No. 08-897
Vide 08-887

In The Supreme Court of the United States

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

v.

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

On Petition for Writ of Certiorari to the California Court of Appeals Fourth District

PETITIONERS' REPLY BRIEF

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REPLY TO RESPONDENTS BRIEFS IN OPPOSITION

Respondents State of California ("California") and the Director of its Department of Health Services, Sandra Shewry ("Shewry"), San Diego NORML ("NORML"), a non-governmental entity, and intervenors Wendy Christakes, Norbert Litzinger, William Britt, Yvonne Westbrook, Stephen O'Brien, Wo/Men's Alliance for Medical Marijuana, and Americans for Safe Access, a non-governmental entity (collectively referred to as "Intervenors") have opposed the petitions of San Bernardino and San Diego Counties (collectively referred to as the "Counties") on essentially two grounds: 1) that the Counties failed to attack the key issue in this dispute, the decriminalization of medical marijuana; and 2) the Counties lack of standing to challenge the constitutionality of California's medical marijuana laws as they suffered no direct harm under the Compassionate Use Act ("CUA"), California Health and Safety Code section 11362.5, or the Medical Marijuana Program ("MMP"), Cal. Health & Saf. Code, § 11362.7.

For example, Intervenors argue that the Counties have mischaracterized the issue as being one of federal preemption of the state's medical marijuana laws, when in fact the question is much narrower: whether the state's user identification card system is preempted. (Intervenors' Opposition, p. 7.) This claim, however, disregards the direct adverse impact on the Counties' law enforcement agencies when faced with contradictory requirements of California's medical marijuana laws and the federal Controlled Substances Act ("CSA"), 21 U.S.C. § 801, et seq., or

when California courts order the return of federal contraband to medical marijuana users as in *City of Garden Grove v. Superior Court*, 157 Cal.App.4th 355 (2007); see also App. 196a-201a).

I. DECRIMINALIZATION OF MEDICAL MARIJUANA IS NOT THE ISSUE, "LEGAL" POSSESSION IS.

Both the State and Intervenors have repeatedly referred to the Counties' purported failure to directly challenge the State's decriminalization of medical marijuana. Respondents miss the point. It is not the decriminalization of medical marijuana which the Counties object to, but rather the consequent possession of a substance banned under the CSA which the State permits, if not encourages. The Respondents continued references to the issue of decriminalization thus diverts attention from the true conflict between state and federal law.

As the Counties have repeatedly stated, the State is within its powers to decriminalize possession or cultivation of marijuana for medical purposes. Had the State simply stopped at decriminalization of medical marijuana there would be no present dispute. However, the enactment of the MMP goes beyond simple decriminalization to permit possession of a substance banned for all purposes under CSA. Under the MMP, the system established by the State allows qualified individuals to be given an identification card which exempts the cardholder from arrest and prosecution for the cultivation or possession of limited amounts of marijuana. (Cal. Health & Saf. Code, §§ 11362.71(e); 11362.765(a).) While the MMP does not require the accommodation of medical marijuana

at any place of employment or within penal institutions (Cal. Health & Saf. Code, § 11362.785, subd. (a)), it nevertheless allows that under certain circumstances authorized card holders incarcerated in a county jail may be permitted access to and use of medical marijuana. (Cal. Health & Saf. Code, § 11362.785, subds. (b) and (c).) Application of the Act also extends to parolees. (Cal. Health & Saf. Code, § 11362.795.) Thus, under the MMP, the incongruous situation exists that possession of federal contraband may be permitted in California penal institutions!

As related in Section II, below, the permissiveness of the State in permitting possession of medical marijuana, has a direct and adverse impact on the ability of the Counties' law enforcement personnel to carry out their jobs, and forces them into a position of having to chose between enforcement of State or federal law.

Simple decriminalization would likewise not result in the State's courts ordering the Counties to return federal contraband, i.e., medical marijuana, to its owners were it not for the extensive provisions of the MMP attempting to implement the decriminalization. Thus, such cases as *City of Garden Grove v. Superior Court*, 157 Cal.App.4th 355 (2007), and the instances cited in San Bernardino County's pleadings earlier in this case in opposition to the State's demurrer (App. 196a-198a), would not have occurred absent the MMP's condoning of the possession of medical marijuana.

