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NO. 880794

SUPREME COURT OF THE STATE OF WASHINGTON

CANNABIS ACTION COALITION
STEVE SARICH, JOHN WORTHINGTON;
AND; DERYCK TSANG; AND; ARTHUR WEST

Appellants

v.

CITY OF KENT ET AL,

Respondents

APPELLANT JOHN WORTHINGTON'S REPLY BRIEF

John Worthington
4500 SE 2ND PL.
Renton WA.98059

ORIGINAL

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I. INTRODUCTION

The City of Kent's first response to the plaintiffs' legal challenge of its ban on medical cannabis collectives was to file a counterclaim against Worthington for violations of Kent ordinance 4036. When doing so, Kent had to reference Worthington's public participation in the lawsuit challenging Kent's ordinance, because they had no Kent location where Worthington violated the ordinance.

In response to Kent's counterclaims, Worthington filed both a SLAPP special motion to strike and a SLAPP suit defense. In response to the SLAPP defenses, Kent argued that Worthington had standing to be countersued, and that its counterclaim was not a SLAPP. Then in reply to the appellants' motion for summary judgment, Kent argued Worthington had no standing.

In a fair tribunal, Kent either filed a SLAPP back suit against Worthington for his public participation in a lawsuit challenging Kent's ban on medical cannabis collectives, or, Worthington had standing to challenge the ordinance since he was countersued and was in effect challenging the ordinance as applied.

For its part, the trial court confused the situation by protecting Kent from the consequences of filing a SLAPP suit against Worthington, by allowing Worthington standing for the purposes of avoiding a SLAPP judgment[1], and or, for the purposes of including Worthington in the injunction order. The trial courts

---

[1] The trial court judge "forecasted" prior to a ruling "But at the moment the Court does not believe that there would be multiple awards of $10,000." Worthington agreed to drop his SLAPP defenses because it was obviously a futile motion in front of an unfair tribunal. (PRP 9)

ruling that Worthington had no standing is not clear by the order, and would make no sense because Worthington was included in the injunction order and because Kent was pronounced pre-hearing not to be liable for SLAPP fines, despite filing an obviously frivolous counterclaim.

If the Appellate courts determine that the trial court's orders ruled Worthington did not have standing, Worthington's SLAPP suit claims should still be available, since Kent's counterclaims were obviously frivolous and the trial court judges pre-hearing ruling that Kent did not file frivolous counterclaims was incorrect. Furthermore, the injunction would not apply to Worthington and the trial court's ruling that there were no disputes of material fact should be reversed and remanded back to the trial court, with orders to determine issues regarding frivolous counterclaims and SLAPP defenses.

In the alternative, Worthington respectfully requests the Appellate courts rule Worthington has standing to challenge Kent's ban on medical cannabis collectives since he was countersued for violating the ordinance and was in effect challenging the ordinance as applied and not on its face. Furthermore, since by Kent's own admission, one member of the group of plaintiffs had standing (Plaintiff Tsang), the court need not consider the standing of the other plaintiffs.

Finally, Kent's arguments in response to Worthington's opening brief have no merit and their ordinance amounts to an act of cooperative federalism that violates state law. When the Washington State legislature failed to pass SB 5955 and SB 6255, Kent and other frustrated cities and counties took matters into their own hands, and took local control of medical cannabis collectives on their own.

II. ARGUMENT IN REPLY

A. Kent filed a counterclaim against Worthington for violating the Ordinance

In its answer to plaintiffs' complaint for declaratory and injunctive relief, the Kent filed counterclaims against all the plaintiffs. (CP 658-757) Worthington immediately filed a special motion to strike pursuant to the SLAPP statute under RCW 4.24.525. Kent responded to that motion arguing the countersuit was not a SLAPP suit and that Worthington could be countersued. Worthington replied that Kent did file a SLAPP suit because they referenced the complaint in the counterclaim. (CP 126-134.) In their response to Worthington's special motion to strike, Kent argued its counterclaim against Worthington was not based on retaliation and to cause delay or undue expenses, and was based on all the plaintiffs' violations of the ordinance. Kent Cited a California SLAPP case, City of Cotati v. Cashman 29 Cal.4th 69, 79 (2002), which held a countersuit was not a SLAPP suit. Worthington argued the *Cotati* ruling affirmed that Kent indeed filed a SLAPP countersuit because the Kent counterclaim arose from the plaintiffs Complaint and not from violations of Kent's ordinance. Worthington demonstrated that Kent, absent any locations for plaintiffs Worthington, Sarich and West, had no choice but to reference the complaint in its counterclaims, unlike in *Cotati*, where the City did not reference the complaint in its countersuit. (CP 126-134)

