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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

PATIENT-INTERVENORS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE COUNTIES' MOTIONS FOR JUDGMENT ON THE PLEADINGS

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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INTRODUCTION

The sovereign State of California has the ability to enact its own penal law. It is free to decide what conduct will be illegal under state law, as well as what conduct will not be illegal. No other entity—be it an individual, a city, a county, another state, or the federal government—can mandate that California criminalize any particular conduct.

California acted on its sovereign authority when, in codifying Proposition 215,[1] it withdrew from criminal sanction the medical use of marijuana for seriously ill individuals and their primary caregivers. It further acted within its sovereign powers when it enacted the Medical Marijuana Program Act ("Program Act") (§§ 11362.7 – 11362.83), which established an identification card program that allows law enforcement officers to identify qualified medical marijuana patients pursuant to the initiative.

Perhaps recognizing that states can decide to criminalize, or not to criminalize, certain conduct, the Counties[2] do not challenge the heart of California's medical marijuana law: The provision that deletes from the penal code criminal penalties for the use of marijuana by qualified patients and their primary caregivers (see § 11362.5(d)). One would not know this, however, from the Counties' opening briefs, in which the Counties present a general and unfocused broadside attack on California's medical marijuana laws—with virtually no reference to any specific statutory provisions. (See, e.g., Merced County's Opening Br., at p. 2 ["Because of the conflict between the [Controlled Substances Act] and [Proposition 215], . . . [Proposition

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[1] Health & Safety Code § 11362.5. Unless otherwise specified, all subsequent references to statutory provisions are to California's Health and Safety Code.

[2] In the interests of brevity and clarity, this brief responds to the three motions for judgment on the pleadings separately filed by the Counties of San Diego, San Bernardino, and Merced (collectively, "the Counties").

215] is *entirely preempted* by the [Controlled Substances Act]."] [Emphasis added.].) To be absolutely clear: The Counties have not put into issue the validity of California's basic decision not to criminalize the medical use of marijuana by certain sick individuals, which is the cornerstone of Proposition 215.

The provisions actually challenged are no more preempted by the Controlled Substances Act ("CSA") (21 U.S.C. § 801 *et seq.*) and the Single Convention on Narcotic Drugs ("Single Convention") (18 U.S.T. 1407) than the State's decision to withdraw from criminal penalty marijuana use for seriously ill individuals. The CSA and the Single Convention are unambiguous in providing that states retain their sovereign authority to determine the scope and extent of their own penal laws, whether those state laws criminalize marijuana possession more or less forcefully than the CSA, or even criminalize marijuana possession at all. Indeed, if California were so inclined, it could completely eliminate marijuana prohibition without fear that its laws would be preempted. It thus is beyond peradventure that the State's decision to except seriously ill patients from its otherwise strict laws against marijuana use is not preempted.

Finally, Merced County's argument that the Program Act violates the State Constitution fails because the Program Act plainly does not "amend" Proposition 215. Accordingly, the Counties' motions for judgment on the pleadings should be denied.

ARGUMENT

I. THE COUNTIES LACK STANDING TO RAISE MOST OF THEIR CLAIMS.

The Counties' motions for judgment on the pleadings fail to demonstrate that they have standing to challenge most of the statutory provisions at stake in this litigation. Their kitchen-sink approach—not discussing which statutory provisions are really at issue—fails because, among other reasons, the Counties clearly do not have standing to challenge most of the provisions referenced in their complaint.

In order to prove the jurisdictional issue of standing, "[i]t 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." (*In re Tania S.* (1992) 5 Cal.App.4th 728, 737 [citations omitted].) As Patient-Intervenors demonstrated in their motion for judgment on the pleadings (see pp. 4-5), the Counties have not—and cannot—demonstrate standing as to most of the statutory provisions that they challenge.[3] The Counties' motions must therefore be denied as to their claims regarding the constitutionality of those provisions.

II. THE CSA AND THE SINGLE CONVENTION, WHICH DO NOT REQUIRE STATES TO CRIMINALIZE THE POSSESSION OF ANY CONTROLLED SUBSTANCE, DO NOT PREEMPT THE CHALLENGED STATE STATUTES.

By including an anti-preemption provision in the CSA, Congress made clear that it would allow States to codify and effectuate their own drug policies. Pursuant to this anti-preemption provision, only a narrow class of state penal laws could be preempted—those that affirmatively require an individual to violate the CSA. Because California's marijuana laws do not mandate that anyone use a controlled substance or otherwise violate the federal law, they are not preempted.

The Counties have not pointed to a single case where a state criminal law was preempted by federal law because a state law did not criminalize certain conduct. There is a reason for this: No such case exists. Simply put, that is not how preemption works. Depending on the preemption provision in the relevant federal statute, a state may, or may not, be able to regulate conduct affirmatively in certain ways. But a state's threshold decision as to whether to make

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[3] By way of example, the Counties allege that Proposition 215's title and purposes (§ 11362.5 subd.(a),(b)) are unconstitutional.

conduct criminal lies exclusively within the sovereign powers of the state. Accordingly, the challenged State laws are not preempted.

A. THE CSA'S ANTI-PREEMPTION PROVISION ALLOWS THE CSA TO PREEMPT STATE LAW BASED ON A "POSITIVE CONFLICT" WITH THE FEDERAL LAW, BUT NOT BASED ON STATE LAW BEING AN OBSTACLE TO THE FEDERAL LAW.

