## INTRODUCTION

Despite the coexistence of California's medical marijuana laws with federal law for more than eleven years, the counties of San Diego and San Bernardino [hereinafter "Counties"] contend that there is such an intractable conflict between the two sets of laws that California law must be held invalid. Although there can be no question that the California electorate has chosen to tread a different path than the federal government when it comes to medical marijuana, this does not mean that California's laws in this area are preempted. Federal officials may enforce the federal government's prohibition on marijuana for all purposes, even in derogation of the medical marijuana laws of the state, if that is how they choose to expend their resources. California voters, however, do not believe that the arrest and prosecution of seriously ill persons for whom marijuana provides much-needed, often life-saving, relief is worth the cost. Our federalist system of government allows for both sovereigns to control their own purse strings.

It is noteworthy that the federal government has not itself claimed that its laws preempt and invalidate California's medical marijuana laws. To the contrary, out of respect for our federalist system of government and the historical power of the states over matters of health and safety, Congress included in the Controlled Substances Act (21 U.S.C. § 801 *et seq.*) [hereinafter "CSA"] an express anti-preemption provision that disclaims any intent that the federal drug laws preempt those of the states, unless there is a positive conflict "so that the two cannot consistently stand together." Reading this provision in the case to reject the

Counties' preemption challenge will effectuate Congress' intent for the states to have wide latitude in regulating drugs within their borders. Reading the provision in the opposite fashion, on the other hand, will not only do violence to this intent, but will unnecessarily disturb the delicate federal-state balance, as hundreds, if not thousands, of state drug laws will be imperiled. While the Boards of Supervisors of San Diego and San Bernardino may not agree with the medical marijuana policy choice of the California electorate, this is not a reason to set the state laws aside. As the past eleven years of experience has demonstrated, the state laws and the federal laws can coexist.

## STATEMENT OF FACTS

On November 4, 1996, the California electorate enacted the Compassionate Use Act (Health & Safety Code § 11362.5) [hereinafter "the CUA"] "[t]o 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 in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." (Health & Safety Code § 11362.5, subd. (b)(1)(A).) To this end, the CUA exempts qualified patients from criminal liability for cultivation and possession of marijuana. (Health & Safety Code § 11362.5, subd (d).) A "qualified patient" is a seriously ill person who has received a physician's

oral or written recommendation or approval to use marijuana medicinally. (Health & Safety Code § 11362.5, subd. (d).)

In 2003, the California Legislature enacted the "Medical Marijuana Program Act" [hereinafter "the MMPA"]. (Health & Saf. Code § 11362.7 *et seq*.) Among its other provisions, this legislation requires counties to implement a voluntary identification card program that protects against the arrest and prosecution of qualified patients for marijuana offenses. (Health & Saf. Code § 11362.71 *et seq.*)

## PROCEDURAL HISTORY

Rather than implement the identification card provisions of the MMPA, as the Legislature intended, the County of San Diego filed suit in federal court on January 20, 2006, seeking a declaration that the MMPA and portions of the CUA are preempted by federal law. (*County of San Diego v. State of California*, 06-cv-0130 (S.D. Cal. 2006).) That action was voluntarily dismissed on February 1, 2001, which prompted the County of San Diego to file the instant action in Superior Court on February 1, 2006. (Clerk's Transcript [hereinafter "CT"], vol. 1, pp. 1-11.) One week later, the County of San Bernardino joined this action by filing its own complaint, which was consolidated with San Diego's on March 30, 2006. (CT, vol. 6, pp. 1268 & 1298.)

On June 2, 2006, the County of Merced intervened in this action, asserting in its complaint that the MMPA constitutes an impermissible legislative amendment of a voter-approved initiative, in violation of article 2, section 10(c) of

the California Constitution. The County of Merced is no longer a party, however, as it elected to implement the identification card program, rather than pursue an appeal, after the Superior Court affirmed the constitutional validity of the CUA and MMPA.

Meanwhile, on August 4, 2006, patient intervenors 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"] were given leave to intervene in the action. This brief is submitted on their behalf.

In the proceedings below, there was extensive briefing. On September 1, 2006, all parties filed cross-motions for judgment on the pleadings, which were heard on November 16, 2006. On December 6, 2006, the Superior Court granted the motions of the State of California, NORML, and the patient intervenors, and denied the motions of the Counties. (CT, vol. 6, p. 1232.) Specifically, the Honorable William R. Nevitt, Jr. found as follows:

> 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.
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> 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.

(CT., vol. 6. p. 1229 [italics in original].) This appeal by the Counties of San Diego and San Bernardino (collectively "Counties"), but not Merced, followed.

## ISSUES PRESENTED FOR REVIEW

1. Did Congress intend for the federal CSA to preempt state drug laws only where the two sets of laws are in positive conflict such that they cannot coexist?

2. Do California's medical marijuana laws positively conflict with the CSA where they do not require anyone to violate the CSA, nor prevent federal officials from enforcing federal law?

3. Would preemption of California's identification card program violate the Tenth Amendment, since it would "commandeer" the state to enforce laws against medical marijuana patients that the state does not wish to enforce?

