Supreme Court, U.S.
FILED

08-897 JAN 12 2009

No. _____ OFFICE OF THE CLERK

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

PETITION FOR WRIT OF CERTIORARI

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January 2009

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QUESTION PRESENTED

Do California's Compassionate Use Act and Medical Marijuana Program conflict with the Controlled Substances Act, and are they therefore barred under the doctrine of federal preemption?

PARTIES TO THE PROCEEDING

Petitioners: County of San Bernardino ("San Bernardino") and its Sheriff Gary Penrod ("Penrod").

Respondents: State of California ("California") and the Director of its Department of Health Services, Sandra Shewry ("Shewry").

Plaintiff and Appellant below: County of San Diego ("San Diego").

Defendants and Respondents below: San Diego NORML ("NORML"), a non-governmental entity.

Interveners and Respondents below: Wendy Christakes, Pamela Sakuda, 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").

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The opinion of Division One of the California Fourth District Court of Appeal is reported at 165 Cal.App.4th 798, see also App. 1a. The order of the California Supreme Court denying Petitioners' petition for review appears at App. 64a. The Superior Court's judgment is unpublished and appears at App. 45a.

JURISDICTION

The California Supreme Court denied review of this case on October 16, 2008. (App. 64a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the appendix to this brief. (App. 65a-135a.)

STATEMENT OF THE CASE

The current federal laws controlling the use and possession of marijuana were enacted in 1970 with Congress' passage of the Controlled Substances Act ("CSA"), 21 U.S.C. § 801, et seq. Title II of the CSA categorizes drugs into five "schedules" which are determined by the drugs' potential for abuse, the drugs' medical uses, and the lack of accepted safety for the drugs' use under medical supervision. 21 U.S.C. § 812. Under the CSA, marijuana is classified as a Schedule I drug, the most restrictive category, which makes it a criminal offense to manufacture, distribute, or possess. 21 U.S.C. §§ 823(f), 841(a)(1), and 844(a);

see also *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 490 (2001).

In November 1996, California voters passed Proposition 215 legalizing the medical use of marijuana. The proposition exempted patients and their caregivers from criminal liability for the cultivation and/or possession of marijuana for personal use based on a physician's recommendation. Proposition 215 was codified under California Health and Safety Code section 11362.5, and is known as the Compassionate Use Act ("CUA").

Under subsequent legislation known as the Medical Marijuana Program ("MMP"), Cal. Health & Saf. Code, § 11362.7, et seq., the California Legislature enacted a system for qualified individuals to be given an identification card. Authorized possession of such cards exempts holders from arrest and/or criminal prosecution for the cultivation and/or possession of limited amounts of marijuana. Cal. Health & Saf. Code, §§ 11362.71(e); 11362.765(a). The MMP further 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. Application of the MMP also extends to parolees. Cal. Health & Saf. Code, § 11362 .795.

Given the apparent conflict between California's medical marijuana laws and the CSA, a number of challenges have arisen in the courts, several of which have been addressed by this Court and the Ninth Circuit Court of Appeals. *U.S. v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483 (2001), *Gonzales v. Raich,* 545 U.S. 1 (2005), and *Raich v. Gonzales*, 500 F.3d 850

(9th Cir. 2007). Significantly, the *Oakland Cannabis Buyers' Cooperative, Raich,* and the Ninth Circuit's subsequent *Raich* decisions all dealt with injunctive relief, and none of the cases directly addressed whether California's medical marijuana laws are preempted by the CSA and are therefore unconstitutional.

On February 8, 2006, San Bernardino and Penrod filed their complaint (App. 147a) in the present action, challenging the constitutionality of California's medical marijuana laws. On March 30, 2006, the matter was consolidated with a previous action filed by San Diego (App. 136a), and was ultimately joined by the County of Merced and its Sheriff, and Intervenors.

