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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

COUNTY OF SAN DIEGO,

Plaintiff,

v.

SAN DIEGO NORML, a California Corporation, SANDRA SHEWRY, Director of the California Department of Health Services in her official capacity; and DOES 1 through 50 inclusive,

Defendants.

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

Plaintiffs,

v.

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

Defendants.

Case No. GIC 860665

NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: November 16, 2006
Time: 1:30 p.m.
Dept.: 64
Judge: Honorable William R. Nevitt, Jr.
Action Filed: February 1, 2006

COUNTY OF MERCED AND MARK PAZIN, as Sheriff of the COUNTY OF MERCED, and DOES 51 through 100 inclusive,

Intervenors.

WENDY CHRISTAKES; PAEMLASAKUDA; NORBERT LITZINGER; WILLIAM BRITT; YVONNE WESTBROOK; STEPHEN O'BRIEN; WO/MEN'S ALLIANCE FOR MEDICAL MARIJUANA; AND AMERICANS FOR SAFE ACCESS,

Third-Party Plaintiff-Intervenors.

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NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS

TO ALL PARTIES AND TO THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on November 16, 2006, at 1:30 p.m., in Department 64 of the above-captioned Court, located at Hall of Justice, Fourth Floor, 330 W. Broadway, San Diego, California, Third Party Plaintiff-Intervenors Wendy Christakes, Pamela Sakuda, Norbert Litzinger, William Britt, Yvonne Westbrook, Stephen O'Brien, the Wo/Men's Alliance for Medical Marijuana ("WAMM") and Americans for Safe Access ("ASA") will move and do hereby move this Court for judgment on the pleadings in the above-captioned consolidated action.

This Motion is based upon the Court's file in this matter, the pleadings and records on file herein, this Notice of Motion, the accompanying Memorandum of Points and Authorities, and the simultaneously filed Motion for Judicial Notice, along with such other and further oral and documentary evidence as may be presented at the hearing thereon.

Dated: August 31, 2006

Respectfully submitted,

ALLEN HOPPER (SBN 181678)
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION AND SUMMARY OF ARGUMENT

Nearly a decade ago, California voters approved Proposition 215,[1] creating a narrow exception to the State's marijuana laws by removing state criminal penalties for seriously ill patients who use marijuana to alleviate their pain and symptoms upon the recommendation of their physician. Over the intervening decade no federal official has ever claimed in any state or federal court that these state laws are preempted by federal marijuana laws. Nor is the federal government making such a claim here, and for good reason. Out of respect for the federalist system of government, Congress inserted a specific non-preemption clause into the Controlled Substances Act ("CSA").[2] (21 U.S.C. § 903.) Now, however, three California counties opposed to the medicinal use of marijuana assert a novel and untenable preemption argument under the CSA and a 45-year-old treaty. Plaintiffs attack all but one provision of California's medical marijuana laws, in an unfocused broadside that fails to explain specifically how the various provisions of California's laws run afoul of the federal legal framework.

Plaintiffs' unique legal claims are as remarkable for what they omit as for what they assert. Plaintiffs do not claim that *all* of Proposition 215 and its implementing legislation, the Medical Marijuana Program Act, (Health & Saf. Code, §11362.7 [hereinafter "Program Act"]), are preempted by federal law. Rather, Plaintiffs explicitly avoid challenging section 11362.5, subdivision (d). That lone unchallenged subdivision is the core of Proposition 215; it exempts medical marijuana patients and caregivers from generally applicable state laws prohibiting possession or cultivation of marijuana.

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[1] Codified at Health and Safety Code § 11362.5. Unless otherwise specified, all further references to statutory provisions are to the California Health and Safety Code.

[2] The CSA is codified at 21 U.S.C. § 801 *et seq.*

Plaintiffs' silence concerning section 11362.5, subdivision (d) speaks volumes. That silence is tacit admission of a fundamental tenet of federalism that dictates the outcome of this case: California, not the federal government, and not California's municipal subsidiaries, must determine what is, and is not, criminal under State law. If California so chose, it could completely remove *all* State-law criminal penalties for marijuana use. Under current federal constitutional and statutory law, the federal government simply could not require any State to keep in place or reenact State criminal law sanctions if the State were to decriminalize marijuana completely.

Of course, California has not gone so far, instead electing to keep marijuana illegal for the vast majority of its citizens. Ironically, Plaintiffs' lawsuit targets the very mechanisms the State has created in order to maintain its general prohibition of marijuana use by most citizens, such as the patient identification card system that state law enforcement officers rely upon to distinguish qualified medical marijuana patients from the general public.

Plaintiffs' preemption arguments must fail. As a matter of federal law, international law and basic principles of federalism, California is free to decide not to make criminals, under State law, of seriously ill citizens merely for using a medication their physicians recommend to ease their suffering.[3]

Merced County's tacked-on argument concerning the unconstitutional amendment of voter initiatives pursuant to Article II, § 10(c) of the California Constitution is similarly unavailing. As discussed below, the Program Act plainly does not amend Proposition 215.

For all of these reasons, Defendants and the intervening patients, caregivers and physicians are entitled to judgment on the pleadings.