There are four types of preemption—express, positive conflict, obstacle, and field[4]—of which only one, positive conflict preemption, is applicable to the CSA. The parties agree that the CSA does not envision field preemption or express preemption, and while the Counties urge the Court to apply both positive conflict preemption and obstacle preemption to the challenged statutes, Congress explicitly provided that the CSA will preempt a state statute only where it is in positive conflict with the federal law.

Preemption turns on congressional intent. (*Bronco*, *supra*, 33 Cal.4th at p. 955 [citing *English v. Gen. Elec. Co.* (1990) 496 U.S. 72, 78-79].) In many instances, Congress seeks to impose a nationwide framework for addressing a particular issue, specifically intending to displace most, or all, state measures that might address the issue differently. It accomplishes this objective through a preemption provision (which provides the broad circumstances in which the federal law will preempt state law) and a savings clause (which provides the limited circumstances in which the federal law will not preempt state law). (See, e.g., 29 U.S.C. § 1144 [providing that the Employee Retirement Income Security Act preempts state "laws insofar as they may now or hereafter relate to any employee benefit plan," but does not preempt state laws "which regulate[] insurance"].) In other cases, Congress intends to allow, or even encourage,

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[4] *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955. See also *Hilsborough County v. Automated Med. Labs., Inc.* (1985) 471 U.S. 707, 713.

states to enact their own, independent frameworks for addressing a particular issue. In those instances, Congress will include solely an *anti*-preemption clause that makes clear that the federal law's preemptive effect will be quite narrow. By including 21 U.S.C. § 903 ("Section 903") in the CSA, Congress enacted the latter, an anti-preemption provision that reflects Congress' desire for states to set their own criminal policy regarding controlled substances.

Section 903 provides, in its entirety:

> *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 [emphasis added].) Congress thus spoke loudly and clearly that only positive conflict preemption, and not obstacle preemption, would apply to the CSA. (See also *Southern Blasting Servs., Inc. v. Wilkes County* (4th Cir. 2002) 288 F.3d 584, 591 [reviewing an anti-preemption provision that is materially identical to Section 903 and limiting the preemption analysis to positive conflict preemption].)

Undaunted, and with disregard for this clear command from Congress, the Counties implore this Court to turn statutory interpretation doctrine on its head—to ignore the explicit statutory language in order to apply implicit obstacle preemption under the CSA. Rather than taking Congress at its word, they conjure hidden meaning into the congressional mind. They cite (with no explanation or analysis) cases in ostensible support for their argument, but these cases analyze preemption provisions that differ markedly from Section 903. (See, e.g., County of San Diego's Opening Br., at p. 5 [citing *Volt Info. Sci., Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.* (1988) 489 U.S. 468, 477; *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 950].) What the Counties overlook is that Congress could have included—but did not in fact include—a preemption provision in the CSA that would have allowed for obstacle preemption.

Applying only positive conflict preemption has support not only in the text of Section 903, but also in judicial interpretations. Justice Scalia, for example, recently noted that Section 903 contemplates only positive conflict preemption. (See *Gonzales v. Oregon* (2006) – U.S. –, 126 S. Ct. 904, 934 [dis. opn. of Scalia] [stating that, given the language of Section 903, an interpretive rule issued pursuant to the CSA "does not purport to pre-empt state law [regarding assisted suicide] in any way . . . unless . . . some States require assisted suicide," which is the test for positive conflict preemption].)

Furthermore, Justice Scalia's understanding comports with a recent federal court of appeals' interpretation of an anti-preemption provision that is materially identical to Section 903. Reviewing that provision (18 U.S.C. § 848),[5] the U.S. Court of Appeals for the Fourth Circuit held that the federal law would preempt state laws only in the event of a positive conflict between the two. (*Southern Blasting Servs., supra*, 288 F.3d at p.591 [stating that preemption could occur under Section 848 only in "cases of an actual conflict . . . such that compliance with both federal and state regulations is a physical impossibility"] [internal quotation marks omitted].)

"[W]hen Congress has made its intent known through explicit statutory language," as it did in Section 903, "the courts' task is an easy one." (*English, supra*, 496 U.S. at p. 79.) Congress could not have been clearer: The CSA will preempt a state law only where the state law is in positive conflict with the federal statute.

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[5] 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.

18 U.S.C. § 848.

B. THE CHALLENGED STATUTES ARE NOT IN POSITIVE CONFLICT WITH THE CSA BECAUSE THEY DO NOT REQUIRE ANY ACTION THAT THE CSA PROSCRIBES.

It is beyond dispute that the challenged statutes are not in positive conflict with the CSA, since California law does not require any action that would contravene the federal law. Although the Counties purport to find a conflict between the federal and State laws, they are able to do so only by confusing (1) the removal of criminal penalties for using medical marijuana, with (2) affirmatively requiring the use of medical marijuana. Because California law does the former, but obviously not the latter, the challenged statutes are not in positive conflict with the CSA.

For purposes of preemption, "positive conflict" means "an actual conflict with federal law such that compliance with both federal and state regulations is a physical impossibility." (*Southern Blasting Servs.*, *supra*, 288 F.3d at p. 591 [internal quotation marks omitted].) As Justice Scalia recently noted, a positive conflict with the CSA occurs only where a state law "require[s]" someone to violate the CSA. (*Gonzales*, *supra*, 126 S. Ct. at p. 934 [dis. op. of Scalia].)