As the dispute presented only issues of law, the parties agreed to file cross-motions for judgment on the pleadings, and established a briefing schedule in conjunction with the Superior Court. The parties' motions came to hearing on November 16, 2006, at which time the Superior Court released its tentative decision in favor of the State, NORML, and Intervenors. The Superior Court's tentative decision was adopted, and ultimately incorporated into the judgment (the "Judgment"; App. 45a), which is the subject of this petition.

San Diego, San Bernardino and Penrod appealed the Judgment, and on July 31, 2008, Division One of the California Fourth District Court of Appeal released its opinion in this matter, *County of San Diego v. San Diego NORML,* 165 Cal.App.4th 798 (2008) ("*San Diego*"), affirming the Judgment. San Bernardino and Penrod, and San Diego separately petitioned the California Supreme Court for review of the Court of

Appeal's decision, and on October 16, 2008, the California Supreme Court summarily denied review. (App. 64a.)

REASONS FOR GRANTING THE PETITION

Although this Court has considered California's medical marijuana laws on two prior occasions, the underlying constitutionality of those laws remains undetermined. Most recently, this Court denied review of *City of Garden Grove v. Superior Court*, 157 Cal.App.4th 355 (2007)[1], in which a California court ordered the return of medical marijuana to its owner. The *Garden Grove* case, however, did not present a direct challenge to the constitutionality of California's medical marijuana laws, for as stated by the *Garden Grove* court:

> The City here invokes the preemption doctrine, but not by asking us to declare the CUA and MMP unconstitutional across the board, nor by challenging the right of Californians to use marijuana for medicinal reasons. Rather, it urges us to find the federal drug laws preempt state law to the extent state law authorizes the return of medical marijuana to qualified users. *City of Garden Grove, supra,* at p. 381.

The Garden Grove court acknowledged the limited nature of its ruling in stating:

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[1] The City of Garden Grove's petition for writ of certiorari, Docket No. 07-1569, was denied by this Court on December 1, 2008.

> In fact, our holding with respect to the preemption issue presented in this case is very narrow. All we are saying is that federal supremacy principles do not prohibit the return of marijuana to a qualified user whose possession of the drug is legally sanctioned under state law. *City of Garden Grove, supra,* at p. 386.

Unlike *Garden Grove*, this case deals directly with the question of federal preemption. Even the *Garden Grove* court recognized that the present action more fully presents the issue of federal preemption of California's medical marijuana laws:

> The broader issue of whether federal law generally preempts California's medical marijuana laws is, as we have explained, not before us. However, we note that last year a Superior Court judge in San Diego rejected a sweeping challenge to the CUA and MMP on preemption grounds. (See County of San Diego v. San Diego NORML, case Nos. GIC860665 & GIC861051.) That decision is currently being appealed to our colleagues in Division One. *City of Garden Grove, supra,* at fn. 11.

This Court has yet to directly rule whether California's medical marijuana laws are preempted by federal law and are therefore unconstitutional. The question raised in this case, unlike *Garden Grove*, addresses that ultimate issue: do the CUA and MMP conflict with the CSA, and are California's medical marijuana laws therefore barred under the doctrine of federal preemption?

A. CALIFORNIA'S MEDICAL MARIJUANA LAWS ARE PREEMPTED AND RENDERED UNCONSTITUTIONAL UNDER THE SUPREMACY CLAUSE.

California may be within its rights to decriminalize medical marijuana under state law if it so desires. *Ross v. Raging Wire Telecommunications, Inc.*, 42 Cal.4th 920, 926 (2008) (". . . California voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes [the CUA and MMP]"). The problem arises when, having acknowledged that possession of medical marijuana is no longer a state crime, California enacts a series of laws which thwart federal law. The various portions of the California Health and Safety Code which provide for the identification of medical marijuana users and permit possession of limited amounts of the drug (e.g., see Cal. Health & Saf. Code, §§ 11362.7, et seq.) fly squarely in the face of federal law which bans possession of marijuana for *any purpose*. The situation is further aggravated when California courts mandate the return of medical marijuana to State-authorized users. See *City of Garden Grove v. Superior Court*, *supra;* see also San Bernardino's and Penrod's Request for Judicial Notice in support of Demurrer Opposition. (App. 185a.)