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[3] Furthermore, as a threshold matter, Plaintiffs lack standing to raise the bulk of their claims. See *infra* pp. 4-5.

PROCEDURAL HISTORY

The Counties of San Diego and San Bernardino, as well as the Sheriff of San Bernardino County, filed two complaints in this Court in February 2006. On March 30, 2006, the original actions were consolidated by order of the Court, and two months later, on June 2, 2006, the Court overruled Demurrers to the Complaints and entered an order permitting Merced County and the Sheriff of Merced County to join the action as Plaintiff-Intervenors.[4] The Court subsequently entered an order permitting certain medical-marijuana patients and their caregivers, as well as a medical doctor, (hereinafter "Patient-Intervenors") to intervene.[5]

Patient-Intervenors include medical marijuana patients and care providers qualified for the protections of Proposition 215 and the Program Act, as well as two organizations whose membership is made up of such individuals. Patient-Intervenors are the only parties who stand to be impacted personally and directly by the outcome of this lawsuit.

STANDARD OF REVIEW

Where pleadings raise only questions of law and no issue of material fact, the court may render a judgment on the pleadings. (*DiPirro v. Am. Isuzu Motors, Inc.* (2004) 119 Cal.App.4th 966, 972 [noting that, in deciding a motion for judgment on the pleadings, a court admits all material facts, but does not accept as true "contentions, deductions, or conclusions of fact or law"].) If, as here, a plaintiff's factual allegations could not constitute a meritorious claim as a matter of law, the Court should rule in favor of the defendants. (See *Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 452-53.)

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[4] For the sake of efficiency, all three sets of County parties shall be referred to collectively throughout this brief as "Plaintiffs."

[5] The Patient-Intervenors are Wendy Christakes, Pamela Sakuda, Norman Litzinger, William Britt, Yvonne Westbrook, Dr. Stephen O'Brien, the Wo/Men's Alliance for Medical Marijuana ("WAMM"), and Americans for Safe Access ("ASA").

I. PLAINTIFFS LACK STANDING TO RAISE MOST OF THEIR CLAIMS.

As a threshold matter, the Court should enter judgment against Plaintiffs as to those portions of their claims that challenge state laws that are neither applicable to nor injure Plaintiffs. Plaintiffs' pleadings amount to an unfocused broadside, challenging all but one of California's medical marijuana provisions, while ignoring the basic requirement that parties have standing before raising claims in this Court.

California courts will hear a constitutional challenge only when it is raised by a party suffering direct injury from the challenged portions of the allegedly unconstitutional law. (*In re Tania S.* (1992) 5 Cal.App.4th 728, 736-37; Code Civ. Proc., § 367.)[6] "It is incumbent upon a party to an action or proceeding who assails a law invoked in the course thereof to show that the provisions of the statute thus assailed are applicable to him and that he is injuriously affected thereby." (*Tania S.*, *supra*, 5 Cal.App.4th at p. 737 [citations omitted].)

Because Plaintiffs are not real parties at interest with regard to all but one of the challenged provisions of Proposition 215 and a few, limited provisions of the Program Act, the Court should enter judgment for the Patient-Intervenors for lack of standing as to most of Plaintiffs' claims. Specifically, Plaintiffs lack standing to challenge subdivisions (a), (b) and (e) of Proposition 215, which lay out the title and purposes of the act, limit protections provided to individuals by the act, and define "caregiver" for the purposes of subdivision (d).[7] Plaintiffs similarly lack standing to challenge the following provisions of the Program Act: §§ 11362.765 (explicitly limiting criminal liability for qualified patients and caregivers); 11362.77 (setting presumptions regarding reasonable amounts of marijuana that can be possessed for a medical

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[6] "[C]ontentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding." (*Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 438 [citations omitted].)

[7] Subdivision (d) is the only provision of the initiative that Plaintiffs do not challenge.

purpose); 11362.775 (explicitly limiting criminal liability for patient and care-giver co-operatives); 11362.79 (prohibiting the smoking of marijuana by qualified patients in certain circumstances); 11362.8 (prohibiting professional licensing boards from penalizing licensees for acting as primary caregivers); 11362.82 (severability provision); and 11362.83 (preserving the power of cities and other local governments to adopt and enforce laws consistent with the Act). Plaintiffs cannot demonstrate that these provisions impose any obligations on them and cause them injury.

Without a justiciable interest in the above-referenced provisions of California's medical marijuana laws, judgment should be entered against Plaintiffs as to their claims implicating these provisions. As for those provisions for which the Court finds that Plaintiffs have standing, the Court should nevertheless enter judgment for Defendants and Patient-Intervenors on the merits of those claims, as discussed below.