Here, the challenged statutes could be in positive conflict with the CSA only if California law *required* individuals to possess marijuana. Of course, this is not what California law does. Instead, State law excepts a limited class of individuals from criminal penalties for marijuana possession, a far cry from mandating that people violate the CSA.

The Counties erroneously attempt to concoct a positive conflict with the CSA by arguing that State law cannot "authorize what federal law prohibits." (See, e.g., County of San Diego's Opening Br., at p. 5.) The California Supreme Court, however, has expressly rejected the argument, made in the context of a preemption claim, that withdrawing criminal penalties for a certain activity is tantamount to "authorizing" that action. As the Court remarked only two years ago: "There is a difference between (1) not making an activity unlawful, and (2) making that

activity lawful." (*Bronco Wine*, *supra*, at p. 992 [quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal. 4th 163, 183].) In other words, removing criminal penalties for a particular action does not affirmatively require the action.

Applying this principle to the CSA and California's medical marijuana laws yields a clear result: Mandating that people use medical marijuana would be in positive conflict with the CSA; not criminalizing the use of medical marijuana, as is the case with California's laws, poses no such conflict. Judge Breyer stated this expressly after reviewing Proposition 215 and the CSA:

> Defendants are correct that Proposition 215 does not conflict with federal law, but not for the reasons advanced by defendants, i.e., that medical marijuana is not illegal. Proposition 215 does not conflict with federal law because on its face it does not purport to make legal any conduct prohibited by federal law; it merely exempts certain conduct by certain persons from the California drug laws.

United States v. Cannabis Cultivators Club (N.D. Cal. 1998) 5 F. Supp. 2d 1086, 1100.

The Counties' argument—relying on cases saying that State statutes "cannot authorize what federal law forbids"—is therefore entirely inapposite because California law does not "authorize" the medical use of marijuana; rather, it merely does not criminalize such action. The distinction between authorizing and not criminalizing makes all the difference, as the California Supreme Court and Judge Breyer have noted.

The issue of authorizing versus not criminalizing aside, the Counties' cases are irrelevant for two other reasons. First, some of the cases, unlike the present action, arise in a context where the federal law's preemption provision allowed a state either to regulate in the field as strictly as the federal law or not to regulate in the field at all. (See, e.g., *City of Burbank v. State Water Res. Control Bd.* (2005) 35 Cal.4th 613, 618 [interpreting 33 U.S.C. § 1370].) Under such a preemption provision, of course a state statute cannot authorize what the federal law forbids. However, that type of preemption provision—the most robust form of preemption—does not

describe the narrow positive conflict preemption codified in Section 903. Therefore, the Counties' reliance on such cases would be persuasive only if the CSA's anti-preemption provision were different and if the State law actually authorized the use of marijuana.

The second line of cases simply repeats the basic principle of supremacy, reiterating that state law cannot override federal law. For instance, in *United States v. Landa* (N.D. Cal. 2003) 281 F. Supp. 2d 1139, 1145, the court noted that federal law makes marijuana manufacturing a crime, even though state law does not criminalize certain cultivation of marijuana for qualifying patients. In reaching this conclusion, the court repeated the maxim that "[i]n any conflict between federal and state policy, the federal view must prevail supreme in our system." *Ibid.* In other words, *Landa* merely reaffirms the basic principle that state laws do not render the federal government powerless to enforce its own laws.

Nowhere, however, do Patients-Intervenors contend that California's laws imply the invalidity of federal laws, or that the federal government cannot enforce its laws.[6] Indeed, the concept of supremacy means that the federal government can enforce federal law, and state law does not trump or otherwise provide a shield from the reach of federal legislation. However,

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[6] After all, these are the holdings of *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483 ("OCBC"), and *Gonzales v. Raich* (2005) 545 U.S. 1, 125 S.Ct. 2195. Although the Counties attempt to extract from these opinions a suggestion that the challenged statutes are preempted, neither opinion says, or even implies, anything about preemption. Rather, both opinions simply discuss the potential reach of federal law in states where state law does not criminalize the possession of marijuana for seriously ill individuals: *OCBC* held that California's medical marijuana law did not provide a defense to a federal prosecution, in federal court, for a violation of the CSA based on marijuana possession (532 U.S. at p. 499); and *Raich* held that Congress did not exceed its legislative authority when it criminalized, on a federal level, the possession of marijuana (125 S. Ct. at p. 2215). These cases provide no guidance whatsoever regarding whether the CSA preempts California's medical marijuana laws.

under the system of cooperative federalism endorsed in the CSA, the federal government, like any particular county, cannot tell California that it must criminalize marijuana.[7]

The only way that the CSA would preempt the challenged statutes would be if State law required an individual to violate the CSA. Doing nothing of the sort, but rather merely withdrawing from criminal penalty the medical use of marijuana by certain seriously ill individuals, the CSA does not preempt California's laws.

C. THE CHALLENGED STATUTES WOULD NOT BE PREEMPTED BY THE CSA EVEN IF OBSTACLE PREEMPTION ANALYSIS WERE APPLICABLE.

Even if obstacle preemption analysis were warranted under Section 903, which it is not, the CSA still would not preempt State law. The challenged provisions of the State statutes are simply not obstacles to the accomplishment of the CSA's full purposes and objectives.