In the joint Special Motion to Strike/ Summary judgment hearing, Worthington reluctantly dropped his SLAPP defenses, but only after the trial court judge stated "But at the moment the Court does not believe that there would be

multiple awards of $10,000." (PRP 9) Worthington objects to the pre-judgment comments of the trial court used to pressure all the plaintiffs to drop SLAPP defenses, because it enabled Kent to take multiple inconsistent positions and get away with it. First, they countersued the Plaintiffs, and then they claim three of the plaintiffs they just countersued had no standing. Then Kent writes an injunction order asking for an injunction on the same three plaintiffs they claimed had no standing. The trial court accommodated every position Kent took and looked far too partial in the process. Worthington respectfully requests the trial courts pre-judgment "forecasting", " the Court does not believe that there would be multiple awards of $10, 000." be treated as a ruling. If the Appellate courts see fit to consider the trial court's pre –judgment comments as a ruling, Worthington would like to add an assignment of error to include the pre-judgment ruling , that Kent did not file frivolous counter claims and there was no cause to consider SLAPP penalties. In that additional assignment of error, Worthington argues that the trial court's pre-judgment ruling rested on untenable grounds and was manifestly unreasonable because Kent obviously filed frivolous counterclaims against Worthington and three other members of the Cannabis Action Coalition. (Heretofore CAC). Worthington respectfully requests the appellate court rule the trial courts forecasted ruling "the Court does not believe that there would be multiple awards of $10, 000, be overturned because it was an abuse of discretion. Abuse of discretion occurs where the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255(2001).

B. Worthington had standing because he was countersued and was listed in the court's injunction order.

Worthington had standing because he was countersued (658-757), and because he was listed in the injunction order. (CP 646-647) If the Appellate court finds the trial court made a ruling Worthington did not have standing after he was countersued and then listed in the injunction order, Worthington would like to add that ruling Worthington to the assignments of error Worthington argues that decision should be overturned because it rested on untenable grounds and was manifestly unreasonable because Kent filed counterclaims against Worthington. Abuse of discretion occurs where the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255(2001).Once Kent's counterclaims were filed, Worthington's claims went beyond speculation and a facial challenge to an as applied challenge. Either Worthington had standing or he was hit with a SLAPP.

C. Plaintiff Tsang had standing so the rest of the CAC had standing

The City of Kent acknowledged Plaintiff Tsang of the CAC had standing.so the rest of the CAC had standing according to the federal case law in Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 918 (9th Cir.2004). "We agree that there is no reason to address Planned Parenthood's Standing. Where the legal issues on appeal are fairly raised by "one plaintiff [who] had standing to bring the suit, the court need not consider the standing of the other plaintiffs." Laub v. U.S. Dep't of the Interior, 342 F.3d 1080, 1086 (9th Cir.2003) (citing and explaining Watt v. Energy Action Educ.

Found., 454 U.S. 151, 160, 102 S.Ct. 205, 70 L.Ed.2d 309 (1981), and Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 264 & n. 9, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)); Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366, 1369 (9th Cir.1992); see also Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 147 n. 10 (3d Cir.2000).

As shown above, Worthington and the CAC had standing to challenge the Kent ordinance as applied, because of Kent's counterclaim, or in the alternative Because one of its members had standing, or because all the plaintiffs were in the court ordered injunction. If the trial court made a ruling Worthington did not have standing after he was countersued and then listed in the injunction order, it would have been an abuse of discretion, considering one member of the CAC had standing.

D. RCW 69.51A.140 is an orphan section

The exhibits reveal that SB 5955 and SB 6255 were purposely written to attempt to give local control of all production of cannabis and create non-profit co-operatives. These bills would not have been written if RCW 69.51A.140 contained the local control language Kent claims it did after the Governor's veto. Internet research and public records requests revealed the Association of Washington Cities, the Washington State Association of Counties and the prime sponsors of ESSSB 5073 themselves Senator Jeanne Kohl Welles and Senator Jerome Delvin, all thought RCW 69.51A.140 lacked any language to give any sort of local control for any production of medical cannabis. The Governor's veto created no authority for counties and cities to co-regulate medical cannabis

and medical practice in Washington State. The Governor left section 1102 of ESSSB 5073 in for one reason and one reason only, and that was to give the legislature a chance to pass legislation creating non-profit cooperatives language in the extended session, which the Governor indicated she "remained open to". When these bills did not pass Kent, and numerous other cities started passing medical cannabis collective bans out of frustration not from any statutory authority. The trial court abused its discretion and rested its decision on untenable grounds and was manifestly unreasonable, because the legislature and the Governor had different reasons for leaving RCW 69.51A.140 intact and it was not for local control of 'all production" of medical cannabis as Kent claims. It was to allow nonprofit cooperatives to distribute medical cannabis if the legislature could create such language. (CP 530-545) (APPENDIX A)

E. Kent's ordinance violates RCW 69.51A.025 and RCW69.51A.085

The words "nothing in this chapter" would include RCW 69.51A.140, even if it wasn't an orphan section. RCW 69.51A.085 contains no language indicating any local control of collective gardens. The trial court's decision was based on statutory interpretation; in such a case, a trial court's decision is reviewed de novo. Meadow Valley Owners Ass'n v. Meadow Valley, LLC, 137 Wn. App. 810, 816, 156 P.3d 240 (2007).The trial court abused its discretion when applied an incorrect legal analysis of RCW 69.51A.140, RCW 69.51A.085,and RCW 69.51A.025. "A trial court may abuse its discretion by applying an incorrect legal analysis or other error of law". State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167

(2007).The trial court also rested its decision on untenable grounds and was manifestly unreasonable, because it failed to give effect to the plain meaning of RCW 69.51a.140, RCW 69.51A.025 and RCW 69.51A.085. "In the absence of ambiguity, we will give effect to the plain meaning of the statutory language." In re Marriage of Schneider, 173 Wash.2d 353, 363, 268 P.3d 215 (2011).