II. CALIFORNIA'S MEDICAL MARIJUANA LAWS ARE VALID AND ENFORCEABLE UNDER THE UNITED STATES CONSTITUTION.

A. California's Medical Marijuana Laws are not Preempted by the CSA.

Congress carefully drafted the CSA to respect states' rights to craft their own criminal laws. With the power, under the federal constitution's Supremacy Clause, to completely preempt state law in a particular arena, Congress chose not to take that approach with the CSA.[8] Instead,

[8] It is not difficult to understand why Congress did not include broad preemption language in the CSA. The cost of such preemption is that states unhappy with federal regulatory choices could choose to opt out of any state enforcement in the area occupied by the federal regulatory apparatus. (See *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.* (1981) 452 U.S. 264, 288.) In the context of drug law enforcement, this cost would be prohibitive for the federal government, which relies heavily on state and local law enforcement of drug control laws because it makes only a small percentage of marijuana arrests nationally each year. (See *Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 646 fn. 10 [conc. opn. of Kozinski] [noting that federal agents and prosecutors pursue only a small fraction of the nation's drug cases].)

the CSA expressly provides that the federal enactment is not to be construed as preempting state law, except in the rare situation where there is a "positive conflict" between state law and the CSA, "so that the two cannot consistently stand together." (21 U.S.C. § 903.)

As the Supreme Court recently noted, the CSA "explicitly contemplates a role for the states in regulating controlled substances, as evidenced by its pre-emption provision." (*Gonzales v. Oregon* (2006) -- U.S. --, 126 S.Ct. 904, 912; accord *People v. Boultinghouse* (2006) 36 Cal.Rptr.3d 244, 248 ["Congress has chosen to take a deferential approach to the states in the area of drug enforcement."].) California, in turn, has taken its role seriously, prohibiting the possession and use of marijuana for everyone except the relatively small number of people who are seriously ill and whose physicians have recommended that they use the substance to alleviate their pain or symptoms. As discussed below, California's marijuana laws are not in positive conflict with the CSA, and thus the CSA does not preempt those state laws.

1. The CSA Preempts State Law Only in the Rare Circumstance Where it "Positively Conflicts" With State Law.

The doctrine of federal preemption arises from the Supremacy Clause of the U.S. Constitution (U.S. Const. art. 6, cl. 2.), under which "Congress has the power to preempt state law concerning matters that lie within the authority of Congress." (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955 [citing *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 372]. "In determining whether federal law preempts state law, a court's task is to discern congressional intent." *Ibid.* [citing *English v. Gen. Elec. Co.* (1990) 496 U.S. 72, 78-79].

"Courts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it." (*Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 548). There is a strong presumption against preemption when the challenged law falls within the traditional police powers of the state. A court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless

that was the clear and manifest purpose of Congress." (*Bronco*, *supra*, 33 Cal.4th at p. 957 [citing *California v. ARC Am. Corp.* (1989) 490 U.S. 93, 101, quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230].)[9] "This assumption provides assurance that 'the federal-state balance' [citation] will not be disturbed unintentionally by Congress or unnecessarily by the courts." (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525).

"When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation." (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 517, [internal citations and quotations omitted]). Absent an explicit expression of Congressional intent, intent can be implied, (*Bronco supra*, 33 Cal.4th at p. 955),[10] but "when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." (*English*, *supra*, 496 U.S. at p. 79). That is the case here. In the CSA, Congress *explicitly expressed* its intent to preempt state laws regarding controlled substances in only very rare circumstances.

The CSA's express preemption provision states as follows:

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[9] The regulation of health and safety matters is primarily, and historically, a matter of local concern. (*Hernandez v. DMV* (1981) 30 Cal.3d 70, 74 [noting "the state's traditionally broad police power authority to enact any measure which reasonably relates to public health and safety"]; see also *Ledcke v. State* (Ind. 1973) 296 N.E.2d 412, 420 ["the regulation of drug abuse is a state concern with special local problems necessitating the use of state police power"].)

[10] Implied preemption can be found when (1) it is clear that Congress intended to occupy the entire field of regulation to the complete exclusion of the states, (2) when compliance with both federal and state laws is a physical impossibility, or (3) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Bronco*, *supra*, 33 Cal.4th at 955 [quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67]. See also *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 814; *Hillsborough County v. Automated Med. Labs., Inc.* (1985) 471 U.S. 707, 713.)

> No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless 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 "positive conflict" language in 21 U.S.C. § 903 narrowly restricts the instances in which the CSA can be found to preempt state law to "cases of an actual conflict with federal law such that 'compliance with both federal and state regulations is a physical impossibility.'" (*Southern Blasting Servs., Inc. v. Wilkes County* (4th Cir. 2002) 288 F.3d 584, 591).[11] As Justice Scalia recently noted, this means the CSA preempts only those state laws that *require* someone to engage in some action specifically forbidden by the CSA. (*Gonzales*, *supra*, 126 S. Ct. at 934 [dis. opn. of Scalia] [noting that the CSA "does not purport to pre-empt state law [regarding assisted suicide] in any way . . . unless . . . some States require assisted suicide"].)

In other words, the express intent of Congress in enacting the CSA was for the CSA to preempt state law only where the state law *affirmatively demands* activity that the CSA prohibits. "[M]ere speculation about a hypothetical conflict is not the stuff of which preemption is made." (*Solorzano v. Superior Court* (1993) 10 Cal.App.4th 1135, 1148.) None of the challenged California laws places this sort of affirmative obligation upon anyone to do anything that violates

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[11] In rejecting a federal preemption claim concerning county and federal regulations governing explosive materials, the court in *Southern Blasting Services* analyzed the express preemption provision contained in 18 U.S.C. § 848, which uses language that is materially identical to that in 21 U.S.C. § 903. Section 848 provides:

> No provision of this chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision operates to the exclusion of the law of any state on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State such that the two cannot be reconciled or consistently stand together.

