SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE 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

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

Intervenors

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

Third-Party Plaintiff Intervenors.

Case No. GIC 860665

ORDER RE MOTIONS FOR JUDGMENT ON THE PLEADINGS

Judge: Hon. William R. Nevitt, Jr.
Dept.: 64

The Court has considered the papers filed in support of and in opposition to the motion for judgment on the pleadings filed in this matter by each party. The Court heard oral argument on November 16, 2006. The matter has been submitted, and the Court now issues its rulings deciding those motions. These rulings dispose of the entire matter.

The rulings herein do not decide whether marijuana has medical benefits, or for whom. Those issues are not before this Court in this matter. This matter presents the Court with issues of law only.

A. The Nature and Procedural History of this Matter.

Case GIC860665 is the declaratory relief action filed on February 1, 2006, by County of San Diego against San Diego NORML, the State of California, and Sandra Shewry in her official capacity as Director of the California Department of Health Services.

Case GIC861051 is the declaratory relief action filed on February 8, 2006, by County of Bernardino and Gary Penrod, as Sheriff of the County of San Bernardino, against the State of California and Sandra Shewry.

On March 30, 2006, the above two cases were consolidated, with GIC860665 as the lead case.

On June 2, 2006, the Court granted the motion of County of Merced and Mark Pazin, as Sheriff of the County of Merced, for leave to file their Complaint In Intervention alleging causes of action for declaratory relief and injunctive relief.

On August 4, 2006, the Court granted the motion by Wendy Christakes, Pamela Sakuda, Norbert Litzinger, William Britt, Yvonne Westbrook, Stephen O'Brien, the Wo/Men's Alliance for Medical Marijuana and Americans for Safe Access (collectively, "Patient Intervenors") for leave to file their proposed complaint in intervention (on condition they simultaneously file an amendment to their proposed complaint in intervention that explicitly states that subdivision (d) of Health and Safety Code section 11362.5 is not being placed in issue by their complaint). That complaint in intervention and the amendment thereto were filed on August 10, 2006.

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The three counties and two sheriffs allege that Health and Safety Code[1] section 11362.5 ("Compassionate Use Act" or "CUA"), with the exception of subdivision (d) thereof, and sections 11362.7 through 11362.83 ("MMP"[2]) are preempted, by the Supremacy Clause of the United States Constitution, by the federal Controlled Substance Act ("CSA") and/or by the Single Convention on Narcotic Drugs ("Single Convention"). The CUA is the codification of Proposition 215, an initiative.

County of Merced and Sheriff Pazin also allege that the MMP (in purported contravention of section 10(c) of article II of the California Constitution) improperly "amends" the CUA. At oral argument on November 16, 2006, the other counties and sheriff joined in this challenge under section 10(c) of article II of the California Constitution.

The counties and sheriffs filed motions for judgment on the pleadings. The State of California (and Sandra Shewry) and Patient Intervenors also filed motions for judgment on the pleadings. San Diego NORML also filed a notice of motion for judgment on the pleadings, but merely "adopts, joins in, and incorporates by reference herein all arguments made by" the State and Patient Intervenors. San Diego NORML also "adopts, joins in, and incorporates by reference as though set forth fully herein all arguments" made in the State's and Patient Intervenors' oppositions to the counties' motions.

The three counties and two sheriffs are collectively referred to below as "plaintiffs." The State, Sandra Shewry, Patient Intervenors and San Diego NORML are collectively referred to below as "defendants."

At oral argument, each party agreed that all plaintiffs win or lose together and that all defendants win or lose together.

B. The Primary Legal Issues.

The three primary legal issues presented by this matter are as follows:

1. Whether plaintiffs have standing to file and pursue their complaints.

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[1] Unless otherwise noted, statutory references herein are to the California Health and Safety Code.