F. Kent's claim that ESSSB 5073 makes "production" of cannabis legal is incorrect.

RCW 69.51A does not make "production" of cannabis legal for everyone, and only allows qualified medical cannabis patients or their designated provider to grow medical cannabis without being subject to state criminal charges. Medical cannabis remains a criminal exemption to a state crime only if certain conditions apply, and those conditions will never apply to recreational users. Until then there is no conflict with the federal CSA. Now that I-502 has made recreational use "legal", the federal government has still not acted, and most likely never will. They will most likely just provide legal threats to enable the states to kill their own state cannabis laws instead of having to preempt them outright. The trial court would have abused its discretion when it ruled otherwise.

G. Kent engaged in cooperative federalism

The State of Washington has its own uniform controlled substances act, which is a mirror act written to share the burden of policing controlled substances with the federal government. This co-authority to police controlled substances was created for the states in 21 U.S.C. 903- Application of State law.

From the onset of state medical cannabis laws, the federal government has refused to challenge state medical use laws upfront, because to do so would require them to amend 21 USC 903,and strip all of the states of authority to police controlled substances. This action would eliminate the state's authority to police controlled substances and force the federal government to police controlled substances themselves. However, policing controlled substances by themselves would have cost the federal government astronomical amounts of resources and would force a confrontation with the anti-commandeering doctrine and the 10th Amendment. Instead of taking such steps the federal government resorted to creating High Intensity Drug Trafficking Area (HIDTA) grants which cross designated state and local law enforcement with federal authority and conditioning federal grants on state's enforcing a federal drug control policy.

All of the recent federal preemption threats have the same telltale signs of cooperative federalism. The state or local entity cites a letter written alleging some form of violation of federal law and pending legal action by a government agency or official, lately a U.S. Attorney, and then kills the state law using cooperative federalism. This strategy is clear and has been played out over and over since 1996. Governor Gregoire employed that strategy when she cited letters from the U.S. Attorney's office as a reason to veto the medical cannabis dispensary system in ESSSB 5073. Arizona Governor Jan Brewer tried the same tact in her attempt to kill the Arizona Medical Marijuana Act using those same letters, but the federal court ruled those letters were too general in nature to be considered an actual federal action. (CV-11-01072-PHX-SRB (D. Ariz. 2012)) (APPENDIX B)

Now, the City of Kent is using the same letters to and from U.S. Attorneys and the same general threat of federal preemption, in an attempt to convince the Washington courts that there is a federal preemption that enables them to act on behalf of the federal government. As the pattern indicates, Kent is acting so the federal government doesn't have to act directly, and has used the same general threats instead of concrete legal actions by the federal government.

San Diego County, California, tried unsuccessfully to declare a federal preemption as a means of not adhering to California's medical use provision, but was denied by the California courts. (See County of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461 (Cal. Ct. App.2008), (CP 601-636) (APPENDIX C)

As shown above, the trial court abused its discretion when it rested its decision on untenable grounds and was manifestly unreasonable, after it allowed Kent to use general threats of federal preemption to take the place of concrete actions by the federal government to preempt state medical cannabis laws directly. The trial court's decision enabled Kent to engage in cooperative federalism, to ban medical cannabis collectives, without any state authority to do so. In fact, most of the medical cannabis collective bans across the State of Washington, rests their bans on those same untenable and manifestly unreasonable grounds of generalized threats using the same acts of cooperative federalism.

H. The Anti-Commandeering doctrine prevents any requirement to enforce federal regulatory schemes

In Printz v. United States, 521 U.S. 898 (1997) the United States Supreme Court made a ruling that established the unconstitutionality of certain interim

provisions of the Brady Handgun Violence Prevention Act. In that ruling, the Majority stated:

> "When we were at last confronted squarely with a federal statute that unambiguously required the States to enact or administer a federal regulatory program, our decision should have come as no surprise. At issue in New York v. United States, 505 U.S. 144 (1992), were the so called "take title" provisions of the Low Level Radioactive Waste Policy Amendments Act of 1985, which required States either to enact legislation providing for the disposal of radioactive waste generated within their borders, or to take title to, and possession of the waste--effectively requiring the States either to legislate pursuant to Congress's directions, or to implement an administrative solution. Id., at 175-176. We concluded that Congress could constitutionally require the States to do neither. Id., at 176. "The Federal Government," we held, "may not compel the States to enact or administer a federal regulatory program." Id., at 188.

When the ruling in New York v. United States, 505 U.S. 144 (1992), is studied at Length, one can see the beginning of cooperative federalism and can discover the root of the current tact to condition federal grants on state and local governments enforcing a federal drug control policy.

> (e) The Act's monetary incentives are well within Congress' Commerce and Spending Clause authority, and thus are not inconsistent with the Tenth Amendment. The authorization to sited States to impose surcharges is an unexceptionable exercise of Congress' power to enable [505 U.S. 144, 146] the States to burden interstate commerce. The Secretary's collection of a percentage of the surcharge is no more than a federal tax on interstate commerce, which

> petitioners do not claim to be an invalid exercise of either Congress' commerce or taxing power. Finally, in conditioning the States' receipt of federal funds upon their achieving specified milestones, Congress has not exceeded its Spending Clause authority in any of the four respects identified by this Court in Dole, supra, at 207-208.