Southern Blasting Servs., *supra*, 288 F.3d at p. 591.

federal law. Accordingly, there is therefore no "positive conflict" with the CSA and, thus, no federal preemption.

2. None of California's Medical Marijuana Laws is in Positive Conflict with Federal Law Such That the two "Cannot Consistently Stand Together."

None of the challenged provisions of California's medical marijuana laws is in positive conflict with the CSA because none of them requires action that is prohibited under federal law. The challenged provisions can be divided into two groups for preemption analysis purposes: (1) provisions that could be interpreted as compelling someone to act, and (2) provisions that clearly do not require any action. Because the state-law provisions in both categories do not create the perverse situation where an individual cannot follow California law without violating federal law, they are not preempted.

(a) Because none of the actions potentially required by California's medical marijuana law is prohibited under federal law, the statutes creating these obligations are not preempted.

The provisions of California's medical marijuana laws that might affirmatively require some action are not preempted by federal law because none of the required actions violates federal law. Plaintiffs' federal preemption arguments as to these sections are thus wholly unfounded.

Of the statutory enactments challenged by Plaintiffs, Proposition 215 does not require any person or entity to take any action, and only a small portion of the Program Act could even possibly be construed as requiring individuals and entities to affirmatively act.[12] Under these

[12] Those provisions are sections 11362.71 (establishing the voluntary identification card program and outlining state and county obligations), 11362.715 (laying out fee and information requirements for an individual to apply for an identification card), 11362.72 (outlining the duties of counties after receipt of an application for an identification card), 11362.735 (providing rules

sub-sections of the Program Act, which include the provisions establishing the voluntary identification card program, it could be argued that counties are required to (1) provide applications to prospective medical marijuana patients, (2) receive and process completed applications, (3) maintain records, (4) use the protocols established by the state for confirming the accuracy of information in applications and for protecting the confidentiality of program records, and (5) issue identification cards to qualified patients. (Health & Saf. Code § 11362.71, subd. (b) & § 11362.735.)

Although these statutes might require counties and the California State Department of Health to take actions, none of the required actions violates federal law. Simply put, no federal law prohibits the issuance of medical marijuana patient identification cards by state and county employees. Nor does federal law prohibit California's scheme to implement the provision of such identification cards—i.e., the procedures established under state law to make the issuance of identification cards a reality. Because federal law does not prohibit the conduct potentially required by the Program Act's above-referenced provisions, federal law does not preempt these provisions.

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regarding the numbering of identification cards and information to be included on said cards), 11362.74 (providing rules for the denial of applications, appeal rights and reapplying for a card), 11362.755 (providing rules regarding the establishment of application and renewal fees for identification cards by a state agency), 11362.76 (establishing duties for identification card holders), and 11362.795 (creating process for criminal defendants to request permission to use medical marijuana while on probation or released on bail).

(b) The provisions of the California medical marijuana laws that clearly do not require any person or entity to act are not preempted by federal law.

The vast majority of the provisions of California law challenged by Plaintiffs do not require any individual or entity to do anything.[13] Because these provisions create no obligations to act, they cannot run afoul of the CSA's prohibitions. (See 21 U.S.C. § 841 et seq.; see especially 21 U.S.C. § 903 [providing that states are free to enact any law that does not create a positive conflict with the CSA]; *Gonzales*, *supra*, 126 S.Ct. at 934 [dis. opn. of Scalia] [stating that the CSA's "positive conflict" preemption provision permits all state laws that do not clearly *require* some action that the CSA itself prohibits].)

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[13] The provisions analyzed here include sections 11362.5, subd. (a) (stating the title of Proposition 215); 11362.5, subd. (b)(1) (setting forth the purposes of Proposition 215); 11362.5, subd. (b)(2) (stating that Proposition 215 shall not "be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes"); 11362.5, subd. (c) (protecting physicians from being punished or being denied a right or privilege for recommending medical marijuana to a patient); 11362.5, subd. (e) (defining "caregiver"); 11362.765 (exempting qualified patients and caregivers from California statutes criminalizing marijuana); 11362.77 (creating a presumption regarding they quantity of marijuana one may possess for medical use);11362.775 (exempting patient-caregiver cooperatives from criminal laws);11362.78 (making explicit the limit on law enforcement's ability to find probable cause to arrest a cardholder for a violation of state marijuana laws);11362.785, subd. (a) (making it clear that the Program Act does not require the accommodation of medical marijuana use at a place of employment, during employment hours, or on the property or premises of any jail, correctional facility or other type of penal institution); 11362.785, subd. (c) (noting that the Program Act does not prevent penal institutions from allowing prisoners with medical marijuana patient identification cards from using medical marijuana); 11362.785, subd. (d) (stating that the Program Act does not require government, private or other health insurance providers or service plans to be liable for a claim for reimbursement for the medical use of marijuana);11362.79 (providing that the Program Act does not authorize a cardholder to smoke medical marijuana in certain, limited enumerated circumstances);11362.8 (protecting caregivers from civil penalties);11362.81 (criminalizing and providing penalties for fraud, theft and other misuse of an identification card or breaching the confidentiality provisions of the identification card program);11362.82 (providing that all provisions of the Program Act are distinct and severable); and 11362.83 (noting the power of cities and other local governments to enact laws consistent with the Program Act).