4. Did the Legislature undo what the voters had accomplished in passing the CUA when it enacted the MMPA?

## STANDARD OF REVIEW

An order granting judgment on the pleadings is reviewed *de novo.* (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 166.)

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## ARGUMENT

## I. THE SUPERIOR COURT CORRECTLY HELD THAT THE CSA DOES NOT PREEMPT CALIFORNIA'S MEDICAL MARIJUANA LAWS

### A. Legal Standards

"[C]ourts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it." (*Viva! Int'l Voice for Animals v. Adidas Prom. Retail Ops., Inc.* (2007) 41 Cal.4th 929, 936 [quoting *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815]; accord *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 956-957.) Courts "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." (*Viva! Int'l, supra*, 41 Cal.4th at p. 938 [quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230]; accord *United States v. Bass* (1971) 404 U.S. 336, 349; see also *Bronco Wine Co., supra*, 33 Cal.4th at p. 974 [in areas of traditional state regulation, a "strong presumption" against preemption applies and state law will not be displaced "unless it is clear and manifest that Congress intended to preempt state law"].) The strong presumption against preemption "'provides assurance that the "federal state balance" will not be disturbed unintentionally by Congress or unnecessarily by the Courts.'" (*Olszewski, supra*, 30 Cal.4th at p. 815 [citation omitted].) To find preemption, the Court must be "absolutely certain that Congress intended" that result. (See *Gregory v. Ashcroft* (1991) 501 U.S. 452, 464.)

Ordinarily, there are four ways in which a statute may be preempted: (1) where Congress enacts a statute that explicitly preempts state law, (2) where state law actually conflicts with federal law, (3) where federal law occupies a field to such an extent that it is reasonable to conclude that Congress does not wish the states to regulate in that area, or (4) where the state law at issue stands as an obstacle to the accomplishment of the objectives of Congress. (*Viva!, supra*, 41 Cal.4th at p. 936.) At its core, the preemption question is one of Congressional intent, which is the "ultimate touchstone." (*Viva!, supra*, 41 Cal.4th at p. 939 [quoting *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485]; *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949.)

To determine whether Congress intended to preempt state law, courts look to the statutory text as the best indicator of Congress' intent. (*Sprietsma v. Mercury Marine* (2002) 537 U.S. 51, 62-63.) Where, as here, "Congress has expressly identified the scope of the state law it intends to preempt, [courts] infer [that] Congress intended to preempt no more that that absent sound contrary evidence." (*Viva!, supra*, 41 Cal.4th at p. 945; see also *Sprietsma v. Mercury Marine, supra*, 537 U.S. at pp. 62-63 [where a stature "contains an express pre-emption clause, our 'task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent'"] [quoting *CSX Transp., Inc. v. Easterwood* (1993) 507 U.S. 658, 664]; *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 541 ["In these cases our task is to identify the domain expressly preempted, [citation],

because ‘an express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to preempt other matters”] [quotation omitted]; *Jevne v. Superior Court, supra*, 35 Cal.4th at p. 950 [inclusion of a savings clause in a statute negates field preemption].)

Under our federalist system of government, the states have traditionally regulated the practice of medicine and defined crimes. (See *Whalen v. Rose* (1977) 429 U.S. 589, 603 fn. 30 [collecting cases]; *Medtronic, Inc. supra*, 518 U.S. at p. 475 [noting that States “primarily and historically” have power “to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons” and the “historic primacy of state regulation of matters of health and safety”] [citing cases].) Due to this historical allocation of power to the states regulate in these areas, as well as their status as “independent sovereigns in our federalist system,” the United States Supreme Court has concluded that a clear statement is required before the Court will conclude that Congress intended to interfere with those powers. (*Medtronic Inc., supra*, 518 U.S. at pp. 475 & 485.) Express preemption provisions in these areas are to be interpreted narrowly. (*Ibid.*)

### B. The CSA Expressly Provides for Federal Preemption of State Drug Laws Only Where There Is a “Positive Conflict” Such that the Two Sets of Laws Cannot Stand Together

It was out of respect for the traditional role of the states in regulating medicine and crime that Congress included in the CSA an express preemption

provision, which contains an unambiguous expression of intent *not* to preempt state law. 21 U.S.C § 903 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.

This express preemption provision has been referred to as the CSA's "anti-preemption" provision. (Cf. *United States v. $79,123.49 in United States Cash & Currency* (7th Cir. 1987) 830 F.2d 94, 98 [referring to 21 U.S.C § 903 as the "anti-preemption provision of Controlled Substances Act"]; *City of Hartford v. Tucker* (Conn. 1993) 621 A.2d 1339, 1341 [same]; Am. Jur. 2d Drugs and Controlled Substances § 30 (2007) [same]; see also *Gonzales v. Oregon* (2006) 546 U.S. 243, 251 ["The CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its pre-emption provision"].) It precludes obstacle preemption.