It should be noted that HIDTA grants were created the following year and that Kent is a member of the Valley Narcotics Enforcement Team (VNET), which receives HIDTA funding. In fact, the Kent chief of police has signed a statement of assurances to uphold all federal laws as a condition upon receiving HIDTA grants. Although Kent police officers assigned to VENT do have authority to act on behalf of the federal Government, when empowered by U.S. Attorneys, they not required to do so. Kent has chosen to in effect volunteer to do so or engage in cooperative federalism. The federal grant itself does not create federal authority (See United States v. Spires, 79 F.3d 464, 466 (5th Cir.1996) shown below:

> "This record reveals that the task force agent does not consider herself a federal officer or agent and has never held a federal commission. The agent's commission was held through the Jones County Sheriff's office. The task force is a federally funded but state operated investigative unit ultimately run by the Texas Governor's office. The task force and its agents are state actors. Federal funding alone does not make agents of the task force federal government officials or agents".

While Kent's police officers assigned to VNET are empowered to act federally by the U.S. Attorney's offices after state investigations are complete, the Mayor or Kent City Council possesses no cross designation status and has no

obligations to enforce federal law. As shown above, the trial court abused its discretion when it rested its decision on untenable grounds and was manifestly unreasonable, when it ruled the federal government could force Kent to enforce a federal drug control policy, in spite of the Anti-Commandeering Doctrine.

I. Kent has to enforce federal drug control strategy or it will lose federal funding, and be liable for federal grant non-compliance

When the federal government was presented with the issues of medical marijuana in 1996, they decided they could not directly challenge these new laws and decided to create the Cascade HIDTA. Kent is a member of a Cascade HIDTA , and has signed a statement of assurances to enforce a federal drug control strategy. The federal government decided to leverage state and local resources into enforcing a federal drug control strategy by conditioning federal funding on adopting such a policy. This strategy was signed by President Clinton, and placed in the federal register on February 11, 1997, in volume 62, number 28 on pages 6164-6166. After the federal grant contract to leverage state and local compliance with federal drug control policies was created, Kent signed the HIDTA contract, and direct federal preemption of state cannabis laws became unnecessary. The federal government has no need to take a direct preemption action. The state and local authorities have been bribed to take that federal action for them and engage in cooperative federalism. The King County Superior Court has a conflict of interest because it also receives HIDTA funding for its drug court and treatment programs. The state of Washington is contractually obligated to violate its own laws or face the consequences of federal grant non-compliance. (APPENDIX D)

III. CONCLUSION

Based on the aforementioned arguments, Worthington respectfully requests the Appellate courts rule Worthington has standing to fight the injunction and counterclaim against him and requests a reversal of all the trial courts orders. Or in the alternative, Worthington respectfully requests a reverse and remand to the trial courts to pursue his SLAPP defense, since Kent referenced Worthington's complaint when it filed a frivolous counterclaim against him, and since Worthington did not have standing to be countersued by Kent.

Respectfully submitted on this 10TH day of April, 2013

BY John Worthington

John Worthington
4500 SE 2ND PL.
Renton WA.98059

DECLARATION OF SERVICE

I declare that on the date and time indicated below, I caused to be served via email and U.S. Mail, a copy of the documents and pleadings listed below upon the attorneys of record for the Respondent, and Appellants, as well as the other parties herein listed and indicated below.

1. APPELLANT WORTHINGTON'S REPLY BRIEF

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I declare under penalty of perjury under the laws of the United States that the foregoing is True and correct.

Executed on this 10TH day of April, 2013

BY John Worthington

John Worthington
4500 SE 2ND PL.
Renton WA.98059

APPENDIX A

BEST IMAGE POSSIBLE

Senate Democrats Blog

Jeanne Kohl-Welles

Sen. Kohl-Welles issues statement on medical marijuana legislation

Tuesday, May 24 2011 - Jeanne Kohl-Welles | Permalink

Sen. Jeanne Kohl-Welles, D-Seattle, issued the following statement today regarding her efforts to reform Washington's medical marijuana law.

"Regretfully, I have decided not to pursue further attempts this year to strengthen our state's voter-approved medical marijuana law.

"My efforts to make improvements to existing law were motivated by the need to provide qualifying patients with protection from arrest and prosecution and access to a safe, secure and reliable source of the medicine they are legally entitled to use and that has been recommended to them by their licensed health care provider. I also sought to increase public safety and provide a bright line for law enforcement in determining those who are authorized patients, regulated growers and dispensers.

"Despite having bipartisan support, we were unable to achieve these objectives. By far, this represents the greatest disappointment of my legislative career.

"Senate Bill 5073, the medical marijuana legislation I originally introduced this session, included many key improvements to the status quo, such as creating a state regulatory system for licensing producers, processers, and dispensaries and protecting patients who voluntarily sign up on a confidential, secure state registry from arrest and prosecution.