Attempting to circumvent this point, the Court of Appeal in this case stated:

> We conclude the identification card laws do not pose a significant impediment to specific federal objectives embodied in the CSA. The purpose of the CSA is to combat recreational drug use, not

> to regulate a state's medical practices. (Citation.) *San Diego, supra,* at pp. 826-827. (App. 35a.)

What the Court of Appeal missed is the fact that the federal government *does* regulate the medical use of controlled substances, particularly when a substance classified in Category I of the CSA, such as marijuana, is deemed by Congress to have *no medical use*. For example, in *U.S. v. Oakland Cannabis Buyers' Co-op., supra,* this Court found that:

> In the case of the Controlled Substances Act, the statute 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, see 21 U.S.C. § 829, the same is not true for marijuana. ***Indeed, for purposes of the Controlled Substances Act, marijuana has "no currently accepted medical use" at all.*** § 812. *Oakland Cannabis Buyers' Co-op, supra,* 532 U.S., at p. 491; italics added; see also *Gonzales v. Raich, supra,* 545 U.S. 1, 26-29.

Ignoring the fact that the federal government has deemed marijuana to have no medical use, the Court of Appeal next concluded that the CSA does not regulate state medical practices. In this regard, the Court of Appeal found that:

> The identification card statutes impose no significant *added* [original italics] obstacle to the purposes of the CSA not otherwise inherent

> in the provisions of the exemptions that Counties do not have standing to challenge, and we therefore conclude the limited provisions of the MMP that Counties *may* [original italics] challenge are not preempted by principles of obstacle preemption. *San Diego, supra,* at p. 827. (App. 35a-36a.)

The Court of Appeal implicitly recognized the obstacle to the CSA which California's authorization to possess medical marijuana poses, but avoided the issue by reverting to its position that San Bernardino, Penrod, and San Diego have no standing to raise the core issue of federal preemption under the Supremacy Clause.

Finally, the Court of Appeal noted:

> We conclude that even if Congress intended to preempt state laws that present a significant obstacle to the CSA, the MMP identification card laws are not preempted. *San Diego, supra,* at p. 828. (App. 38a.)

The Court of Appeal's preemption analysis and conclusion ignore well-established precedent. As the California Supreme Court has noted:

> Conflict preemption does not require a direct contradiction between state and federal law; the ***state law is preempted if state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress***. *Dowhal v. Smithkine Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 929, quoting *English v. General*

Electric Co., 496 U.S. 72, 79 (1990); italics added.

Similarly, this Court has found:

> The relative importance to the State of its own law is not material when there is a conflict with a valid federal law . . . . ***[A]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.*** (*Free v. Bland,* 369 U.S. 663, 666 (1962); italics added.)

The Court of Appeal's interpretation of the relationship between California's medical marijuana laws and the CSA thus results in an impermissible subordination of federal law:

> [U]nder the Supremacy Clause of the United States Constitution, the state is required to treat federal law on a parity with state law, and thus it ***is not entitled to relegate violations of federal law or policy to second-class citizenship.*** (See *Claflin v. Houseman*, 93 U.S. 130, 136-37, 23 L.Ed. 833 (1876).) *Brandon v. Anesthesia & Pain Management Associates, Ltd.*, 277 F.3d 936, 942 (7th Cir. 2002); italics added.

It may be said that a fundamental error underlying the decisions of the Superior and Appellate Courts in this case is their acceptance of the position that California's medical marijuana laws do not require violation of the CSA. However, while California law may not *require* violation of the CSA, it certainly

encourages if not facilitates the CSA's violation. California's medical marijuana laws condone the use, possession, and cultivation of marijuana for medical purposes. Further, California law provides what literally amounts to "get-out-of-jail-free" cards to qualified medical marijuana users. Cal. Health & Saf. Code, §§ 11362.765 and 11362.775. As long as California's medical marijuana laws permit the possession of a substance banned under the CSA, a conflict exists.