It is therefore unsurprising that Plaintiffs have not articulated how any particular provision of the challenged state laws is preempted by federal law. Instead, Plaintiffs have issued an unfocused broadside, challenging all but one provision of California's medical marijuana laws *en masse*. Considering the CSA's extraordinarily narrow preemption provision and the measured nature of the challenged state laws, Plaintiffs' claims regarding federal preemption must fail.

B. California Law is not Preempted by the Single Convention on Narcotic Drugs Because the Convention Operates Domestically Through the CSA and Because the Single Convention Expressly Allows for Domestic Law not to Criminalize the Use of Marijuana for Medical Purposes.

Plaintiffs tack on a preemption claim pursuant to the Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407 [hereafter "Single Convention"], that is no more availing than their statutory preemption argument. Although Plaintiffs appear to claim that the Single Convention creates an independent source for preemption, preemption analysis under the treaty is the same as that under the CSA, and the treaty otherwise imposes no obligations on states to criminalize the use of marijuana by seriously ill individuals who want to alleviate their suffering.

Treaties, like federal statutes, are "the supreme law of the land." (U.S. Const. art. 6, cl. 2; *Breard v. Greene* (1998) 523 U.S. 371, 376 (per curiam).) By its own terms, however, the Single Convention is subject to the domestic law of its signatories. (See Single Convention art. 36, ¶ 2. [providing that the Single Convention is "[s]ubject…to [a signatory's] legal system and domestic law . . . ."].)[14]

[14] The Convention further states that "[n]othing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party." (Single Convention art. 36, ¶ 4.)

Unlike self-executing treaties, non-self-executing treaties, such as the Single Convention, have the power of federal law only upon the passage of—and subject to the limitations of—implementing federal legislation. (*People v. Ghent* (1987) 43 Cal.3d 739, 779; *Sei Fujii v. State* (1952) 38 Cal.2d 718, 721, 725; cf. Compl. of San Diego County, at ¶ 14 [noting that the Single Convention is non-self-executing]; Compl. of San Bernardino County, at ¶ 10 [same]; Compl. in Interven. of Merced County, at ¶ 11 [same].) The Single Convention's implementing legislation is the CSA. (Compl. of San Diego County, at ¶ 15 [citing 21 U.S.C. § 801(7)]; Compl. of San Bernardino County, at ¶ 11 [same]; Compl. in Interven. of Merced County, at ¶ 12 [same].) In fact, the CSA was passed, in part, to fulfill the United States' obligations under the Single Convention. (*Ibid.*)

Accordingly, the Single Convention is subject to both the protections and limitations of the CSA, including its preemption provision. As outlined in the previous section, none of the challenged provisions of California law is preempted by the CSA, and, thus, none is preempted by the Single Convention.

This conclusion is buttressed by the language of the treaty and the fact that the treaty imposes obligations on the federal government, but not on the states directly. First, the language of the Single Convention does not require that ratifying countries in fact criminalize any particular controlled substance. The Convention's Official Commentary states:

> The "use" of drugs is not specifically listed in article 36, paragraph 1, among the actions which...a Party must treat as punishable offences. . . . . [I]t is left to the discretion of each Party to decide whether it wishes to penalize the non-medical consumption of narcotic drugs by addicts, or whether it prefers to prevent such abuse solely by administrative and penal measures.[15]

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[15] Secretary-General of the United Nations, Commentary on the Single Convention on Narcotic Drugs, United Nations (1973), commentary on art. 4, ¶ 1, at <http://www.drugtext.org/library/legal/treat/commentary/default.htm> [as of Aug. 29, 2006].).

As a result, participating countries have wide latitude to fashion domestic law regarding controlled substances. In fact, many signatories to the Convention have enacted marijuana-related legislation that goes substantially further than California law in terms of relaxing criminal prohibitions. For example, Canada, a Party to the treaty,[16] has officially recognized medical marijuana and permits the cultivation and distribution of the drug to qualified Canadian patients. (Marihuana Medical Access Regs (Controlled Drugs and Substances Act) SOR/2001-227 (Can) §§ 70, 70.1, 70.2.)

Even if Canada and other signatories to the Single Convention with more lenient domestic laws have somehow violated the Single Convention—and there is every reason to believe that they have not, considering the language of the treaty quoted above—the treaty is crystal clear that its signatories may permit the use of controlled substances for medicinal purposes. (Single Convention art. 4, ¶ 1, subd. (c) [providing that "the Parties shall take such legislative and administrative measures as may be necessary…to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs"]; cf. *NORML v. DEA* (D.C. Cir. 1977) 559 F.2d 735, 751 ["[T]he parties agreed and the [DEA] Acting Administrator held that cannabis and cannabis resin could be rescheduled to CSA Schedule II consistent with the Single Convention."].) At the very least, then, the Single Convention affirms the allowance for the medical use of controlled substances, and in no way limits the ability of states to withhold criminal penalties against individuals who use marijuana for "medical purposes."