Because the scope of federal preemption is defined by congressional intent (*Viva!, supra*, 41 Cal.4th at p. 939; *Jevne v. Superior Court, supra*, 35 Cal.4th at p. 949), the Superior Court correctly found that Congress' use of the term "positive conflict," such that the state and federal cannot stand together, evidences Congress' intent that obstacle preemption not apply. (See CT., vol. 6. p. 1229; cf. *Viva!, supra*, 41 Cal.4th at p. 945 [where "Congress has expressly identified the scope of the state law it intends to preempt, [courts] infer [that] Congress intended

to preempt no more that that absent sound contrary evidence"]; see also *Gonzales v. Oregon, supra*, 546 U.S. at pp. 270-271 ["Further cautioning against the conclusion that the CSA effectively displaces the States' general regulation of medical practice is the Act's pre-emption provision, which indicates that, absent a positive conflict, none of the Act's provisions should be 'construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State'"] [quotation omitted]; *United States v. Oakland Cannabis Buyers' Coop.* (2001) 532 U.S. 483, 502 [conc. opn. Of. Stevens, J.] ["courts [must], whenever possible, ... avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a state have chosen to serve as a laboratory in the trial of novel social and economic experiments without risk to the rest of the country"] [citations and quotation marks omitted].)

In arguing for preemption in the face of this clear expression of Congressional intent, the Counties contend that Congress' use of the term "conflict" means that ordinary conflict preemptions apply, since the modifier "positive" has no meaning because there is no such thing as a negative conflict. (See Appellant County of San Diego's Opening Brief [hereinafter "San Diego Brief"] at p. 19 7 fn. 10; Opening Brief of Plaintiffs and Appellants County of San Bernardino and Gary Penrod [hereinafter "San Bernardino Brief] at p. 17].) This

attempt to read Congress' limitation on the scope of conflict preemption out of the statute violates longstanding principles of statutory construction.

One well-recognized maxim of statutory construction is that significance must be attributed to every word and phrase of a statue, since the Legislature cannot be presumed to have engaged in idle acts. (See *United States v. Menasche* (1955) 348 U.S. 528, 538-539 [quoting *Montclair v. Ramsdell* (1883) 107 U.S. 147, 152]; *People v. Woodhead* (1987) 43 Cal.3d 1002, 1010; *Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805.) Here, not only does Congress define "positive conflict" as meaning that the two sets of statutes cannot coexist, but this can be divined from the ordinary meaning of "positive." The *Webster's Dictionary* defines "positive" as "admitting of no question," "fully assured," and "not speculative or theoretical." Thus, one can glean from the language of § 903 that Congress intended the CSA to preempt state drug laws only where it is proven that compliance with both sets of laws is impossible. (Cf. *Viva, int'l, supra*, 41 Cal.4th at p. 944.)

Thus, in *Southern Blasting Services v. Wilkes County* (4th Cir. 2002) 288 F.3d 584, the court was called upon to apply the preemption provision of the federal Hazardous Materials Transportation Act (*Id.* at pp. 587-589.). Like Section 903, that statute provides that states may legislate in the areas of explosives "unless there is a direct and positive conflict between [state and federal law] so that the two cannot be reconciled or consistently stand together." (18 U.S.C. § 848.) The court interpreted this express preemption provision as

"restat[ing] the principle that state law is superseded in cases of actual conflict with federal law such that 'compliance with both federal and state regulations is a physical impossibility.'" (*Southern Blasting, supra*, 288 F.3d at p. 590.) The court held that the applicable federal law did not preempt the state regulation because the state law "would [not] result in a violation of" the federal law. (*Id.* at p. 591.) The court did not, in addition, analyze the state regulation under obstacle preemption principles. (See also *Gonzales, supra*, 546 U.S. at p. 290 [dis. Opn. of Scalia, J.] [stating that, in light of express preemption provision of Section 903, a federal regulation barring physician-assisted suicide "does not purport to pre-empt state law in any way, not even by conflict preemption – unless . . . [the State law] *require[s]* assisted suicide"] [italics in original].)

Nor does the United States Supreme Court's decision in *Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, compel a different result. In *Geier, supra,* the Court was called upon to decide, *inter alia*, whether the "saving" clause of the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. § 1381 *et seq.*) precludes the operation of implied conflict preemption principles. In concluding that it did not, the Court relied heavily on the express language of the statute. The "saving" clause at issue in *Geier* states that "[c]ompliance with" a federal safety standard "does not exempt any person from any liability under common law." (15 U.S.C. § 1397(k).) Because the statute is silent about the types of conflict that might cause state law to be preempted, the Court found that "[n]othing in the language of the saving clause suggests an intent to save state-law tort actions that

conflict with federal regulations." (*Geier, supra*, 529 U.S. at p. 869.) In doing this, however, the Court did not rule out the possibility of an express preemption provision foreclosing obstacle preemption; to the contrary, the Court stated that Congress *could* do this (*id.* at p. 872), "[b]ut there is no reason to believe that Congress has done so here." (*Ibid.*) The possibility described by the Court in *Geier* is precisely what is at issue here. The CSA contains an express preemption provision that rules out obstacle preemption.