The Counties' misapplication of obstacle preemption is rooted in their failure to appreciate the full range of Congress' purposes in passing the CSA. Mindful of the crucial, independent role that states can play in shaping drug policy, Congress allowed states wide

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[7] The twin concepts of supremacy and cooperative federalism recently compelled a justice of the Oregon Supreme Court to conclude that Oregon's medical marijuana laws—which are similar to California's medical marijuana laws—are not preempted by the CSA. Whereas six justices of that court did not address the defendant employer's preemption argument, since they found that the plaintiff employee claiming disability discrimination was not "disabled" under state law, Justice Kistler's concurrence found that federal law does not preempt a state's decision to exempt medical marijuana patients from the reach of its criminal prohibitions on marijuana:

> The fact that the state may choose to exempt medical marijuana users from the reach of the state criminal law does not mean that the state can affirmatively require employers to accommodate what federal law specifically prohibits. Federal law preempts the latter decision *but not the former*.

Washburn v. Columbia Forest Prods., Inc. (Or. 2006) 134 P.3d 161, 167-68 [conc. opn. of Kistler] [emphasis added]. Patient-Intervenors may disagree that employers need not accommodate medical marijuana use by disabled employees, but Justice Kistler gets it right when she recognizes that federal law does not preempt a state's decision to withdraw from criminal penalty the medical use of marijuana.

latitude when crafting their own criminal laws. (See, e.g., *Gonzales*, *supra*, 126 S. Ct. at p. 912 [recognizing that the CSA "explicitly contemplates a role for the states in regulating controlled substances"].) As the California Court of Appeal recently noted, "Congress has chosen to take a deferential approach to the states in the area of drug enforcement." (*People v. Boultinghouse* (2006) 36 Cal.Rptr.3d 244, 248.) That states are free to fashion their own, independent penal laws regarding controlled substances is a key attribute of the CSA.[8]

Ignoring this crucial aspect of congressional intent, the Counties present a simplistic view of the CSA. As the Supreme Court has cautioned, however, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." (*Rodriguez v. United States* (1987) 480 U.S. 522, 526 [emphasis omitted].) As if to illustrate this very principle, the Counties advance an argument that has implausible consequences. In essence, the Counties argue that California's decision to withdraw a limited

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[8] These policy considerations are illustrated by a portion of the floor debate on the CSA. Representative Robinson expressed concern that, unless the CSA preempted state laws, the state laws making marijuana possession a felony would frustrate Congress' decision to be more lenient toward first-time offenders convicted of possessing marijuana. *See* 116 Cong. Rec. 33307 (Sept. 23, 1970). Later, this concern was addressed in the following exchange:

> MR ROBINSON.
>
> I think it ought to be made more clear than it has been, so far during this debate, that this more humane and realistic approach to the question of penalties for mere use or possession of drugs, including marihuana, will have a very limited effect across the Nation. This is because we are revising and modernizing only the existing Federal laws in this regard and—if section 708 [codified at 21 U.S.C. § 903] means what it seems to say—we have no intention of preempting existing State laws in this same regard. To this limited intent, then, has to be added the fact that, although there is an overlapping of jurisdiction, it is very rare that drug or marihuana use and possession cases come into Federal purview.
>
> MR SPRINGER.
>
> May I say to the distinguished gentleman from New York that we did not seek to preempt State laws and I think very wisely so.

116 Cong. Rec. 33605 (Sept. 24, 1970).

subset of its criminal penalties will frustrate federal goals because this might lead to an increase in the supply of marijuana in California. However, a *withdrawal* of state criminal penalties has never been found preempted by federal law. As a federal appellate court stated recently: "It is not a state's refusal to impose some law that typically triggers preemption concerns, but a state's positive regulation of some matter in a manner inconsistent with federal regulation." (*U.S. v. Leal* (6th Cir. 1996) 75 F.3d 219, 227 [abrogated on other grounds by *United States v. Kennedy* (6th Cir. 2004) 107 F.App'x 518, 519].) It is no wonder that the absence of state penal law has never been held preempted by federal law. This is a likely reason why, in the ten years since California voters approved Proposition 215, during which time period ten other states have approved similar medical marijuana laws, no federal official has ever argued that any state law regarding medical marijuana is preempted by the CSA.

In addition to ignoring the CSA's goal of cooperative federalism, the Counties apparently forget that they have explicitly not challenged Section 11362.5(d), California's decision to withdraw state criminal penalties for the medical use of marijuana. (See Order Granting Patient-Intervenors' Motion for Intervent. [granting permissive intervention under the condition that Section 11362.5(d) "is not being placed in issue" in this case].) In essence, the Counties are challenging the Program Act and, more specifically, its provisions concerning the patient identification cards. However, these cards will *assist* police to enforce California's strict prohibitions against marijuana possession by making it easier to distinguish between medical and non-medical users, which is completely consistent with all of the purposes and objectives underlying the CSA.

Accordingly, California's laws do not frustrate the CSA's full purposes and objectives. Rather, California's marijuana-related penal laws are consonant with Congress' purposes of giving states an independent role in fashioning their drug policies and allowing local law enforcement authorities to effectuate state law regarding controlled substances. Therefore, even

if obstacle preemption were somehow applicable to the CSA under Section 903—which it is not, for the reasons stated *supra* Part II.A—the federal law still would not preempt California's decision to withdraw from criminal sanction the use of medical marijuana by seriously ill individuals.