"Unfortunately, around the time the bill passed the Legislature with bipartisan support, the U.S. Department of Justice (DOJ) reinforced its authority to prosecute those involved with commercial dispensaries. As a result, Governor Gregoire vetoed the most substantive parts of SB 5073 out of concern that state employees involved in regulating medical marijuana would be at risk of federal arrest and prosecution. Unfortunately, in my opinion, the situation for patients and their designated providers was exacerbated as a result.

"While the governor did encourage the Legislature to follow-up with a special session bill, it is apparent there is insufficient time to pass a bill addressing these problems at this time.

"My original bill was developed over the course of a year, with significant input from a diverse group of stakeholders, including groups representing patients, designated providers, advocates, local governments, state agencies, and law enforcement.

"But it's very difficult to develop complex policy—especially with multiple stakeholders—in the course of a 30-day special session. And, unfortunately, in the end, it just was not possible to pass a bill that would address the governor's concerns, while meeting the needs of patients and local governments in such a limited time frame.

"The governor also specified that the leaders of the four legislative caucuses agree to move the bill. Unfortunately, that was not possible.

"In addition to my keen disappointment in not being able to improve access and protections for patients, I also regret our failure to provide cities and counties with the tools they need to regulate dispensaries and grow operations. The attached letter submitted by King County Executive Dow Constantine, King County Prosecutor Dan Satterberg, Seattle Mayor Mike McGinn, and Seattle City Attorney Pete Holmes illustrates the challenges faced by local governments.

"My most recent attempt to reform the medical marijuana law would have scaled back the proposal to a pilot program giving local governments in counties with populations greater than 200,000 the option of authorizing and regulating nonprofit patient cooperatives. It also would have created a joint legislative task force to make recommendations to the Legislature next December on issues still needing resolution. But, even this proposal failed to receive sufficient support to move forward in the remaining days of special session, mainly due to the overriding focus on the budget.

"While it is clear this issue has stalled for now, we cannot continue to ignore this issue– it simply will not solve itself. It is clear that the needs of patients and local jurisdictions remain unresolved and will necessitate further legislative efforts."

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Sen. Kohl-Welles issues statement on medical marijuana legislation

Tuesday, May 24 2011 - Jeanne Kohl-Welles | Permalink

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"Despite having bipartisan support, we were unable to achieve these objectives. By far, this represents the greatest disappointment of my legislative career.

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"Unfortunately, around the time the bill passed the Legislature with bipartisan support, the U.S. Department of Justice (DOJ) reinforced its authority to prosecute those involved with commercial dispensaries. As a result, Governor Gregoire vetoed the most substantive parts of SB 5073 out of concern that state employees involved in regulating medical marijuana would be at risk of federal arrest and prosecution. Unfortunately, in my opinion, the situation for patients and their designated providers was exacerbated as a result.

"While the governor did encourage the Legislature to follow-up with a special session bill, it is apparent there is insufficient time to pass a bill addressing these problems at this time.

"My original bill was developed over the course of a year, with significant input from a diverse group of stakeholders, including groups representing patients, designated providers, advocates, local governments, state agencies, and law enforcement.

"But it's very difficult to develop complex policy—especially with multiple stakeholders—in the course of a 30-day special session. And, unfortunately, in the end, it just was not possible to pass a bill that would address the governor's concerns, while meeting the needs of patients and local governments in such a limited time frame.

"The governor also specified that the leaders of the four legislative caucuses agree to move the bill. Unfortunately, that was not possible.

"In addition to my keen disappointment in not being able to improve access and protections for patients, I also regret our failure to provide cities and counties with the tools they need to regulate dispensaries and grow operations. The attached letter submitted by King County Executive Dow Constantine, King County Prosecutor Dan Satterberg, Seattle Mayor Mike McGinn, and Seattle City Attorney Pete Holmes illustrates the challenges faced by local governments.

"My most recent attempt to reform the medical marijuana law would have scaled back the proposal to a pilot program giving local governments in counties with populations greater than 200,000 the option of authorizing and regulating nonprofit patient cooperatives. It also would have created a joint legislative task force to make recommendations to the Legislature next December on issues still needing resolution. But, even this proposal failed to receive sufficient support to move forward in the remaining days of special session, mainly due to the overriding focus on the budget.

"While it is clear this issue has stalled for now, we cannot continue to ignore this issue– it simply will not solve itself. It is clear that the needs of patients and local jurisdictions remain unresolved and will necessitate further legislative efforts."

EXHIBIT 2

Stay in touch!

Please keep me informed of your ideas, concerns and community activities.

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Senate Committees:

- Labor, Commerce & Consumer Protection-Chair
- Judiciary
- Ways & Means
- Rules

Other Involvements (selected):

- Joint Legislative Audit and Review Committee
- Joint Legislative Systems Committee
- K-20 Education Network
- Washington State Arts Commission
- Washington Institute on Public Policy
- Western Interstate Commission for Higher Education

36th Legislative District

Senator Jeanne Kohl-Welles

Summer 2011

Dear Neighbors,

After an intense 105-day legislative session and subsequent 30-day special session, it is wonderful to be back home in the district! The back-to-back 105-day regular and 30-day special sessions finally came to a close last month after we grappled with the most challenging budget shortfall in our state's history. While I remain troubled by the many unfortunate outcomes, I believe it's important to communicate my perceptions of this worst legislative session I've experienced in my 20th year of serving you in Olympia.