### C. There Is No Positive Conflict Between State and Federal Law

Judged by these appropriate standards, it is clear that there is no positive conflict between the challenged medical marijuana laws and the CSA. Notwithstanding the Counties' attempt to create a conflict by pointing to the very different treatment of medical marijuana under state versus federal law, the important points for CSA preemption purposes are that California's medical marijuana laws do not require anyone to violate federal law, nor do they purport to immunize persons from prosecution under the CSA. (See *infra* at p. 18.) The only provisions of the CUA or MMPA which directly impact the Counties are those requiring them to implement the voluntary identification card program. (Health & Saf. Code § 11362.71 *et seq.*) Issuing these identification cards, however, does not require the Counties to run afoul of any federal law. The Counties can comply with their obligations under the MMPA without risk of a federal prosecution. The federal government may, if it chooses, continue to prosecute Californians for cultivating and possessing marijuana for medical purposes (*Gonzales v. Raich*

(2005) 545 U.S. 1, 28-29), but this can be accomplished while at the same time leaving California's medical marijuana laws, "which involve state law alone" (*People v. Mower* (2002) 28 Cal.4th 457, 465 fn. 2), intact.[1] There is no positive conflict under the CSA where, as here, the two sets of laws can stand together in this fashion. (See *Viva, int'l, supra,* 41 Cal.4th at p. 944 [stating that there is no conflict preemption where compliance with both federal and state law is not a "physical impossibility"] [quoting *Hillsborough County v. Automated Medical Labs., Inc.* (1985) 471 U.S. 707, 713].)

### D. Even if Obstacle Preemption Were to Apply, California's Medical Marijuana Laws Do Not Stand as an Obstacle to the Objectives of Congress

In any event, California's medical marijuana laws do not stand as an obstacle to the objectives of Congress in enacting the CSA. The purpose of the CSA, as declared at its outset, is to promote the "health and general welfare of the American people." *See* 21 U.S.C. § 801(2). To this end, as the Supreme Court and Ninth Circuit have recognized, the CSA was narrowly drafted to combat drug abuse and drug trafficking, not to regulate the practice of medicine generally.

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[1] The Counties trumpet *Raich* as strongly suggesting that California's medical marijuana laws are preempted. (San Diego Brief at pp. 32-36; see San Bernardino Brief at pp. 11-14.) But, as Division Three of this Court recognized in *Garden Grove v. Superior Court (Kha)* (Nov. 28, 2007) --- Cal.Rptr.3d ----, 2007 WL 4181909, *Raich* was not decided on preemption grounds. (*Id.* at p. *16.) "The upshot of *Raich* is that the federal government and its agencies have the authority to enforce the federal drug laws, even in a state like California that has sanctioned the use of marijuana for medicinal purposes. However, we do not read *Raich* as extending beyond this particular point, into the realm of preemption." (*Id.* at p. *17.)

(*Gonzales v. Oregon, supra,* 546 U.S. at p. 269; cf. *Oregon v. Ashcroft* (9th Cir. 2004) 368 F.3d 1118, 1128 & 1129, *affd. in Gonzales v. Oregon, supra* ["Congress clearly intended to limit the CSA to problems associated with drug abuse and addiction;" noting "CSA's limited mandate to combat prescription drug abuse and addiction"] [collecting citations]; see also *Gonzales v. Raich,* 545 U.S. 1, 12 (2005) ["The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances."]; see also *Oregon v. Ashcroft* (D. Or. 2002) 192 F.Supp.2d 1077, 1092, *affd. in* 368 F.3d 1118 (9th Cir. 2004), *affd. in* 126 S.Ct. 904 (2006) ["The CSA was never intended, and the USDOJ and DEA were never authorized, to establish a national medical practice or act as a national medical board."].) "The particular drug abuse that Congress sought to prevent [in the CSA] was that deriving from the drug's 'stimulant, depressive, or hallucinogenic effect on the central nervous system.'" (See Statement of Attorney General Reno on Oregon's Death with Dignity Act (June 5, 1998) [found at http://judiciary.house.gov/Legacy/attygen.htm [quoting 21 U.S.C. § 811(f)]; see also *Gonzales, supra,* 546 U.S. at p. 273 ["The statutory criteria for deciding what substances are controlled, determinations which are central to the Act, consistently connect the undefined term 'drug abuse' with addiction or abnormal effects on the nervous system."].)

With these objectives of Congress properly understood, it can be seen that California's medical marijuana laws do not stand as an obstacle to them. Seriously ill persons who use marijuana after having this treatment recommended

to them are not engaging in drug abuse, as that term has been conventionally understood. (Cf. *People v. Mower* (2002) 28 Cal.4th 457, 482 [equating possession of marijuana in compliance with the CUA to "the possession of any prescription drug with a physician's prescription"]; *Oregon v. Ashcroft* (9th Cir. 2004) 368 F.3d 1118, 1166, *affd. in* 126 S.Ct. 904 (2006) [contrasting "drug abuse" and "medical practice"].) Nor is drug trafficking at issue here, since the CUA expressly provides that it shall not "be construed to supersede legislation prohibiting persons from endangering others, nor to condone the diversion of marijuana for nonmedical purposes." (Health & Saf. Code § 11362, subd. (b)(2)(C).)