D. THE SINGLE CONVENTION DOES NOT PREEMPT CALIFORNIA LAW.

California law is not preempted by the Single Convention because the Convention operates domestically through the CSA, which itself does not preempt California law. Furthermore, the Single Convention in fact permits domestic law not to criminalize the use of marijuana for medical purposes.

All parties agree that the Single Convention is not a self-executing treaty. (See County of San Diego's Opening Br., at p. 2 ["The Single Convention is not self-executing."].) Treaties that are not self-executing are, by definition, not enforceable of their own accord. Although such treaties constitute obligations of the United States, they do not become enforceable until duly implemented by Congress. (See, e.g., *People v. Ghent* (1987) 43 Cal.3d 739, 779.) Even then, it is the implementing federal statute—not the underlying treaty—that takes effect. (See Rest.3d The Foreign Relations Law of the United States, § 111, com. h ["[I]t is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States."].) Here, the implementing legislation is the CSA. The Single Convention carries no legal weight beyond the CSA, which, as demonstrated above, does not preempt California law.

Even if the Single Convention somehow had some independent significance for purposes of preemption, California's medical marijuana laws do not violate it. The Counties claim that California is trying to usurp the United States' role because under the treaty the "federal government, and not individual states, has the authority to decide whether to prohibit the production, manufacture, possession and use of marijuana." (County of San Diego's Opening

Br., at p. 9.) However, the Single Convention expressly defers to a signatory's "constitutional, legal and administrative systems." (*In re Baird* (8th Cir. 1982) 668 F.2d 432, 433.) Accordingly, the Single Convention in no way alters the CSA's system of cooperative federalism, which does not allow the federal government to mandate that California criminalize any particular conduct.

The Counties' reliance on *Zschernig v. Miller* (1968) 389 U.S. 429, is similarly misplaced. That case considered very different facts and stands for the proposition that state laws must give way to treaty obligations "if they impair the effective exercise of the Nation's foreign policy." (*Ibid.* at pp. 440-41.) Unlike the Oregon law at issue in that case, which hindered the ability of foreign nationals to vindicate their rights in Oregon courts, California's medical marijuana laws do not interfere with federal foreign policy.

The Counties also erroneously claim that California law "is in direct conflict with the Single Convention because it requires none of the controls on marijuana cultivation required by the treaty." (County of San Diego's Opening Br., at p. 9.) Proposition 215 and the Program Act, contrary to the Counties' suggestion, do not establish a marijuana cultivation program, but instead simply carve out a narrow exception from the State's generally applicable criminal code for seriously ill patients and their caregivers. The federal government's creation of the National Institute on Drug Abuse to cultivate marijuana for medical research has no bearing on California's sovereign right to except certain sick people from criminal sanctions under State law.

Moreover, the Single Convention provides signatories wide latitude in fashioning domestic laws regarding the cultivation and use of controlled substances, including marijuana. The official interpretation of the Single Convention, prepared by the Secretary-General of the United Nations, states that the only requirement imposed under the treaty is that a signatory "act in good faith in determining whether any special measures are needed with regard to Schedule

IV drugs." (See *NORML v. DEA* (D.C. Cir. 1977) 559 F.2d 735, 751 [citing to the Commentary on the Single Convention].) For example, the Single Convention does not prohibit the federal government from listing marijuana under Schedule II—as opposed to schedule I—of the CSA. (*Ibid.* [holding that the United States could decline to restrict cannabis and cannabis resin to research purposes and could reschedule the drugs].)

Other signatories to the Single Convention have relaxed criminal penalties for marijuana, and none of these countries has been found to be in violation of their international treaty obligations. For example, Canada has officially recognized the benefits of medical marijuana and has a program to help cultivate and dispense the drug to qualified patients. (Marihuana Medical Access Regs (Controlled Drugs and Substances Act) SOR/2001-227 (Can) §§ 70, 70.1, 70.2.) California, by contrast, has taken the more limited step of withdrawing criminal penalties for a narrow class of people.

In short, California's medical marijuana laws are wholly consistent with the requirements of both the Single Convention and the CSA. The Single Convention is not a self-executing treaty. It does not give the federal government authority to mandate that California criminalize any particular conduct. Proposition 215 and the Program Act do not interfere with foreign relations and are fully consistent with the United States' treaty obligations. The Court should therefore reject the Counties' novel argument that California's medical marijuana laws violate the Single Convention.

E. THE COUNTIES' PREEMPTION CLAIM SHOULD BE REJECTED TO AVOID VIOLATING THE TENTH AMENDMENT TO THE U.S. CONSTITUTION.

The Counties' preemption argument is a thinly veiled attack on the ability of states everywhere to enact their own laws. However, the Tenth Amendment to the U.S. Constitution, upholding the principles of comity and federalism, prohibits the federal government from

requiring California to make any particular act illegal. Indeed, *had* Congress sought to preempt the challenged State medical marijuana statutes, which it has not, such "commandeering" of the State would violate the Tenth Amendment. The Court should interpret the CSA and Single Convention to avoid this constitutional infirmity.