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[16] According to the United Nations Office on Drugs and Crime, 180 states are parties to the Single Convention. (United Nations Office on Drugs and Crime, Participation in the Convention (29 August 2006), at < http://www.unodc.org/pdf/treaty_adherence_convention_1961.pdf > [as of Aug 29, 2006].) Those parties include Canada and several European nations, like the Netherlands, known for their relatively lenient drug policies.

Importantly, while the Single Convention imposes certain obligations on its signatories (or "Parties," in the language of the treaty), it does not directly create obligations for states such as California, which are not "Parties" to the treaty. To the extent, then, that the Single Convention obliges the states to do anything at all, it prohibits the states from commanding individuals to take action that violates federal law. This mimics the CSA's "positive conflict" preemption analysis. As discussed *supra* regarding statutory preemption, California's decision not to criminalize the use of marijuana, upon a physician's recommendation, by seriously ill individuals is not in positive conflict with the CSA.

In short, California's Proposition 215 and the Program Act are wholly consistent with the requirements of both the Single Convention and the CSA. Accordingly, none of the challenged provisions of state law is in positive conflict with federal law or is otherwise preempted by the Single Convention.

III. THE PROGRAM ACT DOES NOT UNCONSTITUTIONALLY AMEND PROPOSITION 215 BECAUSE, BY SIMPLY IMPLEMENTING PROPOSITION 215 IN A MANNER THAT DOES NOT FRUSTRATE THAT ACT, IT PLAINLY DOES NOT AMEND PROPOSITION 215 AT ALL.

Merced's claim that the Program Act violates the California Constitution because it amends Proposition 215 fails for one key reason: the Program Act plainly does not amend Proposition 215. Rather, as Merced candidly admits, the Program Act merely implements Proposition 215—and it does so in a way that neither expands upon nor lessens the scope or effect of the initiative. Accordingly, not only does the Program Act comply with the constitution, but it is an important vehicle to effectuate the will of the voters in approving Proposition 215.

Merced grounds its cause of action in Article II, § 10(c) ("Section 10(c)") of the California Constitution. (Merced's Compl. in Interven., at ¶¶ 23a, 27; see also *id.* at ¶ 19.) Section 10(c) provides, in its entirety, as follows: "The Legislature may amend or repeal

referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." This Constitutional provision was designed to "protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484 [quoting *Huening v. Eu* (1991) 231 Cal.App.3d 766, 781].)

Section 10(c) does *not* prohibit the legislature from passing a statute that merely touches on the same subject matter as a voter initiative, but rather proscribes *amending* or *repealing* a voter initiative without the express consent of the electors. (See, e.g., *People v. Cooper* (2002) 27 Cal.4th 38 [holding that legislatively enacted statute did not violate Section 10(c) because it did not "amend" voter initiative]; *Proposition 103, supra*, 64 Cal.App.4th at p. 1484 [noting that Section 10(c) claim fails if the challenged statute "does not amend the provisions of Proposition 103"].) In assessing the merits of a claim for an alleged violation of Section 10(c), courts must "apply the general rule that a strong presumption of constitutionality supports the Legislature's acts." (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1253, internal quotation marks omitted.)

There is a small, yet clear, body of case law that guides what constitutes an amendment for purposes of Section 10(c). In general terms, "[a]n amendment is a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision." (*Cooper*, *supra*, 27 Cal.4th at p. 44; see also *Proposition 103*, *supra*, 64 Cal.App.4th at p. 1484 [stating that emendation occurs only where a statute results in the "addition, omission, or substitution of provisions" of the voter initiative].)

Employing this general framework, courts have identified two relevant, specific circumstances where a statute is not deemed to amend a voter initiative. First, where an initiative neither authorizes nor prohibits a particular subsequent legislative act and the Legislature then

passes that act in a manner that does not violate the spirit of the initiative, the statute does not amend the initiative. (*Cooper*, *supra*, 27 Cal. 4th at pp. 44 & 47 [holding that a statute limiting *pre*sentence conduct credits to certain inmates did not amend an initiative that limited *post*sentence conduct credits to the inmates, noting that the initiative did not "specifically authorize or prohibit presentence conduct credits"]; *Knight v. Superior Court* (2005) 128 Cal.App.4th 14 [holding that legislation that accorded rights and responsibilities to individuals in same-sex *domestic partnerships* did not amend initiative that refused to recognize same-sex *marriages*].) Second, a statute does not amend a voter initiative for purposes of Section 10(c) where the legislation merely implements the initiative without frustrating its purpose. (*Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011.) In these two situations, the statute touches upon the subject matter of an initiative, but it does not operate to "undo what the people have done" in approving an initiative.