Nevertheless, San Diego contends that California's medical marijuana laws stand as an obstacle to the objectives of Congress because there will be leakage of marijuana produced for medical purposes into the recreational market. (San Diego Brief at pp. 25-28.) Not only does this statement lack factual support in the record, but, more importantly, it overlooks the fact that California law enforcement continues to arrest and prosecute crimes relating to the recreational use of marijuana. (See Health & Saf. Code § 11362, subd. (b)(2)(C).) Thus, California continues to further the objectives of Congress, even though it could have elected to opt out completely by decriminalizing marijuana for all purposes. San Diego views the glass as half empty when it should be viewed as half full.

Thus, in *Garden Grove v. Superior Court (Kha)* (Nov. 28, 2007) --- Cal.Rptr.3d ----, 2007 WL 4181909, Division Three of this Court rejected nearly

identical arguments as those made by the Counties here. That case involved the question whether law enforcement must return medical marijuana to qualified patients who demonstrate that they are legally entitled to possess the marijuana under California law. In finding that due process requires this, and federal law does not preempt state law in this regard, Judge Bedsworth, writing for a unanimous court, explained as follows:

> Despite [the anti-preemption provision of 21 U.S.C. § 903], the City argues that in enacting the CSA, Congress intended to occupy the field of marijuana regulation so extensively that ordering the return of a defendant's medical marijuana under state law would be absolutely anathema to congressional intent. We cannot agree. It's abjuration of preemption is simply too clear. Congress enacted the CSA to combat recreational drug abuse and curb drug trafficking. (*Gonzales v. Oregon, supra*, 546 U.S. at p. 271; *Gonzales v. Raich, supra*, 545 U.S. at pp. 10-13.) Its goal was not to regulate the practice of medicine, a task that falls within the traditional powers of the states. (*Gonzales v. Oregon, supra*, 546 U.S. at p. 269.) Speaking for the majority in *Gonzales v. Oregon*, Justice Kennedy explained, "The [CSA] and our case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood. *Beyond this, however, the statute manifests no intent to regulate the practice of medicine generally."* (*Ibid.*, italics added.)
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> These restrictions [on recreational use of marijuana in California's medical marijuana laws] are consistent with the goals of the CSA. Irrespective of Congress' prohibition against marijuana possession, "[i]t is unreasonable to believe that use of medical marijuana by [qualified users under the CUA] for [the] limited purpose [of medical treatment] will create a significant drug problem" (*Conant v. McCaffrey* (N.D. Cal. 1997) 172 F.R.D. 681, 694 fn. 5, *affd. in Conant v. Walters, supra*, 309 F.3d 629), so as to undermine the stated objectives of the CSA. (Cf. *Gonzales v.*

> *Oregon, supra*, 546 U.S. at p. 273 [state initiative allowing doctors to prescribe controlled substances for the purpose of facilitating a patient's suicide is not inconsistent with the CSA's objective to prevent recreational drug use].)

(*Garden Grove v. Superior Court, supra,* 2007 WL 4181909, at pp. *18-*19.) This reasoning is equally applicable here.

Still, San Diego contends that a state law that authorizes what federal law prohibits is preempted. (San Diego Brief at pp. 28-31.) This, however, is not the law. (See Brief of Respondents State of California and Sandra Shewry [hereinafter State Brief] at pp. 23-25 & fn. 11.) Whereas a state cannot immunize persons from federal prosecution for violating federal law (or authorize a violation of federal law), they may make activity legal under state law that is prohibited by federal law, so long as the conduct is not required and the federal government remains free to regulate it. California has expressly disclaimed any intent to authorize the violation of federal law. (See CT, vol. 5, p. 939 [MMPA application admonishing that "the Act does not protect . . . individuals from federal prosecution under the federal Controlled Substances Act"].) Nor, as the Superior Court found, do the laws at issue require anyone to violate the CSA. (See CT, vol. 6, p. 1163 ["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."] [italics in original].)

Again, *Garden Grove v. Superior Court, supra,* is instructive:

> In considering the City's preemption argument, it is also important to recognize what the CUA does *not* do. It does not expressly "exempt medical marijuana from prosecution under federal law." (*United States v. Cannabis Cultivators Club* (N.D. Cal. 1998) 5 F.Supp.2d 1086, 1100.) "[O]n its face," the Act "does not purport to make legal any conduct prohibited by federal law; it merely exempts certain conduct by certain persons from California drug laws." ( *Ibid.*) While in passing the CUA the voters may have wanted to go further and actually exempt marijuana from prosecution under federal law, a result which would have led to an irreconcilable conflict between state and federal law ( *ibid.*), we know from *Raich* that the Commerce Clause forecloses that possibility. So, what we are left with is a state statutory scheme that limits state prosecution for medical marijuana possession but does not limit enforcement of the federal drug laws. This scenario simply does not implicate federal supremacy concerns. (*United States v. Cannabis Cultivators Club, supra*, 5 F.Supp.2d at p. 1100.)

(*Garden Grove v. Superior Court, supra,* 2007 WL 4181909, at p. *19 [italics in original, footnote omitted].)