It has been argued that the only applicable test to determine the medical marijuana laws' constitutionality in light of the Supremacy Clause is the "positive conflict" provision of 21 U.S.C. § 903. Citing Justice Scalia's dissent in *Gonzales v. Oregon*, 546 U.S. 243 (2006), observing that Oregon's euthanasia law does not require violation of the CSA, California and the Intervenors argue that for a positive conflict to exist, California's medical marijuana laws must compel the violation of the CSA. San Bernardino and Penrod, however, maintain that such an interpretation of 21 U.S.C. § 903 imposes too stringent a standard for the determination of a conflict.

As San Diego aptly noted in oral argument during the Superior Court's hearing on the cross-motions for judgment on the pleadings, the law imposes no particular significance to the term "positive conflict" as it is used in 21 U.S.C. § 903. As counsel noted, there is no "negative conflict" with which to contrast a positive conflict, nor does the law explain exactly what a positive conflict may be. (App. 577a-578a.) In effect, the positive conflict language found in section 903 and other federal statutes simply displays the intent of

Congress not to occupy the field to the exclusion of state regulation which is not otherwise inconsistent with federal law. *Southern Blasting Services, Inc. v. Wilkes County*, 288 F.3d 584, 590 (2002).

> The "direct and positive conflict" language in 18 U.S.C. § 848 simply restates the principle that state law is superseded in cases of an actual conflict with federal law such that "compliance with both federal and state regulations is a physical impossibility." *Hillsborough*, 471 U.S. at 713, 105 S.Ct. 2371[2] (internal quotation omitted). Indeed, § 848 explains that in order for a direct and positive conflict to exist, the state and federal laws must be such that they "cannot be reconciled or consistently stand together." 18 U.S.C. § 848. *Southern Blasting Services, supra,* at p. 591.

Moreover, this Court has interpreted the Supremacy Clause to require that:

> [E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation. *DeCanas v. Bica*, 424 U.S. 351, 357 (1976).

Indeed, the paramount importance of the CSA was emphasized by this Court *in Gonzales v. Raich*:

> Given the enforcement difficulties that attend distinguishing between marijuana

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[2] *Hillsborough County v. Automated Laboratories, Inc.*, 471 U.S. 707 (1985).

> cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels, ***we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA*** . . . That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme. *Gonzales v. Raich,* 545 U.S. 1, 22 (2005); italics added.

Whether under the line of cases finding preemption because of impossibility to comply with both state and federal requirements, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), or under cases finding preemption where state law stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Kelly v. State of Washington, ex rel. Foss Co.*, 302 U.S. 1 (1937), California's medical marijuana laws are clearly preempted by the CSA.

Since the Court of Appeal failed to properly apply state and federal precedent finding federal preemption where state law stands as an obstacle to the enforcement of federal law, review by this Court is necessary to correct the Court of Appeal's error on a matter of significant public importance, and to prevent the threatened erosion of the CSA which the California courts appear to be fostering.

B. FEDERAL PREEMPTION OF CALIFORNIA'S MEDICAL MARIJUANA LAWS DOES NOT CONSTITUTE A VIOLATION OF THE TENTH AMENDMENT.

The Court of Appeal misconstrued the commandeering doctrine of *Printz v. United States,* 521 U.S. 898 (1997), and *New York v. United States,* 505 U.S. 144 (1992) in concluding that there is no federal preemption of California's medical marijuana laws. The Court of Appeal stated, "... Congress does not have the authority to compel the states to direct their law enforcement personnel to enforce federal laws," and went on to quote *Printz v. United States,* where this Court stated:

> Today we hold that Congress cannot circumvent that prohibition [the Tenth Amendment] by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. (*Printz, supra,* at p. 935.)

This Court has rejected the contention that the Tenth Amendment limits Congressional power to preempt or displace state regulation of private activities affecting interstate commerce, and has proclaimed:

> A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict

> with federal law. [Citations.] ***Moreover, it is clear that the Commerce Clause empowers Congress to prohibit all--and not just inconsistent--state regulation of such activities***. [Citations.] ***Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result.*** [Citations.] *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 290 (1981); italics added.)

