hence, under federal law, the possession of marijuana for personal use is a misdemeanor. 21 U.S.C. § 844a(a). However, the CSA does not exclude "any State law on the same subject matter . . . unless there is a positive conflict" between federal and state law such that "the two cannot consistently stand together." *Id.* § 903.

2. Under California law, marijuana also is classified as a controlled substance, and its possession and cultivation are generally illegal. *See* CAL. HEALTH & SAFETY CODE § 11054(d)(13); § 11357 (marijuana possession a misdemeanor); § 11358 (marijuana cultivation a felony); Pet. App. 4. But California is one of at least nine states which permit the use of marijuana for limited medical purposes. *Gonzalez v. Raich*, 545 U.S. 1, 5, 125 S. Ct. 2195 (2005); Pet. App. 9. California voters approved the Compassionate Use Act of 1996, California Health and Safety Code § 11362.5 ("CUA"), on November 5, 1996. This statute made three substantive changes to California law, including the decriminalization of marijuana possession and cultivation by the seriously ill, under state law, when a physician has recommended it for medical use. *Id.* § 11362.5(d). The CUA also protects doctors from state law sanctions when they recommend marijuana for medical purposes. *Id.* § 11362.5(c).

In 2003, the California Legislature enacted the Medical Marijuana Program Act, California Health and Safety Code §§ 11362.7-11362.83 ("MMP"), to address issues not included in the CUA. Pet. App. 6. The majority of the statutes comprising the MMP

relate to the operation of a voluntary program under which qualified patients and caregivers may apply for an identification card designed both to help state law enforcement officers identify qualified patients and caregivers, and to insulate cardholders from arrest for violations of certain state laws relating to marijuana. *See* CAL. HEALTH & SAFETY CODE §§ 11362.71-11362.775. The application for the card expressly states that the card will not shield holders from arrest or prosecution under federal law; it merely identifies people that California has exempted from state law sanctions. Pet. App. 35.

Much of the MMP confers no rights and imposes no obligations on California counties. Pet. App. 7 & n. 2. Counties are, however, required to participate in the identification card program by (a) providing applications upon request to individuals seeking to join the identification card program; (b) processing completed applications; (c) issuing identification cards to approved applicants; and (d) keeping certain records. CAL. HEALTH & SAFETY CODE § 11362.71(b).

3. In 2006, the San Diego chapter of the National Organization for the Reform of Marijuana Laws ("NORML") threatened to sue the County of San Diego over its refusal to process applications for identification cards. Rather than wait for a lawsuit, however, San Diego preemptively filed an action in state court, seeking a judicial declaration that it was not required to issue the cards because federal law preempts the MMP and portions of the CUA. Pet. App. 10. Notably, the county excluded from its complaint a contention that federal law preempts the provision in the CUA which decriminalized the possession and cultivation of marijuana – subdivision (d) of Health and Safety Code section 11362.5. *Id.* The County of San Bernardino and its sheriff filed a similar declaratory relief complaint soon after, and the cases were consolidated. Both complaints named, among other defendants, the State of California and the Director of the Department of Health Services (the "State").

After the State's demurrer on the issue of standing was overruled (Pet. App. 69-74), the parties filed cross-motions for judgment on the pleadings. The court granted the State's motion, ruling that neither the challenged portions of the CUA, nor the MMP, were preempted by federal law. *Id.* at 49-60. Accordingly, judgment was entered for the State and against the County of San Diego, the County of San Bernardino, and San Bernardino County Sheriff Gary Penrod (the "Counties") (*id.* at 61-67), who appealed to the Court of Appeal for the State of California, Fourth Appellate District, Division One.

4. The Court of Appeal affirmed. After observing that the Counties had limited their preemption challenges by declining to challenge the constitutionality of subdivision (d) of the CUA (Pet. App. 3, 10), the Court of Appeal examined whether, under settled principles of state law, the Counties had standing to raise what it called "hypothetical constitutional infirmities" in California's medical marijuana laws. *Id.* at 13. In conferring only limited standing, the court below observed that "major portions of the MMP and CUA neither impose obligations on nor inflict direct injury to Counties," and thus the court rejected "Counties' effort to obtain an advisory opinion declaring the *entirety* of the MMP and the bulk of the CUA invalid under preemption principles." *Id.* at 20 (italics in original). Hence, the Court of Appeal reached the "Counties' preemption arguments as to those statutes, and *only* those statutes, that require Counties to implement and administer the identification card program." *Id.* at 21 (italics in original).