[2] The Medical Marijuana Program (Div. 10, Ch. 6, Art. 2.5) actually includes sections 11362.7 through 11362.9, but the plaintiffs' complaints challenge only 11362.7 through 11362.83, i.e., all but § 11362.9. The challenged sections will be referred to herein as the "MMP."

2. Whether the CUA, with the exception of subdivision (d) thereof, and the MMP are preempted by the Supremacy Clause of the United States Constitution, by the federal CSA, and/or by the Single Convention.

3. Whether the MMP, in alleged contravention of section 10(c) of article II of the California Constitution, improperly "amends" the CUA, an initiative statute.

Each of these three issues is addressed below.

1. Whether plaintiffs have standing to file and pursue their complaints.

The issue of plaintiffs' standing was first raised via demurrers, which the Court overruled. The Court finds the standing arguments now made by defendants to be unpersuasive.

All plaintiffs have standing to file and pursue their complaints.

2. Whether the CUA, with the exception of subdivision (d) thereof, and the MMP are preempted by the Supremacy Clause, by the CSA, and/or by the Single Convention.

As the United States Supreme Court has stated:

> The *Supremacy Clause* [of the United States Constitution] unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is "superior to that of the States to provide for the welfare or necessities of their inhabitants," however legitimate or dire those necessities may be.
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> *Gonzales v. Raich* (2005) 545 U.S. 1, 29 (citations omitted).

As the California Supreme Court has stated:

> The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption. An important corollary of this rule, often noted and applied by the United States Supreme Court, is that "[*w*]*hen Congress legislates in a field traditionally occupied by the States, 'we 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.*'"... [T]his venerable presumption "provides assurance that 'the federal-state balance,' ... will not be disturbed unintentionally by Congress or unnecessarily by the courts."
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> *Bronco Wine Co. v. Jolly (2004)* 33 Cal.4th 943, 956-57 (citations omitted; emphasis in original).

21 U.S.C. § 903, which all parties acknowledge applies here, provides:

> No provision of this subchapter shall be construed as indicating an intent on the part of the 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.*
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> (Emphasis added.)

The State convincingly rebuts County of San Diego's argument that the CUA and MMP are preempted because they "authorize" conduct that federal law prohibits. The State is correct that the test is whether the CUA or MMP *requires* conduct that violates federal law.

Plaintiffs do not effectively rebut defendants' contention that if all the CUA and MMP do is remove penalties for the medicinal use of marijuana from *California's* drug laws, then there is no "positive conflict" between federal and "State law so that the two cannot consistently stand together."

Defendants persuasively argue that requiring the counties to issue identification cards for the purpose of identifying those whom California chooses not to arrest and prosecute for certain activities involving marijuana does not create a "positive conflict" for purposes of 21 U.S.C. § 903.

However, section 11362.78 effectively *requires* state and local law enforcement officials to "accept" the identification cards. It appears that "accepting" the card is for purposes of the prohibition set forth in section 11362.71(e). Section 11362.71(e) provides:

> *No person* or designated primary caregiver in possession of a valid identification card *shall be subject to arrest* for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article, unless there is reasonable cause to believe that the information contained in the card is false or falsified, the card has been obtained by means of fraud, or the person is otherwise in violation of the provisions of this article.
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> (Emphasis added.)[3]

[3] The broad language of section 11362.71(e) contrasts with the more specific language of (unchallenged) section 11362.5(d), which refers specifically to two California statutes, i.e., "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana." Section 11362.71(e) also contrasts with sections 11362.765 and 11362.775, which refer specifically to California statutes, i.e., "Section 11357, 11358, 11359, 11360, 11366.5, or 11570."

To the extent the MMP purports to prohibit arrest for violation of the CSA's regulation of "possession, transportation, delivery, or cultivation of medical marijuana," the MMP does not, as defendants argue, merely "remov[e] marijuana use by the seriously ill from the scope of state penalties;" and to that extent, there is a "positive conflict" with the CSA. However, this Court, guided by *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509, construes sections 11362.71(e) and 11362.78 as prohibiting arrest under California, not federal, laws for "possession, transportation, delivery, or cultivation of medical marijuana."