Indeed, there can be no Tenth Amendment violation where Congress acts under one of its enumerated powers and also because the CSA does not trigger application of the commandeering doctrine. As most recently held by the Ninth Circuit in *Raich v. Gonzales, supra*:

> Generally speaking, however, a power granted to Congress trumps a competing claim based on a state's police powers. "The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981); see also *United States v. Jones*, 231 F.3d 508, 515 (9th Cir. 2000) ("***We have held that if Congress acts under one of its enumerated powers, there can be no violation of the Tenth Amendment***.").

> The Supreme Court held in *Gonzales v. Raich* that Congress acted within the bounds of its Commerce Clause authority when it criminalized the purely intrastate manufacture, distribution, or possession of marijuana in the Controlled Substances Act. See 125 S.Ct. at 2215. Thus, after *Gonzales v. Raich*, ***it would seem that there can be no Tenth Amendment violation in this case. Raich concedes that recent Supreme Court decisions have largely foreclosed her Tenth Amendment claim, and she also concedes that this case does not implicate the "commandeering" line of cases.*** (Fn. omitted.) *Raich, supra,* 500 F.3d, at p. 867; italics added.

The upshot of the case law set forth above is that the CSA does not violate the Tenth Amendment since it does not impermissibly commandeer state regulatory powers.

C. SAN BERNARDINO AND PENROD HAVE THE REQUISITE STANDING TO CHALLENGE CALIFORNIA'S MEDICAL MARIJUANA LAWS.

The issue of standing has been present throughout this case, and has been raised at every step of the litigation. The primary question has focused on the ability of San Bernardino and San Diego, as political subdivisions of California, and Penrod, as an elected official, to challenge the constitutionality of California's medical marijuana laws.

While the Superior Court had little difficulty finding standing on the part of San Bernardino and Penrod, and addressed the merits of the case, the Court of Appeal utilized the standing issue to limit its analysis and avoid the substantive question of whether California's medical marijuana laws violate the Supremacy Clause. The Court of Appeal narrowed the scope of its scrutiny solely to the impact which the MMP's ID card system may have on counties and law enforcement agencies. By this means the Court of Appeal avoided directly confronting the underlying constitutionality of the CUA and MMP, and in doing so ignored California case law precedent. By limiting standing, the Court of Appeal also ruled contrary to its sister court in *City of Garden Grove v. Superior Court, supra,* which found standing to exist if for no other reason than the public importance of the issue presented. Counties and law enforcement officers need this Court's guidance on the significant and timely federal question now squarely before it.

Under California law, the California Supreme Court's decision in *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal.3d 1 (1986), confers standing on counties and other political subdivisions of the state to challenge the constitutionality of state law under the Supremacy Clause.

In *Star-Kist*, the California Supreme Court recognized that situations may arise when unconstitutional state laws are best challenged by the political subdivisions most directly affected.

> Viewing the commerce clause challenge in this light leads to the conclusion that political subdivisions might legitimately raise such

> claims. ***State action cannot be so insulated from scrutiny that encroachments on the federal government's constitutional powers go unredressed.*** In the present case, for example, there is a real possibility that the constitutionality of the Legislature's scheme of differential taxation of business inventories would have gone unchecked absent challenge by those entities charged with administration of the program. Moreover, because the foreign commerce exception precluded the local taxing agencies from taxing business inventories they otherwise would have been authorized to tax, the agencies experienced significant revenue loss. (Fn. omitted.) ***Thus, their interest in testing the constitutionality of the statute is unmistakable.*** *Star-Kist Foods, supra,* at p. 9; italics added.

The *Star-Kist* ruling has been followed by California courts, which have consistently upheld the standing of subordinate public agencies to challenge the constitutionality of state laws. E.g., see *Sanchez v. City of Modesto*, 145 Cal.App.4th 660, 673-674 (2006), and most recently, *City of Garden Grove v. Superior Court, supra.*

Notably, the *Garden Grove* decision made no attempt to limit the city's standing, and in that respect, conflicts with the Court of Appeal's ruling in the present case. Even more importantly, the *Garden Grove* court recognized that law enforcement's return of seized medical marijuana to its owners constituted a significant issue of public concern sufficient to provide the City of Garden Grove with standing to

pursue its challenge of California's medical marijuana laws. *City of Garden Grove, supra,* at p. 365.