Respondents' continued claims that the Counties have not addressed the central issue are inaccurate, and serve only to divert attention from the fact that it

is not the decriminalization of medical marijuana which the Counties find objectionable, but the legislative enactments of the MMP which seek to implement that decriminalization, and which result in the defiance of federal law.

II. SAN BERNARDINO HAS DEMONSTRATED CONCRETE AND PARTICULAR HARM AS A RESULT OF THE MMP.

Since the outset of this dispute, and as noted in opposition pleadings of Petitioner County of San Bernardino ("San Bernardino") to the State's demurrer, its Sheriff's deputies serving on federal narcotics task forces (App. 194a, 195a, 202a-204a) are confronted by an irreconcilable conflict between state and federal law whenever marijuana seized is claimed to be for medical purposes.

In determining whether the present dispute is sufficiently concrete to make declaratory relief appropriate and satisfy the standing requirements, San Bernardino contends that the parameters of the dispute are defined and are known. As maintained throughout this action, a number of areas exist in which the conflict between state and federal marijuana laws impact San Bernardino and its Sheriff's Department. Probably the most significant of these conflicts concerns enforcement.

Notwithstanding the State's argument that county law enforcement officers may have discretionary authority concerning the enforcement of federal law, Respondents ignore the true dilemma which Sheriff's deputies of San Bernardino and other counties face. The dilemma stems from the prohibited nature of

marijuana. As long as marijuana is federal contraband, Sheriff's deputies are unquestionably violating federal law in returning seized marijuana to persons, regardless of whether the marijuana is intended for medical purposes, and even if acting under court order.

Furthermore, the claim that county Sheriff's deputies are not responsible for the enforcement of federal law overlooks the fact that narcotics detectives assigned to the Sheriff's Department's narcotics division of San Bernardino regularly work side by side with federal law enforcement officers as part of the following organizations: the Marijuana Eradication Team, the Methamphetamine Enforcement Team, the Campaign Against Marijuana Planting ("C.A.M.P.") Task Force (C.A.M.P. is a multi-agency task force managed by the State's Bureau of Narcotics Enforcement), the federal Drug Enforcement Administration's ("DEA") Street Narcotics Enforcement Team, the federal High Intensity Drug Trafficking Area ("HIDTA") Task Force (on which San Bernardino Sheriff's deputies serve alongside State Highway Patrol Officers), the Inland Regional Narcotics Enforcement Team ("IRNET"), the Highway Interdiction Enforcement Team (composed of DEA, State, San Bernardino, and city law enforcement officers), and the Ontario International Airport Task Force (composed of DEA, City of Ontario Police Department, and San Bernardino Sheriff's personnel) all of which enforce *both* state and federal marijuana laws. Further, some San Bernardino Sheriff's deputies are cross-deputized as federal DEA agents. (App. 202a-204a.)

In addition to the complications for local law enforcement, the conflict between the state and federal medical marijuana laws have resulted in the filing of motions and government tort claims against San Bernardino Sheriff's Department to return seized marijuana. Thus far, these motions have only failed because: 1) the deteriorated condition of the plants at the time that the motions were heard made it impossible to return the seized material, and/or 2) the existence of other operative facts indicated the confiscated marijuana was being used for other non-medical purposes. Furthermore, San Bernardino has had at least two cases in which the disposition of growing equipment which was seized with allegedly medical marijuana is in question. (See App. 196a-198a.)

Finally, as a result of marijuana seizures by its Sheriff's deputies, San Bernardino has faced an on-going series of tort claims and potential civil liability from individuals claiming to be authorized medical marijuana users or caregivers. (App. 199a-201a.)

As evidenced above, Respondents' claims that the Counties face no direct harm or impact as a result of California's medical marijuana laws disregards the adverse consequences which have been addressed since the outset of this case.

III. CONCLUSION

No matter how innocuous the Respondents may characterize the State's decriminalization of medical marijuana, possession of that substance remains illegal under federal law. While Respondents attempt to argue around that point by challenging the

Counties' standing, and claiming that State and federal law are indeed compatible, the truth is that any state law which allows possession of an illegal substance under federal law is in direct conflict with that law. So long as California's medical marijuana laws seek to facilitate medical usage of federal contraband, those laws conflict with the CSA, and so long as law enforcement is faced with indecision whenever marijuana is seized, required to return seized federal contraband to its owners, and faced with civil tort liability for attempting to comply with federal law, the requisite standing is present.

Respectfully submitted,

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