The Court of Appeal then turned to the question of whether California's identification card program was preempted by the CSA. Following the plain text of the CSA's anti-preemption provision, 21 U.S.C. § 903, the court found that Congress intended to "preempt only those state laws that positively conflict with the CSA so that simultaneous compliance with both sets of laws is impossible." Pet. App. 34. It

went on to conclude that, because the CSA "does not compel the states to impose criminal penalties for marijuana possession, the requirement that Counties issue cards identifying those against whom California has opted not to impose criminal penalties does not positively conflict with the CSA." *Id.* at 35-36. It further observed that, even if Congress had intended to preempt state laws that present an obstacle to the CSA, the identification card laws posed no obstacle because California's decision "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.

5. The Supreme Court of California summarily denied review on October 16, 2008. Pet. App. 68.

REASONS WHY THE PETITIONS SHOULD BE DENIED

This case presents a poor vehicle for deciding whether the federal Controlled Substances Act preempts state laws that allow possession of marijuana for medical purposes. First, that issue was not before the court below because the Counties declined to challenge the statute which actually decriminalized the possession and cultivation of marijuana for medical purposes under California law. Second, because the court below properly curtailed the Counties' standing under established state law principles, it did not reach even the more limited preemption question that the Counties posed in their complaints. Instead, the Court of Appeal decided the narrow question of whether the CSA prohibits California counties from issuing identification cards to medical marijuana patients and their caregivers. On that question, the Court of Appeal applied settled law to the facts of the case, and the Counties simply dispute the result. Accordingly, this case does not warrant review.

I. BECAUSE THE COUNTIES DECLINED TO CHALLENGE A KEY PROVISION OF THE COMPASSIONATE USE ACT, THE BROAD PREEMPTION QUESTION POSED IN THE PETITIONS WAS NOT BEFORE THE COURT BELOW.

The Counties contend that this Court's review is warranted because the case presents the "important question" of whether "state laws that authorize individuals to use marijuana for medical purposes are preempted by the CSA." San Diego Pet. 13-14; see also San Bernardino Pet. 5. In reality, this broad preemption question is not presented in this case because the Counties did not challenge subdivision (d) of Health and Safety Code section 11362.5, the provision which decriminalized the possession and cultivation of marijuana under California law when a physician recommends its use to treat a serious medical condition. Pet. App. 3, 10; San Bernardino Pet. App. 144a-145a.[2]

Because the Counties elected not to challenge subdivision (d), the question of whether the CSA preempts a state law exemption for medical marijuana was not before the court below – a point

---

[2] The Counties' failure to challenge subdivision (d) of section 11362.5 is a tacit acknowledgment that California (like other states) may decriminalize marijuana for medical purposes because the Tenth Amendment to the United States Constitution precludes the federal government from compelling "States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925, 117 S. Ct. 2365 (1997). If states were precluded from decriminalizing marijuana for medical purposes, they would, in effect, be required to enforce federal drug policy. Such "commandeering" of the states' powers violates the Tenth Amendment because, as this Court has held, states must retain "the ultimate decision" whether to comply with a federal regulatory program. *New York v. United States*, 505 U.S. 144, 168, 112 S. Ct. 2408 (1992); Pet. App. 39.

which the Court of Appeal made explicit (Pet. App. 3, 10), and which San Diego quietly acknowledges. San Diego Pet. 26 n. 7. Hence, the question of whether California's medical marijuana laws are preempted by the CSA is, at best, a hypothetical issue, making this case a poor vehicle for review. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553, 121 S. Ct. 2404 (2001) (declining "to reach an issue that was not decided below"); *Asbury Hospital v. Cass County, N.D.*, 326 U.S. 207, 213-214, 66 S. Ct. 61 (1945) ("This Court is without power to give advisory opinions. It will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied").

This case does not present any reason to depart from the general rule against review of undecided questions. Indeed, if the Counties had properly presented the question below, the Supreme Court of California may have agreed to review it. If the preemption question is in fact important and recurring, as petitioners suggest, the Court should wait for a case in which the parties properly litigate the question and the lower courts have construed the key provisions of the state statutes.

II. THE COUNTIES' LIMITED STANDING FURTHER DIMINISHES THE UTILITY OF THIS CASE AS A VEHICLE FOR REVIEW.

The Court of Appeal further narrowed the Counties' constitutional challenge when, applying settled state law, it correctly held that the Counties lacked standing "to challenge those portions of the MMP and CUA that are not applicable to them and that do not injuriously affect them." Pet. App. 20. In so holding, the court rejected the "Counties' effort to obtain an advisory opinion declaring the *entirety* of the MMP and the bulk of the CUA invalid under preemption principles." *Id.* (italics in original). Hence, the court below did not reach even the diluted

preemption question alleged in the Counties' complaints. Nevertheless, the Counties urge this Court to find standing and to address the broad (and unpresented) issue of whether the CSA preempts California's medical marijuana laws.