The effects of the Great Recession are still being felt here at the state level. As the March revenue forecast was down by $5 billion for the upcoming 2011-2013 budget cycle which begins July 1, that forced the Legislature to pass an operating budget that reduced state spending on critical services by $4.6 billion—more than 12 percent of the overall state budget! This obviously was not something I wanted to vote for, but we tried to make the best of a terrible situation.

Despite the enormous budget challenges this session, I am pleased to report that there is some relatively good news. We were able to preserve rather than eliminate many critical services and programs in the budget and also managed to make significant policy reforms along the way. Read on for our accomplishments in these areas and on how we dealt with the budget crisis in various areas of government.

Now that session is over, I am back in the district office space I share with Reps. Reuven Carlyle and Ruth Kagi on the base of Queen Anne. The office is in Suite 421 in the Northwest Work Lofts building located at 3131 Western Ave, where Queen Anne Ave. North, West Denny and Western Ave. all come together. My office number is 206-281-6854. I enjoy meeting with constituents so please don't hesitate to contact my legislative assistant, Adam Cooper, to set something up (206-281-6854, adam.cooper@leg.wa.gov).

It continues to be an honor and a privilege for me to serve you as your state senator. Thank you for allowing me to represent your voice in Olympia. As always, never hesitate to share your thoughts and concerns about how we can work together to make our wonderful state even better.

Warmly,

Jeanne

Sen. Jeanne Kohl-Welles

Sign up for my legislative e-newsletters!

I send out regular e-newsletters with updates on legislative activities and other important information about government in Washington. If you haven't already done so, please take a moment to sign-up for my distribution list at:

http://apps.leg.wa.gov/subscriptions/member.aspx?chamber=s&member=kohl-welles|http://apps.leg.wa.gov/subscriptions/member.aspx?chamber=s&member=kohl-welles|

2011-2013 Operating Budget

This year we closed a daunting $5 billion gap for the 2011-2013 budget cycle, which comes at a time when one-time federal stimulus dollars were no longer available and demands were outpacing government's abilities to adequately fund our public schools and colleges and essential services. Drastic reductions to state services were exacerbated by the hundreds of millions of dollars in cuts we made to close a $12 billion shortfall in the 2009–11 budget.

It goes without saying that this was not a budget any of us wanted to pass as we faced the worst revenue shortfall in our state's history. But ultimately, we had to get the job done in order to keep state government running.

Although we unfortunately had to make significant reductions in education and social services, the final budget reduced K-3 class size in high-poverty schools, maintained the State Need Grant for qualifying college students, and expanded worker re-training and low-income housing support. In the face of our current political and economic realities, preservation and expansion of each of these services are noteworthy.

The budget also preserved key parts of the social safety net, such as Disability Lifeline, the Basic Health Plan and Apple Health for Kids. Unfortunately, the funding for these critical programs was reduced, but we were able to keep their core structure in place rather than eliminate them. We also did what we could to preserve funding for basic education, levy equalization and full-day kindergarten for students in some of the poorest schools. And we increased funding for student transportation and principal and teacher evaluations.

2011-13 Budget Overview

- Spends approximately $32.2 billion.
- Makes reductions of $4.6 billion for the 11-13 biennium.
- Leaves a reserve of over $723 million.
- Provides a funding level of $13.8 billion for K-12.
- Preserves as much of the social safety net as possible (e.g., Basic Health Plan, Children's Health, Disability Lifeline Medical).

Efforts to close tax loopholes will have to wait

It's important to note that some of the cuts we made could have been avoided or partially mitigated if we'd been able to raise revenue. But, unfortunately, we were unable to garner the super-majority of votes needed for any significant new revenues, to restructure our highly regressive tax system, or to eliminate tax exemptions or "loopholes" for special interest groups. You may recall that voter approval of Initiative 1053 last November reinstated a requirement for a two-thirds majority in the legislature to increase any tax or to repeal any tax loophole. An alternative would have been to send a referendum to the voters, but there was insufficient support to do so.

Back in April, several of my Senate colleagues and I announced the introduction of legislation targeted at closing some of the more egregious tax loopholes which are costing state taxpayers literally billions of dollars every year.

These tax exemptions – on everything from non-essential plastic surgery to private airplane ownership – represent revenue we're not collecting. That's money that could be going toward children's health care or reducing class sizes. The fact of the matter is we need a two-thirds majority to close even the most unnecessary loophole and, quite frankly, we did not have the sufficient votes to close even a single loophole. And, what one person sees as a loophole, another sees as a revenue-producer.

One of the bills proposed would have amended I-1053 to allow the Legislature to close tax loopholes without a two-thirds vote. The bill would have appeared on the ballot for voters to decide on its approval, but did not have the support to pass the Legislature.

I introduced Senate Bill 5857, an idea proposed by Rep. Reuven Carlyle, which would have required a review of selected tax preferences as part of each two-year budget cycle and an automatic "sunset" of those not reauthorized by the Legislature. I also introduced SB 5932, which would have eliminated B&O tax exemption on one-time membership initiation dues or fees for all businesses other than non-profit organizations.