Under the Tenth Amendment, the federal government may not "commandeer" state officials to carry out federal policy. (See *Printz v. United States* (1997) 521 U.S. 898, 929-31; *New York v. United States* (1991) 505 U.S. 144, 157-75.) "The Federal Government," the Supreme Court has stated, "may not compel the States to implement, by legislation or executive action, federal regulatory programs." (*Printz, supra*, 521 U.S. at p. 925. See also *New York, supra,* 505 U.S. at p. 935.) The Tenth Amendment is an important check on the federal government, just as it is a vital recognition that a state is free to determine how to spend its limited resources. *Printz, supra*, 521 U.S. at p. 922 ["The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States."]; *ibid.*, at p. 930 [noting that the Tenth Amendment prohibits the federal government from "forcing state governments to absorb the financial burden of implementing a federal regulatory program"].)

The Counties' preemption argument, if accepted, would violate this constitutional guarantee of State authority. Here, California has made a decision not to criminalize the medical use of marijuana by seriously ill individuals and their caregivers, and, in the process, to conserve its scarce law enforcement resources by declining to arrest and prosecute such people. To this end, the State has excepted a small group of people from the reach of certain provisions of its penal law, and it has enacted a voluntary identification card program to assist state law enforcement officers in distinguishing qualified medical marijuana patients from recreational users. When enacting these laws, California explicitly recognized that the Tenth Amendment granted it authority to craft its own marijuana laws. (See S.B. 420, § 1, subd. (e) (Sept. 11, 2003)

[noting that the Program Act was enacted "pursuant to the powers reserved to the State of California and its people under the Tenth Amendment to the United States Constitution"].)

Notwithstanding the Tenth Amendment, the Counties argue that California must bow to the federal policy of criminalizing the medical use of marijuana. However, as Judge Kozinski has stated, this very argument flies in the face of the Tenth Amendment:

> If the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal. That patients may be more likely to violate federal law if the additional deterrent of state liability is removed may worry the federal government, but the proper response—according to *New York* and *Printz*—is to ratchet up the federal regulatory regime, *not* to commandeer that of the state.

(*Conant v Walters* (9th Cir. 2002) 309 F.3d 629, 646-47 [conc. op. of Kozinski].)

If the CSA were held to preempt Proposition 215, the federal government would be treading seriously on the ability of the State to enact its own penal laws. Moreover, a finding that the State's voluntary identification card program is preempted would significantly impede the State's ability to distinguish medical marijuana patients (whom the State does not wish to prosecute) from recreational marijuana users (whom the State will continue to prosecute). If the Program Act's identification card program, in particular, were deemed preempted, State law enforcement officers would have to either (1) expend time and energy attempting to verify a patient's status by other means, such as calling his doctor, or (2) burden the State's criminal justice system by citing or arresting medical marijuana patients, only to have the prosecutor or the court verify their status and formally dismiss the charges. The federal government cannot mandate, against the wishes of the State, this scenario.

California has made a choice—with which a few counties disagree—about what conduct is illegal and which people it wishes to arrest and prosecute for engaging in such conduct. By seeking to void the State's constitutional prerogative, the Counties impermissibly "attempt to

control or influence the manner in which States regulate private parties." (*Ibid.* [internal quotation marks omitted]. See also *ibid.* ["In effect, the federal government [would be] forcing the state to keep medical marijuana illegal" under State law if the federal government could require California to rescind its medical marijuana laws].) Accordingly, rejecting the Counties' preemption claim would not only be consistent with the CSA's anti-preemption provision, but, respecting the principles of comity and federalism, would also avoid a needless constitutional violation. (See *Central Delta Water Agency v. State Water Res. Control Bd.* (1993) 17 Cal.App.4th 621, 639 ["[A] statute must be found constitutional if there is any reasonable way to construe it which avoids constitutional infirmity."]. Cf. *National Fed'n of Republican Assemblies v. United States* (S.D. Ala. 2002) 218 F.Supp.2d 1300, 1352 ["[T]he federalism concerns that the Tenth Amendment embodies counsel hesitation before construing Congress's enumerated powers to intrude upon the core aspects of state sovereignty."].)

III. THE PROGRAM ACT DOES NOT VIOLATE THE CALIFORNIA CONSTITUTION BECAUSE IT CARRIES OUT THE WILL OF THE VOTERS IN APPROVING PROPOSITION 215, WITHOUT AMENDING THE INITIATIVE.

The Program Act does not unconstitutionally amend Proposition 215 because, as permitted by the Supreme Court, it merely touches on the general subject matter of the initiative without either adding to or subtracting from the initiative. Were Merced County to have "examin[ed] and compare[ed]" the relevant provisions of Proposition 215 and the Program Act (*Planned Parenthood Ass'n of Cal. v. Swoap* (1985) 173 Cal.App.3d 1187, 1199), as it was required but failed to do, such analysis would have revealed that the Program Act neither amends nor repeals any portion of Proposition 215, and is in fact entirely consistent with the electorate's will in approving the initiative.

California courts have identified numerous situations where legislation can touch upon the subject matter of a previously approved initiative without running afoul of Article II, § 10(c)

("Section 10(c)") of the California Constitution. (See, e.g., *Mobilepark W. Homeowners Ass'n v. Escondido Mobilepark W.* (1995) 35 Cal.App.4th 32, 43 [stating that "legislative enactments related to the subject of an initiative statute may be allowed" if they address a "related but distinct area"].) For example, legislation does not violate Section 10(c) where the statute addresses a "different legal relationship[]" from the initiative. (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 23.) In fact, legislation can permissibly deal with the subject of an initiative in any manner that the initiative "does not specifically authorize or prohibit." (*People v. Cooper* (2002) 27 Cal.4th 38, 47 [emphasis omitted].) In any such scenario, the legislature does not undo "what the people have done" in approving the initiative, ensuring compliance with the purposes of Section 10(c). (*Knight*, *supra*, 128 Cal.App.4th at p. 22 [internal quotation marks and citation omitted].)