San Diego argues that the court below erred when it gave the Counties standing to challenge only the identification card laws. San Diego Pet. 32-36. The county does not, however, address the Court of Appeal's rationale, nor any of the state court decisions upon which it relied in deciding to limit standing. Pet. App. 11-21. Instead, with minimal analysis, it claims standing under Article III of the United States Constitution. Pet. App. 32-33. But even under federal law, litigants must identify some concrete injury to establish standing. *See Lance v. Coffman*, 549 U.S. 437, 439, 127 S. Ct. 1194 (2007) ("One component of the [Article III] case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability"); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 219, 94 S. Ct. 2925 (1974) ("'Abstract injury is not enough'"); *United States v. Richardson*, 418 U.S. 166, 179-180, 94 S. Ct. 2940 (1974) ("to invoke judicial power the claimant must have . . . something more than 'generalized grievances'") (citations omitted).[3] The Counties cannot meet this burden.

---

[3] San Diego also contends that *Lockyer v. City & County of San Francisco*, 33 Cal. 4th 1055 (2004) authorized it to seek declaratory relief invalidating California's medical marijuana laws. San Diego Pet. 33. To the contrary, the California Supreme Court in *Lockyer* expressly declined to address whether San Francisco could have sought declaratory relief. *Lockyer*, 33 Cal. 4th at 1099 n. 27 ("We have no occasion in this case to determine whether the city properly could maintain a declaratory judgment action in this setting").

San Bernardino similarly faults the court below for purportedly using "the standing issue to limit its analysis and avoid the substantive question of whether California's medical marijuana laws violate the Supremacy Clause" (San Bernardino Pet. 16), relying primarily on state court cases such as *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal. 3d 1 (1986) and *City of Garden Grove v. Superior Court (Kha)* 157 Cal. App. 4th 355 (2007) to support its argument. These cases, however, were properly distinguished by the court below on their facts. Pet. App. 18-19. There is little question that a political subdivision may, under the right circumstances, acquire standing in state court to challenge state law under the Supremacy Clause. But, as the court below recognized, the challenged statutes must impose some duty directly on the political subdivision, or cause it injury. *Id.* at 15-21.

Neither the decision below nor the record in this case present the broad preemption question identified in the Counties' petitions, and the court below, applying settled state law, correctly declined to pass on that question. Instead, the court decided a much narrower question involving the identification card laws. Accordingly, review is unwarranted.

III. THE COURT OF APPEAL CORRECTLY HELD THAT CALIFORNIA'S IDENTIFICATION CARD LAWS ARE NOT PREEMPTED BY THE CSA.

The County of San Diego contends that the court below erred by applying the wrong preemption test, arguing that the CSA's express anti-preemption clause, 21 U.S.C. § 903, incorporates the implied doctrine of obstacle preemption. But in interpreting section 903, the Court of Appeal merely followed the plain words of the statute, which states that the CSA does not preempt "any State law on the same subject matter . . . unless there is a positive conflict" between the federal and state law such that "the two cannot consistently stand together." *Id.*

Applying the statute, the Court of Appeal correctly held that, because the CSA "does not compel the states to impose criminal penalties for marijuana possession, the requirement that Counties issue cards identifying those against whom California has opted not to impose criminal penalties does not positively conflict with the CSA." *Id.* at 35-36. In reaching this conclusion, the Court of Appeal rejected the Counties' assertion that Congress's use of the term "conflict" in section 903 signified an intent to incorporate obstacle preemption, noting that the "Counties' proffered construction effectively reads the term 'positive' out of section 903." Pet. App. 32-33.[4]

The Court of Appeal also observed, in dictum, that, "even if Congress intended to preempt state laws that present a significant obstacle to the CSA" (Pet. App. 40-41), California's decision "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. Indeed, the card application warns that it does not immunize applicants against federal prosecution, and the card does not purport to do so. Pet. App. 35.

The Court of Appeal correctly interpreted and applied section 903, thus review is unwarranted.

---

[4] San Diego renews its reliance upon *Sprietsma v. Mercury Marine*, 537 U.S. 51, 123 S. Ct. 518 (2002), *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 121 S. Ct. 1012 (2001), and *Geier v. American Honda Motor Co.*, 529 U.S. 861, 120 S. Ct. 1913 (2000), which it cites for the proposition that an express preemption provision does not bar the application of implied preemption doctrines. San Diego Pet. 30-31. These cases, however, were aptly distinguished by the court below on their facts. Pet. App. 32 & n. 12.

CONCLUSION

For the foregoing reasons, the Counties' petitions for a writ of certiorari should be denied.

Dated: April 15, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DAVID S. CHANEY
Chief Assistant Attorney General
GORDON B. BURNS
Deputy Solicitor General
JONATHAN K. RENNER
Supervising Deputy Attorney General

PETER A. KRAUSE
Deputy Attorney General
Counsel of Record

Counsel for Respondents State of California and Sandra Shewry