My hope is that we pursue such legislation again next year. I think it's irresponsible to give tax breaks on out-of-state coal purchases and mortgage-interest earnings for banks, as examples, while making cuts to education and essential services. Amending I-1053 will allow us at the very least to take a look at some of these tax breaks, some of which serve a very useful purpose, and change those that no longer offer a net benefit to the state.

Improving Washington's medical marijuana law

The use of medical marijuana for qualifying patients has been permitted in Washington since 1998, when voters approved Initiative 692 by 59 percent. Since then, the Legislature has twice clarified and enhanced the law with my legislation in establishing legal limits for medical use in 2007 and a measure passed last year allowing all health professionals having prescriptive authority to authorize use of medical marijuana to qualifying patients.

Despite these efforts, we still do not have in place an adequate statutory framework that protects qualifying patients from arrest and provides them legal access to their medicine. Current law provides for the authorization of medical marijuana, but unless patients grow for themselves or obtain it from a designated provider, the law doesn't offer a legal pathway for patients to access a safe, secure, adequate source of their medicine, creating a real Catch-22 with serious consequences for patients.

My top policy priority this session was Senate Bill 5073, which would have created a state regulatory system for licensing producers, processers, and dispensaries of medical cannabis. The legislation also focused on protecting qualifying patients from arrest and prosecution. Unfortunately, around the time the bill passed the Legislature with bipartisan support, the U.S. Department of Justice reinforced its authority to prosecute those involved with commercial dispensaries. As a result, Governor Gregoire vetoed the most substantive parts of SB 5073 out of concern that state employees involved in regulating medical marijuana would be at risk of federal arrest and prosecution. Although I disagreed they would be of risk, the veto was made and unfortunately, in my opinion, the situation for patients and their designated providers was exacerbated as a result. I introduced another bill, SB 5955, during the special session but it did not receive the traction needed to get through.

While we were not able to achieve much progress this session, we cannot continue to ignore this issue– it simply will not solve itself. Many cities, towns and counties, including Seattle and King County, are now having to wrestle with what they can do without state authority to regulate the increasing number of dispensaries popping up. It is clear that the needs of patients and local jurisdictions remain unresolved and will necessitate further legislative efforts in the 2012 legislative session.

State senator introduces new medical marijuana bill

May 11th, 2011 by Geeky Swedes

State senator Jeanne Kohl-Welles (D) of the 36th District is introducing new legislation which would clarify the state's voter-approved medical marijuana law.

Last week, Governor Christine Gregoire vetoed portions of Senate Bill 5073. In a prepared statement, Governor Gregoire said, "But the central concerns I raised still stand: we cannot presume to assure protections to one group of people—patients, providers and health care professionals—in a way that subjects another group, Department of Health and Department of Agriculture employees to federal arrest or criminal liability. That is not acceptable to me; it is not workable." (Entire statement can be read here.)

"I was disappointed that the governor vetoed most of Senate Bill 5073 — legislation that took nearly two years to develop based on input from a diverse group of stakeholders," Kohl-Welles said. "However, I believe she fully understands the need to provide protections for qualifying patients in accessing a safe, secure and reliable source of their medicine."

The new bill (SB 5955) introduced by Kohl-Welles and a bipartisan group of senators, "addresses the governor's concerns over state employees' not being immune from federal arrest and protection by establishing a system of nonprofit patient cooperatives for qualifying patients to obtain their medical marijuana. The revamped bill would also allow local governments to control where dispensaries may be located and provide arrest protection for patients enrolled in a voluntary, confidential state registry," the press release states.

"The new bill has been well-received in preliminary meetings with the governor and her staff as well as by many other stakeholders," Kohl-Welles added. There is a public hearing this morning in the Senate Ways & Means Committee.