Under Proposition 215, a patient or primary caregiver "who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician" shall not be subject to Sections 11357 or 11358, relating to the "possession" and "cultivation" of marijuana, respectively. (§ 11362.5, subd. (d).) Under the Program Act, qualifying patients may seek to participate in a voluntary identification card program, and if they do so, the county or its designee must take certain steps, such as providing applications, maintaining records, using State-approved protocols, and approving or denying applications within 30 days. (§§ 11362.71, subd. (b), 11362.72.)[9] Nothing in the Program Act amends or repeals anything in Proposition 215.

Significantly, the Program Act expressly provides that "[i]t shall not be necessary for a person to obtain an identification card in order to claim the protections of Section 11362.5."

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[9] The identification card program is described in full at Sections 11362.71 – 11362.76.

(§ 11362.71, subd. (e).) By this plain language, the Legislature made clear that the identification card program does not change, affect, restrict, or undermine anything in Proposition 215. Patients or caregivers are free to rely solely on the protections of Proposition 215 without availing themselves of the separate identification card procedure in the Program Act. Therefore, the Program Act, which relates primarily to "the logistics of developing and operating" the "identification card program" and "outlines the legal protections to which cardholders are entitled" (Merced County's Opening Br., at p. 15), does not undo "what the people have done" in approving Proposition 215. (*Knight*, *supra*, 128 Cal.App.4th at p. 22.)

Proposition 215 confers "a limited immunity from prosecution" but not necessarily "immunity from arrest." (*People v. Mower* (2002) 28 Cal.4th 457, 469-70.) Separately, the Program Act provides immunity from arrest to specified persons "in possession of a valid identification card" under certain circumstances. (§ 11362.71, subd. (f).) The two statutes address "different legal relationships"—arrest as opposed to prosecution[10]—and therefore one does not amend the other. (*Knight*, *supra,* 128 Cal.App.4th at p. 23.)

Furthermore, because Proposition 215 "does not specifically authorize or prohibit" the identification cards, which are not necessary to qualify for protection under Proposition 215, the relevant provisions of the Program Act are "not an invalid modification" of an initiative statute. (*Cooper*, *supra*, 27 Cal.4th at p. 47.) To make absolutely clear that it was not amending an

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[10] An arrest may occur without a prosecution, and vice versa. (See Penal Code, § 813, subd. (a) [court may issue a summons in lieu of arrest warrant]; Penal Code, § 849.5 [noting that a person may be "arrested and released," even though "no accusatory pleading is filed charging him with an offense"]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1070-71 [formal initiation of criminal proceedings is not a prerequisite to arrest]. See also *People v. Case* (1980) 105 Cal.App.3d 826, 833 [criminal proceedings may be initiated only by "the filing of an accusatory pleading in the court having trial jurisdiction over the charged offense"].)

initiative, the Legislature expressly provided in the Program Act that a person need not obtain an identification card to claim the protections of Proposition 215. (§ 11362.71, subd. (f).)

Nor does the Program Act amend Proposition 215 by "providing definitions" of certain terms. (Merced County's Opening Br., at p. 17.) The Program Act's definitions "shall apply" only "[f]or purposes of this article." (§ 11362.7.) The Program Act is contained in Article 2.5, and Proposition 215 is codified in Article 2. Therefore, the defined terms cannot be taken to expand, limit, change, or qualify anything in Proposition 215.

Merced County seems to contend that because Proposition 215 addresses the subject of medical marijuana, the Legislature may never adopt any statute that touches upon that general subject without obtaining voter approval. However, settled law eviscerates that contention. It is clear that "legislative enactments related to the subject of an initiative statute may be allowed" if they address a "related but distinct area." (*Mobilepark*, *supra*, 35 Cal.App.4th at p. 43.) That is exactly what the Program Act has done, as discussed above. Therefore, the Program Act leaves Proposition 215 undisturbed and without amendment.

The cases on which Merced County relies do not support its desired outcome because the cited cases address statutes, unlike the Program Act, that imposed substantive changes upon voter initiatives. In *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, the court found that a statute (Ins. Code, § 769.2) improperly amended Proposition 103, which rolled back insurance premiums in specified amounts, because the "effect of applying section 769.2 is to reduce an Insurer's rollback obligation by the full amount of the premium taxes and commissions actually paid by the Insurer on the excess premiums it collected" and "because section 769.2 removes from the Commissioner the discretion [vested in the Insurance Commissioner by Proposition 103] to determine whether any or all of the taxes and commissions paid by an insurer" should be counted in determining the insurer's obligations. (*Ibid.* at pp. 1481, 1486.) In *Quackenbush*, therefore, the Legislature directly undid the will of

the people by changing how the insurance premium rollbacks mandated by Proposition 103 were calculated. Here, as demonstrated *supra*, the Program Act does not undo the will of the people.