Indeed, the case law is replete with examples of state laws that operate like California's medical marijuana laws, which are not preempted. In *Hyland v. Fukuda* (9th Cir. 1978) 580 F.2d 977, the Ninth Circuit considered the interplay between a federal firearms statute that made it a felony for a felon to possess a firearm (18 U.S.C. § 1202), and a state statute that expressly exempted such conduct from criminal sanction under state law where, as in appellant's case, the felon is a state employee required to carry the firearm as part of his duties (Haw. Rev. Stat. §§ 134-7(b) & 134-11(3)[2].) In rejecting appellant's argument that the state law was preempted, the court explained as follows:

[2] This statute has since been recodified at Haw. Rev. Stat. § 134-11(4).

> In this case, Haw.Rev.Stat. § 134-11(3) exempts state employees from the operation of Hawaii's gun laws. Congress has not chosen to create a parallel exception for section 1202(a). Although section 134-11(3) determines the legality of a certain act under state law, it has no impact on the legality of the same act under federal law. *Simply put, Congress has chosen to prohibit an act which Hawaii has chosen not to prohibit; there is no conflict between section 1202 and section 134-11(3)*.

(*Hyland v. Fukuda*, supra, 580 F.2d at p. 981 [italics added]; see also *Camden County Bd. Of Chosen Freeholders v. Beretta U.S.A. Corp.* (D.N.J. 2000) 123 F.Supp.2d 245, 250 fn. 2 ["this Court, like every other Court to have considered the issue, rejected the firearms defendants' attempt to remove to the case to this Court on the asserted ground that federal firearms regulations preempted the plaintiffs' state law claims."] [citing cases]; accord *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp* (E.D. Cal. 1990) 746 F.Supp.1415, 1427; *United States v. Kozerski* (D.N.H. 1981) 518 F.Supp. 1082, 1091 [citing *Hyland, supra*].)

An even more analogous statutory scheme to California's medical marijuana identification card program was discussed by the United States Supreme Court in *Caron v. United States* (1998) 524 U.S. 308. That case involved state-issued firearm identification cards issued by Massachusetts to felons, which enabled them to possess firearms that they were prohibited from possessing under federal law. (See *Caron, supra,* 524 U.S. at 317 [Dis. Opn. Of Thomas, J.] [citing 18 U.S.C. § 922; Mass. Gen. Laws §§ 140:123, 140:129B, 140:129C].) This identification card program has been in effect since 1969 (Mass. Gen. Laws § 140:129B, Historical and Statutory Notes) and has authorized gun possession that

is criminal under federal law the entire time (see 18 U.S.C. § 922, Historical and Statutory Notes), yet no one has successfully brought a preemption challenge to the state-issued identification card system.[3] California's medical marijuana identification program is not as novel as it has been portrayed, as it replicates other similar state law programs.

Next, San Diego contends that the CSA requires the states to enact drug laws that punish drug offenses as severely as does federal law, if they are to pass any such laws at all. (See San Diego Brief at p. 27.) While Congress could have ordained this (see *infra*), it has elected not do so. Compare, for example, the statute at issue in *Viva! Int'l*, *supra*, 16 U.S.C. § 1535, which states that "[a]ny State law or regulation with respect to [endangered species] is void to the extent that it may effectively (1) permit what is prohibited by this chapter . . . or (2) prohibit what is authorized. . . . Any state law or regulation respecting the taking of an endangered or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive that the prohibitions so defined." (16 U.S.C. § 1535, subd. (f).) Here, by sharp contrast, there is no preemption

[3] Although *Caron* did not involve a preemption challenge, it is noteworthy that the federal law at issue there involved a nearly identical preemption provision as the CSA. 21 U.S.C. § 927 provides: "No provision of this chapter shall be construed as indicating an intent on the part of the 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 so that the two cannot be reconciled or consistently stand together."

provision requiring state law to be at least as restrictive as the CSA. The absence of such a provision demonstrates that Congress did not intend to preempt state laws that are not at least as restrictive. (Cf. *Gonzales v. Oregon, supra*, 546 U.S. at p. 272 ["This provision strengthens the understanding of the CSA as a statute combating recreational drug abuse, and also indicates that when Congress wants to regulate medical practice in the given scheme, it does so by explicit language in the statute."]; *Argentine Republic v. Amerada Hess Shipping* (1989) 488 U.S. 428, 440 [when it wants to, Congress knows how to include the high seas within statute's jurisdictional reach, citing examples; failure to do so invokes the canon of construction that legislation applies only within territorial United States].) Finding preemption under these circumstances, on the other hand, would invalidate nearly all state drug laws, since few are as severe as federal law. Congress did not intend such a drastic disturbance of the federal-state balance. (See also *Viva!, Int'l supra*, 41 Cal.4th at p. 942 ["federal and state regulation should be allowed to coexist to the extent practicable"].)[4]

## II. FEDERAL PREEMPTION OF CALIFORNIA'S MEDICAL MARIJUANA LAWS IS FORECLOSED BY THE TENTH AMENDMENT

Indeed, if the federal government *had* sought to preempt state law in this area, which it has not, such "commandeering" of the states would violate the Tenth

[4] San Bernardino's claim that the Single Convention Treaty preempts California's medical marijuana laws fails for the same reasons as this preemption claim fails under the CSA, since the Treaty is not self-executing. (See Brief for Respondents San Diego NORML, Wo/Men's Alliance for Medical Marijuana, and Dr. Stephen O'Brien at pp. 36-37.)