On the other hand, it is clear when a statute amends an initiative. For instance, a statute implicated Section 10(c) where an initiative placed a certain monetary ceiling on recoverable attorney's fees in cases affecting the public interest, yet a statute subsequently provided a different ceiling on such fees. (*Cal. Labor Fed'n AFL-CIO v. Occupational Safety & Health Standards Bd.* (1992) 5 Cal.App.4th 985, 993-96.) Likewise, a statute unconstitutionally amends an initiative where the initiative was definite in scope and established certain procedures for landlords to apply to a rent-control board for rent increases, while a subsequently enacted statute created a broader class of people who were covered by the rent-control law and altered the procedures for protection under the law. (*Mobilepark W. Homeowners Ass'n v. Escondido Mobilepark W.* (1995) 35 Cal.App.4th 32, 42-43.)

"Whether an act is amendatory of existing law is determined . . . by an examination and comparison of its provisions with existing law." (*Planned Parenthood Affiliates of Cal. v. Swoap* (1985) 173 Cal.App.3d 1187, 1199.) A comparison between Proposition 215 and the

Program Act reveals that the Program Act does not amend Proposition 215. Rather, some portions of the Program Act speak to issues that Proposition 215 neither prohibits nor allows (cf. *Cooper*, *supra*; *Knight*, *supra*), and other provisions of the Program Act simply implement Proposition 215 without adding to or taking away from Proposition 215 (cf. *Creighton*, *supra*).

Proposition 215 was designed to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana . . . ." (Health & Saf. Code § 11362.5, subd. (b)(1)(A).) It provides that patients and their "primary caregivers" will not be subject to criminal prosecution or sanction for their possession or cultivation of marijuana upon a physician's recommendation, just as it allows physicians to recommend marijuana to their patients without fear of reprisal for providing such a recommendation. (Health & Saf. Code §§ 11362.5, subd. (b)(1)(B), subd. (b)(2), subd. (c) & subd. (d); see also Health & Saf. Code § 11362.5, subd. (e) [defining "primary caregiver"].) Finally, Proposition 215 calls upon the federal and state governments "to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (Health & Saf. Code § 11362.5, subd. (b)(1)(C).) Importantly, Proposition 215 does not set forth specific guidance regarding how it should be implemented.

The Program Act furthers the purposes of Proposition 215 by implementing the initiative. At the heart of the Program Act is the establishment of a system for the issuance of identification cards to medical marijuana patients. (Health & Saf. Code §§ 11362.71-76; see also Health & Saf. Code § 11362.735 [providing that "[a]n identification card issued by the county health department shall be serially numbered and shall contain [various information identifying the holder of the card]"], Health & Saf. Code § 11362.78 [providing that law enforcement officers shall "accept an identification card issued by the [State Department of Health Services] unless

the . . . officer has reasonable cause to believe that the information contained in the card is false or fraudulent, or the card is being used fraudulently"].)

It is dispositive to the inquiry that the provisions of the Program Act neither add to nor subtract from those in Proposition 215. As Merced candidly concedes, the Program Act simply implements Proposition 215. (See Merced's Compl. in Interven., at ¶ 19 [acknowledging that the Program Act "implement[s]" Proposition 215].) Moreover, the Program Act implements Proposition 215 in a manner that, far from frustrating the purposes of Proposition 215, is completely consonant with the Act.[17]

This situation is analogous to that in *Creighton*, *supra*, wherein the Court of Appeal upheld a city ordinance that implemented a voter initiative. In 1979, Santa Monica voters approved an initiative that established a rent-control measure to be overseen by a rent-control board that would hire and pay necessary staff, as well as finance its necessary expenses by charging landlords annual registration fees. (*Id.* at p. 1014.) Shortly thereafter, the city council enacted ordinances that, as a means of implementing the initiative, allowed the Board to completely determine its own financial and personnel policies, including adopting its own budget and hiring its own counsel. (*Id.* at pp. 1014 & 1016.) Approving the ordinance, the Court of Appeal noted that the "City Council simply clarified this [initiative] and provided a means of implementation by adopting a series of ordinances directing the Board to adopt a budget after public hearing and affirming the authority of the Board to employ independent legal counsel."

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[17] Given the "strong presumption of constitutionality [of] the Legislature's acts," *Amwest*, *supra*, 11 Cal.4th at p. 1253, as well as the severability provision of the Program Act, Health & Saf. Code § 11362.82, it is especially incumbent on Merced to point out the *specific provisions* of the Program Act that it believes actually amended Proposition 215. (See Health & Saf. Code § 11362.82 ["If any section, subdivision, sentence, clause, phrase, or portion of this article is for any reason held . . . unconstitutional . . ., that portion shall be deemed a separate, distinct, and independent provision, and that holding shall not affect the validity of the remaining portion thereof."].)

