

GIC860665 Consolidated with GIC861051
County of San Diego v. San Diego NORML

Tentative Ruling re Motions for Judgment on the Pleadings

First, the Court states what this ruling is not about. This ruling does 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, and those issues of law are addressed below.

A. The Nature and Procedural Posture of this Matter.

Case GIC860665 is the declaratory relief action filed on 2/1/06 by County of San Diego against San Diego NORML, State of California, and Sandra Shewry (Director of the California Department of Health Services).

Case GIC861051 is the declaratory relief action filed on 2/8/06 by County of Bernardino and Gary Penrod (Sheriff of the County of San Bernardino) against State of California and Sandra Shewry.

On 3/30/06, the above two cases were consolidated, with GIC860665 as the lead case.

On 6/2/06, the Court granted County of Merced and Merced County Sheriff Mark Pazin's motion to for leave to file their Complaint In Intervention alleging causes of action for declaratory relief and injunctive relief.

On 8/4/06, 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 8/10/06.

The three counties and two sheriffs allege that Health and Safety Code¹ 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").

¹ Unless otherwise noted, statutory references 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."

Merced County and Sheriff also allege that the MMP (in alleged contravention of section 10(c) of article II of the California Constitution) improperly “amends” the CUA. The CUA is the codification of Proposition 215, an initiative.

The counties and sheriffs filed motions for judgment on the pleadings. The State of California (and Sandra Shewry) and the 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 the 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 the Patient Intervenors’ oppositions to the counties’ motions.

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

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.
2. Whether the CUA (which is the codification of Proposition 215), 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.

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.”

Bronco Wine Co. v. Jolly (2004) 33 Cal.4th 943, 956-57 (citations omitted; emphasis in original).

More generally, the California Supreme Court explains:

“If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. [Citations.] The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers.”

People v. Superior Court (Romero) (1996) 13 Cal.4th 497, 509 (citations omitted).

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.*

(Emphasis added.)

The State convincingly rebuts San Diego County's argument that, under 21 U.S.C. § 903, the CUA and MMP are preempted because they "authorize" conduct that federal law prohibits. (See State Oppos., pp. 10-13.) The State is correct that the test is whether the CUA or MMP *require* conduct that violates federal law.

Plaintiffs do not effectively rebut defendants' position 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.

(Emphasis added.)³

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 *Romero, supra*, 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."

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."

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

The Court concludes that neither the challenged parts of the CUA nor the MMP are 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.

Merced County and Sheriff challenge the MMP under this section of the California Constitution. The issue is whether the MMP "amends" the CUA.

This Court has the following appellate guidance (*inter alia*):

The purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.

.....

An amendment has been defined as any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form, ... [Citation.] A statute which adds to or takes away from an existing statute is considered an amendment. ... [A]n amendment [is] a legislative act designed to change some prior or existing law by adding or taking from it some particular provision. An amendment of an initiative may be accomplished by some action other than by the subsequent enactment of a statute; the question is whether the action in question adds to or takes away from the initiative. In determining whether a particular action constitutes an amendment, we keep in mind that [i]t is the duty of the courts to jealously guard [the people's initiative and referendum power].... [I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right [to local initiative or referendum] be not improperly annulled. Any doubts should be resolved in favor of the initiative and referendum power, and amendments which *may* conflict with the subject matter of initiative measures must be accomplished by

popular vote, as opposed to legislatively enacted ordinances, where the original initiative does not provide otherwise.

Proposition 103 Enforcement Project v. Quackenbush
(1998) 64 Cal.App.4th 1473, 1484-1486 (internal quotation marks, citations and footnote omitted; brackets in original).

Guided by precedent, including that summarized in *Quackenbush*,⁴ this Court concludes the MMP does not amend the CUA.

The MMP creates a stand-alone and 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 (passed by the Legislature).

C. Requests For Judicial Notice.

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

D. The Tentative Ruling.

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

At the hearing of this matter, counsel should be prepared to address the injunctive relief requested in Patient Intervenors' complaint.

⁴ The Court agrees with defendants that *Gonzales v. Raich, supra*, and *People v. Urziceanu* (2005) 132 Cal.App.4th 747, are not helpful to this Court's analysis because those decisions were not considering the issue before this Court.