Amendment. (See *Printz v. United States* (1997) 521 U.S. 898, 930-31; *New York v. United States* (1991) 505 U.S. 144, 157; *Nat'l Federation of Republican Assemblies v. United States* (S.D. Ala. 2002) 218 F.Supp.2d 1300, 1352 ["the federalism concerns that the Tenth Amendment embodies counsel hesitation before construing Congress's enumerated powers to intrude upon the core aspects of state sovereignty"].) Under the Tenth Amendment, the federal government may not "commandeer" state officials to enforce federal law -- "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." (*New York, supra*, 505 U.S. at p. 935.) The reason is that under our federalist system of government, sovereign states, at a minimum, must be able to control their own purse strings. As the Court stated in *Printz, supra:* "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." (521 U.S. at p. 922.)

Here, California has made a decision to conserve its scare law enforcement resources by declining to arrest and prosecute seriously ill persons in need of marijuana. In furtherance of this policy, in 2003, the Legislature enacted the voluntary identification card program to assist state law enforcement distinguish qualified medical marijuana patients from recreational users, so that qualified patients are "not subject to criminal prosecution or sanction." (See Health & Saf.

Code § 11362.5, subd. (b)(1)(B); SB 420, Stats. 2003, ch. 875, § 1(b)(1).) If the CSA were interpreted to preempt the state's voluntary identification card program, this would deprive the state of the mechanism it has chosen to differentiate medical marijuana patients (whom it does not wish to prosecute) from recreational marijuana users (whom it will continue to prosecute). Lacking such mechanism, state law enforcement officers will either have to: (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 medical marijuana patients, only to have the prosecutor or the court verify their status and formally dismissing the charges.[5] Such compelled expenditure of state funds by the federal government is precisely the type of "commandeering" forbidden by the Tenth Amendment. (Cf. *Printz*, *supra; New York*, *supra*; see also *New York*, *supra*, 505 U.S. at p. 161 ["While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."].)[6]

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[5] Alternatively, in light of these unattractive options, state law enforcement officials may simply throw their hands up in the air and decline to prosecute *any* marijuana offenses. This can hardly be said to advance the federal regulatory scheme.

[6] It bears noting that in *New York v. United States* (1991) 505 U.S. 144, 505, the Supreme Court described the purpose of the Tenth Amendment as follows:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of public officials governing the States. To the contrary, the Constitution divides authority between

Thus, in *Conant v McCaffrey* (9th Cir. 2002) 309 F.3d 629, Judge Kozinski explained in a concurring opinion that the federal government's threat of revoking the DEA licenses of California physicians who recommend marijuana to their patients violates the Tenth Amendment. (*Id.* at pp. 646-647 [conc. op. of Kozinski, J.].) Judge Kozinski reasoned that the federal policy targeting doctors deprives the state of the mechanism it has chosen to distinguish between legal and illegal drug use under state law. (*Id.* at p. 646.) This, in words borrowed from the Supreme Court, constitutes an impermissible "attempt to 'control or influence the manner in which States regulate private parties." (*Ibid.* [quoting *Reno v. Condon* (2000) 528 U.S. 141, 150]; see also *Ibid.* ["In effect, the federal government is forcing the state to keep medical marijuana illegal."].) Because "the state is being forced to regulate conduct that it prefers to leave unregulated," the federal policy targeting doctors violates the commandeering doctrine announced in *New York* and *Printz.* (See *Ibid.* at pp. 646-647.)

Nor can San Diego overcome this Constitutional deficiency in its preemption argument by contending that cooperative federalism allows the federal government to enact regulatory programs that give the states the choice of regulating activity according to federal law or risk preemption. (See San Diego Brief at pp. 36-37.) While it is true that Congress *may* "offer States the choice of

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> federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

regulating . . . activity according to federal standards or having state law pre-empted by federal regulation" (*New York, supra*, 505 U.S. at p. 167), Congress has not elected not to issue this ultimatum to states in the CSA. As the examples cited by the Court in *New York, supra,* demonstrate, where Congress intends to offer the states the choice of regulating by federal standards or having state law preempted, it does so expressly. (See 33 U.S.C § 1313 [Clean Water Act section authorizing the EPA to recommend changes to standards promulgated by the State and, if the State fails to comply with that recommendation, the Act authorizes the EPA to promulgate water quality standards for the State]; 29 U.S.C. § 667 [Occupational Safety and Health Act section requiring approval of State health and safety standards where such standards "are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate to the same issues"]; 33 U.S.C. § 1342, subd. (b) [Resource Conservation and Recovery Act section allowing EPA to authorize a State to supplant the federal permit program with one of its own, if the state scheme is sufficiently stringent to ensure compliance with federal standards]; 16 U.S.C. § 3115, subd. (c) [Alaska National Interest Lands Conservation Act section allowing for state laws that consistent with, and as protective as federal standards for the taking of fish and wildlife].) By sharp contrast, Congress has indicated in the CSA that it does *not* intend to force states to make such a decision. (See 21 U.S.C. § 903.) Absent such ultimatum by Congress, it cannot be assumed that it intended to conscript states to enforce its

federal drug laws, in violation of the Tenth Amendment. (Cf. *New York, supra*, 505 U.S. at p. 175 [holding that Take Title provisions of Low-Level Radioactive Waste Policy Act violate Tenth Amendment, since they "'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments."]; see also S.B. 420, Section 1(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"]; *National Federation of Republican Assemblies v. United States* (S.D. Ala. 2002) 218 F.Supp.2d 1300, 1352 ["the 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 SUPERIOR COURT CORRECTLY CONCLUDED THAT THE MMPA DID NOT UNCONSTITUTIONALLY AMEND THE CUA