In *Franchise Tax Board v. Cory* (1978) 80 Cal.App.3d 772, the court considered whether a bill (Item 106) improperly amended the Political Reform Act of 1974, passed by initiative, that directed "the Franchise Tax Board to audit the financial reports submitted by candidates for public office." (*Ibid.* at p. 774.) Item 106 required that such audits be conducted according to specified standards, and that the audits could not cover "more than 10 percent of the campaign transactions subject to the audit" or "more than 25 percent of the campaign expenditures . . . ." (*Ibid.*) As the court noted, "[t]he Act does not prescribe the standards under which audits are to be conducted, nor does it prohibit the use of the sampling techniques . . . ." (*Ibid.* at p. 776.) However, the court held that Item 106 improperly amended the Act "by clarifying the standards to be used" in conducting the audits "and by significantly restricting the manner in which audits are to be conducted." (*Id.* at p. 777.) In *Cory*, as in *Quackenbush*, it was clear that a subsequent statute attempted to change or curtail the provisions and powers created by a previous initiative, and therefore the statute was unconstitutional.[11]

Here, by contrast, the Program Act does not change, curtail, or restrict anything in Proposition 215. As a result, the holdings of *Quackenbush* and *Cory* simply do not support Merced County's argument. (See *Brown v. Kelly Broad. Co.* (1989) 48 Cal.3d 711, 734-35 ["[T]he language of an opinion must be construed with reference to the facts presented by the

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[11] By relying largely on non-codified legislative findings (Merced County's Opening Br., at pp. 16-17 [quoting but not citing Stats. 2003, ch. 875, § 1(b), p. 2]) rather than the Program Act's actual statutory language, Merced County disregards the rule that "[w]hether an act is amendatory of existing law is determined not by title alone, or by declarations" of intent, but "by an examination and comparison of its provisions with existing law." (*Franchise Tax Board, supra,* 80 Cal.App.3d at p. 777.) In any event, the Legislature also stated, in language ignored by Merced County, that its intent was "to address additional issues that were not included within [Proposition 215], and that must be resolved in order to promote the fair and orderly implementation of the act." (Stats. 2003, ch. 875, § 1, subd. (c).)

case, and the positive authority of a decision is coextensive only with such facts."] [internal quotation marks and citations omitted].)

Merced County further demonstrates the weakness of its argument by relying on two cases that have nothing to do with the issue at hand. Neither the Court of Appeal in *People v. Urziceanu* (2005) 132 Cal.App.4th 747, nor the Supreme Court in *Raich, supra*, 545 U.S. 1, remotely addressed the question whether the Program Act "amends" Proposition 215 for purposes of Section 10(c). It "is axiomatic that cases are not authority for propositions not considered therein." (*Isbell v. County of Sonoma* (1978) 21 Cal.3d 61, 74 [internal quotation marks and citation omitted].) Therefore, these cases are irrelevant, having used the word "amend" in a colloquial sense, entirely divorced from the term of art for which it is employed for purposes of Section 10(c).

Finally, even if Merced County had standing, which it does not, to claim that portions of the Program Act other than the identification card program amend Proposition 215, such a challenge fails on its merits.[12] As noted, Proposition 215 merely precluded application of Sections 11357 and 11358 to patients and their primary caregivers, providing limited immunity from criminal penalty for "possession" or "cultivation" of marijuana. (§ 11362.5, subd. (d).) It said nothing about prosecution under other statutes for other conduct, leaving the Legislature free to enact sections 11362.765 and 11362.775, which create exemptions from liability under other provisions of California law. Because it covered only "possession" and "cultivation," Proposition 215 did not preclude the Legislature from regulating, for example, the *use* of medical marijuana. (See, e.g., §§ 11362.785, subd. (a) ["medical use of marijuana"], 11362.79 ["smoking of medical marijuana"], § 11362.795 [use of medical marijuana on bail, probation,

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[12] Merced County has not shown how it is "injuriously affected" by provisions of the Program Act that impose no obligations on it. (*In re Tania S., supra*, 5 Cal.App.4th at p. 737.)

and parole]. See also *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"].)[13] Likewise, Proposition 215 did not preclude the Legislature from regulating the conduct of professional licensing boards (§ 11362.8) or establishing criminal penalties for the misuse of identification cards. (§ 11362.81.) Because the Program Act allows for possession of medical marijuana in amounts "consistent with the patient's needs" according to "a doctor's recommendation" (§ 11362.77, subd. (b)), it neither expands nor limits the scope of Proposition 215, which applies to possession of "marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (§ 11362.5, subd. (d). See also *Cooper*, *supra*, 27 Cal.4th at pp. 44-47 [allowing legislation in areas that are related to the subject of an initiative, so long as the initiative "does not specifically authorize or prohibit" the statute's provisions].)

It is telling that the State and the Patient-Intervenors, who support Proposition 215, argue that the Program Act does not amend the initiative; whereas the Counties, ardent opponents of Proposition 215, claim that the Program Act should be struck down. While the Program Act does not undo "what the people have done" in passing Proposition 215, Merced County's claim regarding the Program Act is a back-door attempt to undo the will of the voters, who overwhelmingly supported the initiative.

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[13] The Program Act does *not* "require any accommodation of any medical use of marijuana . . . on the property or premises of any jail, correctional facility, or other type of penal institution . . . ." (§ 11362.785, subd. (a).) It merely says that the Act does not "prohibit" a jail from allowing such use, in its discretion, "under circumstances that will not endanger the health or safety of other prisoners or the security of the facility." (§ 11362.785, subd. (c).)

CONCLUSION

For the foregoing reasons, Patient-Intervenors respectfully request that the Court deny the Counties' motions for judgment on the pleadings.

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