Viewed in the most simplistic terms, California's medical marijuana laws permit the possession of a substance banned under federal law. Not only do California's medical marijuana laws permit possession of federal contraband, but as is evident in *Garden Grove,* they require the obstruction, if not violation, of federal law by compelling local law enforcement to return confiscated medical marijuana to its users. Thus, the apparent obstruction of the CSA by courts ordering the return of federal contraband to its users should be an adequate basis to convey standing on any agency or person charged with implementation or enforcement of the law.

San Bernardino and Penrod believe that, notwithstanding the Court of Appeal's limitation on their standing, adequate standing exists under *Star-Kist* and *Garden Grove* for them to pursue the present challenge to California's medical marijuana laws.

Under federal law, an issue arises whether standing exists for political subdivisions, such as San Bernardino and San Diego, to challenge the constitutionality of California's laws. The Ninth and Sixth Circuit Courts of Appeals follow a per se rule prohibiting political subdivisions from challenging the laws of their parent states. *City of South Lake Tahoe v. Calif. Tahoe Regional Planning Agency,* 625 F.2d 231 (9th Cir. 1980); *Palomar Pomerado Health System v. Belshe,* 180 F.3d 1104 (9th Cir. 1999); *Gwinn Area Community Schools v. Michigan*, 741 F.2d 840 (6th Cir. 1984). However, other circuits limit that rule by granting standing to political subdivisions which

question the constitutionality of state legislation under the Supremacy Clause. *Rogers v. Brockette,* 588 F.2d 1057 (5th Cir. 1979); *Branson School Dist. RE-82 v. Rome,* 161 F.3d 619 (10th Cir. 1998); see also Brian P. Keenan, Subdivisions, Standing, and the Supremacy Clause: Can a Political Subdivision Sue Its Parent State Under Federal Law?, 103 Mich.L.Rev. 1899, 1902 (2005).

San Bernardino and Penrod submit that the *Rogers* and *Branson* cases provide the better reasoned approach in that Supremacy Clause challenges, by their nature, seek to require that states act within a constitutional framework and comply with constitutional provisions and valid federal laws.

Further, this Court has granted standing to petitioners who would otherwise have no standing under the Ninth and Sixth Circuits' per se rationale:

> When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met. *ASARCO Inc. v. Kadish,* 490 U.S. 605, 623-624 (1989).

For these reasons, San Bernardino and Penrod urge this Court to acknowledge the more permissive standing rule relating to legal challenges under the Supremacy Clause by political subdivisions, and

recognize as did Division Three of the California Fourth District Court of Appeal in *Garden Grove*, that:

> These considerations militate strongly in favor of granting the City standing. (Citations.) ***So does the fact that this case implicates constitutional concerns respecting the relationship between state and federal law. Courts have recognized that, consistent with our federalist system of government, state political subdivisions should be given standing to invoke the supremacy clause to challenge a state law on preemption grounds***. (Citations.) Standing is also favored if an interested party may otherwise find it difficult or impossible to challenge the decision at issue. (Citation.) And here it appears quite likely that the City will not be able to obtain judicial review of the trial court's order unless it is afforded standing in this proceeding. For all of these reasons, we conclude the City has standing to challenge the trial court's order. (*City of Garden Grove, supra,* 157 Cal.App.4th, at pp. 370-371; italics added.)

San Bernardino and Penrod request that this Court recognize their standing to raise a very important federal question which impacts all counties and law enforcement agencies in California so that this case can be decided on the merits concerning federal preemption of California's medical marijuana laws.

CONCLUSION

For the foregoing reasons, the Judgment and decision of the California Court of Appeal should be reversed.

Respectfully submitted,

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Dated: January 12, 2009