Although neither San Diego nor San Bernardino raised the issue in their complaints below, San Bernardino, but not San Diego, contends that the MMPA unconstitutionally amends the CUA.[7] Overlooked by San Bernardino in making this argument is that the MMPA is fully consistent with the will of the electorate in passing the CUA; it does not "undo what the people have done." (Cf. *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 22 [quotation omitted].) Notably, the qualified patients whom the electorate sought to protect through the passage of

[7] The State correctly notes that this issue has not been properly preserved for appeal. (See State Brief at pp. 31-33.)

Proposition 215 stand in favor of the MMPA, while a county that claims that the state's medical marijuana laws are preempted is attacking it.

Article II, § 10(c) of the California Constitution states: "The Legislature . . . may amend or repeal an initiative statute by another statute . . . only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." Its purpose is to "protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." (*Knight, supra,* 128 Cal.App.4th at p. 22 [quoting *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484].) "[L]egislative enactments related to the subject of an initiative statute may be allowed" if they address a "related but distinct area" or if they address a "different legal relationship." (*Knight, supra*, 128 Cal.App.4th at p. 23; *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 43.) Legislation may be passed relating to the subject of an initiative that the initiative "does not specifically authorize or prohibit." (See *People v. Cooper* (2002) 27 Cal.4th 38, 47.)

Here, the MMPA's identification care provisions are not only not expressly foreclosed by the CUA, but they advance its purposes; hence, it is not unconstitutional. San Bernardino primarily contends that the identification card provisions of the MMPA unconstitutionally amend the CUA because they impose costs on the county. (See San Bernardino Brief at p. 25.) The fact that a statute

imposes costs on the county does not make it an unconstitutional amendment of an initiative. The identification card program is wholly voluntary and does not alter the legal status of qualified patients who choose not to participate in the program in any way. (See Health & Saf. Code § 11362.71, subd. (f) ["It shall not be necessary for a person to obtain an identification card in order to claim the protections of Section 11362.5."].) The California electorate not only did not specifically prohibit the establishment of a medical marijuana identification card program in the CUA, but the voters expressly sought "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes" where recommended to do so by a physician. (Health & Saf. Code § 11362.5, subd. (b)(1)(A).) The Superior Court correctly determined:

> 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."

(CT, vol. 6., p. 1231; cf. *Cooper, supra*, 27 Cal.4th at p. 47-48 [holding that trial court's restriction of presentence credits does not unconstitutionally amend the Briggs Initiative where it did not "circumvent the intent of the electorate in adopting the Briggs Initiative"].)

Nor are any of the MMPA's other provisions contrary to the electorate's intent in passing the CUA and, in any event, the Counties do not have standing to

challenge them. For instance, the CUA speaks only to the cultivation and possession of marijuana, and is silent with respect to transportation, possession for sale, and managing a location where marijuana is sold. (See Health & Saf. Code § 11362.5, subd. (d).) Although the Legislature has stated in the MMPA that qualified medical marijuana patients not be subject to these laws, it is free to change its own laws in these areas, since they involve a "different legal relationship" than the cultivation and possession provisions of the CUA. (Cf. *Knight, supra*, 128 Cal.App.4th at p. 23; *Mobilepark West Homeowners Assn., supra*, 35 Cal.App.4th at p. 43.) Moreover, these laws do not constitute an unconstitutional amendment of the CUA because they are consistent with the voters' request that "the federal and state governments [work] to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (See Health & Saf. Code § 11362.5, subd. (b)(1)(C).)

**CONCLUSION**

Moe than four years has passed since the Legislature passed the MMPA, yet several counties still have refused to implement its identification card provisions. The result is that local law enforcement officials in these counties are deprived of the device that would permit them to implement California law as the voters intended. The refusal to implement state law not only works to the detriment of medical patients, but to the entire state as well, since it results in the waste of scare law enforcement resources. Our federalist system of government not only allows states to control their purse strings in this fashion, but it requires

the federal government to respect this. Here, the federal government has respected California's medical marijuana laws by not claiming they are preempted; instead, the ones making this claim are the Counties. The CUA has existed side by side with the CSA for more than eleven years and there is no good reason to undermine Congress' intent in enacting the anti-preemption provision of the CSA by disturbing this coexistence.

DATED: December 17, 2007 Respectfully submitted,

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## CERTIFICATE OF WORD COUNT

I, JOSEPH D. ELFORD, declare as follows:

On December 17, 2007, I performed a word count of the above-enclosed brief, which revealed a total of 8,457 words.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this __ day of December in Oakland, California.

_____
JOSEPH D. ELFORD