Plaintiffs argue that the common law doctrine of "obstacle conflict" preemption applies, notwithstanding the existence of 21 U.S.C. § 903. The Court disagrees with that argument. However, even if the common law doctrine of "obstacle conflict" preemption did apply, there is, as explained by the State in its opposition, no such obstacle created by the CUA or the MMP.

As for the arguments made by plaintiffs regarding the Single Convention, the Court found defendants' arguments more persuasive.

Neither the CUA nor the MMP is preempted by the Supremacy Clause, by the CSA, or by the Single Convention.

3. Whether the MMP, in alleged contravention of section 10(c) of article II of the California Constitution, improperly "amends" the CUA, an initiative statute.

Section 10(c) of article II of the California Constitution provides:

> 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.

Plaintiffs challenge the MMP under this section of the California Constitution. The issue is whether the MMP "amends" the CUA.

Guided by precedent, including that summarized in *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484-1486, the Court concludes the MMP does not amend the CUA.

The MMP creates a stand-alone and (from the perspective of the persons protected by the CUA) voluntary system. Most importantly, the MMP does not add to or take away from the CUA.

Further, although the Court's ruling does not turn on this point, when the voters passed Proposition 215 (which is codified in the CUA), they expressly stated that one of their purposes was "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes ...." The MMP does not interfere with that purpose. The MMP also appears to be consistent with the voters' other two expressly stated purposes, i.e., "[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction," and "[t]o encourage 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." (Section 11362.5 (b)(1).)

In short, the Court upholds the Compassionate Use Act (which is the codification of Proposition 215, the initiative passed by the voters) and the MMP (statutes passed by the Legislature) against the challenges brought by plaintiffs herein.

C. Injunctive Relief.

Injunctive relief was requested by some of the parties, *i.e.*, by Patient Intervenors and by County of Merced and Sheriff Pazin.

On December 1, 2006, County of San Diego filed a memorandum of points and authorities regarding injunctive relief.

On November 30, 2006, County of Merced and Sheriff Pazin filed a joinder in the brief filed by County of San Diego regarding requests for injunctive relief. In that joinder, County of Merced and Sheriff Pazin stated they do "not intend to further pursue [their] cause of action for injunctive relief."

On December 1, 2006, County of San Bernardino and Sheriff Penrod filed a joinder in the brief filed by County of San Diego on December 1.

On December 1, 2006, Patient Intervenors filed their Supplemental Brief Regarding Injunctive Relief.

Having reviewed the aforementioned briefs filed on November 30 and December 1, 2006, the Court does not grant any injunctive relief. The Court grants no injunctive relief to County of

Merced and Sheriff Pazin because they no longer seek it and, moreover, they do not prevail here. The Court grants no relief to Patient Intervenors because, as they concede, "the issuance of an injunction would be premature at this time."

The Court neither opines now as to the propriety of any injunctive relief that may be sought in the future nor retains any extraordinary jurisdiction in this matter. If, in the future, any party concludes it would be jurisdictionally, procedurally and substantively proper for this Court to grant injunctive relief, they may apply for such relief; and the Court will consider the propriety of the application.

D. Requests For Judicial Notice.

The parties' requests for judicial notice are all unopposed and granted.

E. The Court's Rulings.

Plaintiffs' motions for judgment on the pleadings are denied. Defendants' motions for judgment on the pleadings are granted.

No injunctive relief is granted by this order.

The Attorney General's office is to prepare and submit a proposed judgment within thirty days, after giving all other counsel an opportunity to review it.

The Attorney General's office is to give notice of ruling in accordance with Code of Civil Procedure section 1019.5(a).

Dated: December 6, 2006

WILLIAM R. NEVITT, JR.
Judge of the Superior Court