(*Id.* at p. 1021; see also *Mobilepark, supra*, 35 Cal.App.4th at p. 42 [noting that, in *Creighton*, "it was found proper for a city to pass ordinances implementing basic policy regarding rent control that had been adopted by an initiative"].)[18]

The result would be different, perhaps, if Proposition 215 provided a definite method for implementation, and then the Program Act clearly changed that voter-approved implementation scheme. (Compare *Mobilepark*, *supra*, 35 Cal.App.4th at pp. 41-42 [holding that a municipal ordinance unconstitutionally amended a voter initiative regarding rent control where the initiative clearly provided a specific scope of coverage that the ordinance altered].) However, Proposition 215 did not provide specific implementation directives that the Program Act then amended. The Program Act simply does not "undo[] what the people have done." (*Proposition 103*, *supra*, 64 Cal.App.4th at p. 1484 [stating the purpose of Section 10(c)]), when they approved Proposition 215.

Casting aside the California Supreme Court and Court of Appeals opinions discussed above, Merced instead argues that any measure to implement any part of a voter initiative must itself be enacted only via the initiative process. Not only does this position contradict well-established and controlling precedent, but it would have the effect of considerably delaying the implementation of initiatives—frustrating the will of the voters and miring the electorate in a plethora of technical implementation issues every election day.

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[18] See also *Bartosh v. Board of Osteopathic Examiners of California* (1947) 82 Cal.App.2d 486, 490. In *Bartosh*, plaintiffs claimed that a statute that required the Board of Osteopathic Examiners to appoint an officer to conduct hearings unconstitutionally amended a voter initiative that established the Board to hold hearings in the course of regulating various osteopathic-related affairs. The Court of Appeals disagreed, concluding that "[t]he appointment of a hearing officer and the provisions for an intelligible procedure do not in the slightest degree deprive the board of the privilege of making any decision in the conduct of its affairs." (*Id.* at pp. 492 & 496 [affirming judgment for defendant].) As with the relationship between Proposition 215 and the Program Act, the *Bartosh* statute helped implement an initiative without treading upon its purposes or scope.

If voter initiatives could not be carried out without enacting further initiatives to implement the original initiative, many years would pass between the time that the electors vote for an initiative and the time that the government would be allowed to implement that initiative. Merced's position would subject voters to endless rounds of initiatives concerning the technicalities of implementing, for instance, complex scientific programs. The voters would be injected into the minutia of, for example, the exact information that the State's health department would need to consider before issuing a medical marijuana identification card. These are the types of judgments that are, and should be, left up to elected representatives and regulatory agencies; they are decidedly not the types of things over which tens of millions of voters must study and agonize every time they enter a voting booth.

Moreover, Merced's position runs counter to the purposes of Section 10(c). Here, the Program Act does not at all "undo[] what the people have done" when approving Proposition 215. Rather, as discussed above, the Program Act simply implements a regulatory scheme that is entirely consistent with Proposition 215, thereby appropriately effectuating the will of the voters when they voted overwhelmingly in favor of the initiative.

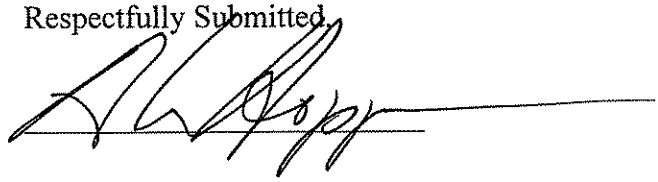
Accordingly, the Program Act does not amend Proposition 215, and thus the Program Act does not violate Article II, § 10(c) of the California Constitution.

CONCLUSION

For the foregoing reasons, Patient-Intervenors respectfully request that the Court grant their motion for judgment on the pleadings and enter judgment against Plaintiffs and Plaintiff-Intervenors.

Dated: August 31, 2006

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I am employed in Santa Cruz County, California. My business address is 1101 Pacific Avenue, Suite 333, Santa Cruz, California 95060. I am over the age of 18 years and not a party to the within cause.

On **August 31, 2006**, I served the within:

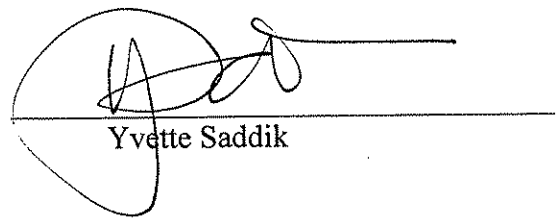
1) **NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF;**
2) **NOTICE OF LODGMENT OF NON-CALIFORNIA AUTHORITY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS;**
3) **NOTICE OF MOTION AND MOTION FOR JUDICIAL NOTICE OF DOCUMENTS PURSUANT TO EVIDENCE CODE SECTIONS 452 AND 453; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF;**
4) **DECLARATION OF ALLEN HOPPER IN SUPPORT OF MOTION FOR JUDICIAL NOTICE OF DOCUMENTS PURSUANT TO EVIDENCE CODE SECTIONS 452 AND 453;**

On the interested person(s) and/or party(ies) in said cause by placing ( ) the original (x) a true copy thereof in a sealed envelope, addressed as follows:

SEE ATTACHED LIST

__X__ **MAIL**: I deposited such envelope with the United States Postal Service in Santa Cruz, California, with first-class postage prepaid.

I declare under penalty of perjury, under the laws of that state of California, that the forgoing is true and correct. Executed on **August 31, 2006**, at Santa Cruz, California.



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