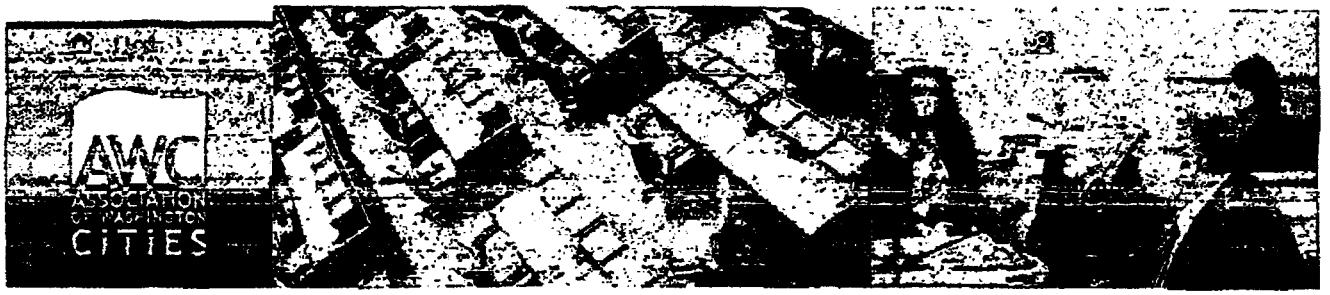
Marijuana

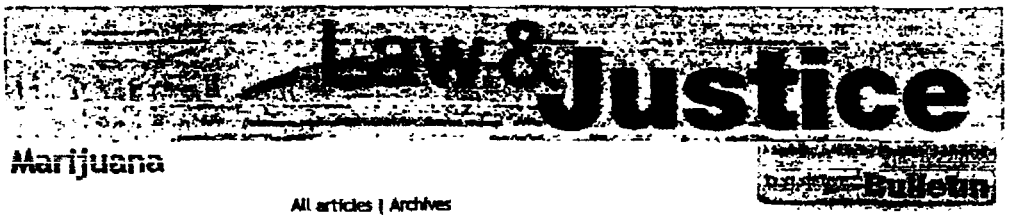
Medical cannabis - 1/13/12

While a bill hasn't been officially introduced and assigned a bill number yet, a hearing has been scheduled for the proposed medical cannabis bill on Wednesday, January 18 at 8am in the Senate Health & Long-Term Care Committee. The bill is follow-up legislation to last year's medical cannabis bill, **SB 5073**, which was passed by the Legislature and then subject to veto of numerous sections. Cities have had numerous conversations about the proposed legislation with the bill sponsor, Senator Kohl-Welles (D-Seattle). The most recent draft circulated provides a new restriction on collective gardens, establishes nonprofit patient cooperatives that cities would have the option of allowing or not allowing within their community, and creates a voluntary patient registry with arrest protections for those who participate.

The bill does not allow cities to preclude the siting of collective gardens, which would be restricted to no more than one per dwelling or commercial building unit. Nonprofit Patient Cooperatives (NPCs) would be allowed to have more members than gardens would, with a limit of 24 ounces of usable cannabis per member (up to 144 ounces), and 15 plants per member (up to 90 plants). They would be prohibited from advertising to the general public and from locating within 500 feet of a community center, child care center, or school. A city could opt to increase or decrease distance requirements.

The proposed bill allows cities to impose zoning requirements, licensing requirements, permitting requirements, health and safety requirements , taxes, fees, or other conditions on NPCs and collective gardens. However, such requirements may not preclude the possibility of siting collective gardens. The bill does not go as far as many cities would like in terms of establishing more explicit requirements for collective gardens, and many cities are also concerned about the inability to prohibit collective gardens. Senator Kohl-Welles has been very open to the concerns raised by cities; however, in drafting this bill she has felt the need to focus on ensuring patient access to cannabis.





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Issues

From the Legislative Director
Energy
Environment & land use
Federal
General government
Infrastructure
Law & justice
Municipal finance
Personnel & labor relations
State budget
Telecommunications
Transportation

Marijuana resources

Kohl-Welles shares insights on addressing medical marijuana

Medical marijuana legislation is coming back in 2012. What will it take to get it passed this session? TVW explores how Castle Rock is handling the situation. Senator Kohl-Welles also shares her insights about addressing city and patient concerns.

Click to watch TVW clip

AWC Annual Conference presentations - June 2011

- Cities and towns may adopt zoning requirements, business licensing requirements, health and safety requirements, and business taxes.
- Zoning authority over licensed dispensers may not preclude the siting of licensed dispensers. (However, this sentence is no longer relevant as the Governor vetoed sections providing for the licensing of dispensers.)

The new bill, **SB 5955**, would make the following changes:

- Establishes a voluntary registry for patients and providers and a mandatory registry for collective gardens and nonprofit patient cooperatives (NPCs) beginning January 1, 2013.
- Provides arrest and prosecution protection for those in compliance with the law who participate in the registry.
- Defines collective gardens as:
  - No more than 10 members (patients or providers).
  - No more than 45 plants and 72 ounces of usable cannabis.
  - No more than one per tax parcel.
  - Can only be a member of one at a time.
  - Contribution may not be solely monetary.
  - Valid documentation must be on site.
- Establishes nonprofit patient cooperatives with the following requirements:
  - Only if not prohibited by the local jurisdiction.
  - Must register with Secretary of State as nonprofit.
  - No more than 15 plants per member, up to 99 total.
  - No more than 24 ounces of usable cannabis, up to total of 144 ounces.
  - Can't be located within 1000 feet of community center, child care center, school, or another cooperative.
  - No advertising.
  - Must allow local jurisdiction to inspect records to verify patient documentation.
- Does not preempt local authority over any entity producing, processing, or dispensing cannabis. However, cities must not preclude the siting of collective gardens.
- Allows a local jurisdiction to "opt in" by enacting an ordinance not prohibiting cooperatives.

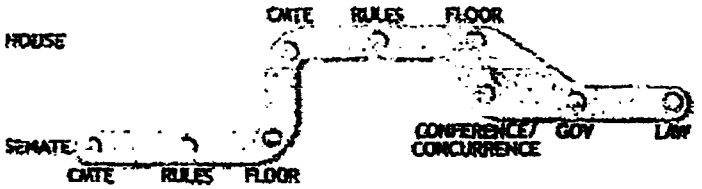
continued

EXHIBIT 3

Bill #: 6265

Medical marijuana clarification

Companion bill #: 0



Summary/AWC comments

Cities were divided in their support for this proposed legislation due to provisions about collective gardens. Given the divergent opinions of cities, the AWC Board of Directors revised AWC's position to neutral.

Bill Summary:
The bill provides a new restriction on collective gardens, establishes nonprofit patient cooperatives that cities would have the option of allowing or not allowing within their community, and creates a voluntary patient registry with arrest protections for those who participate.

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Latest version of bill:

Link to WA Legislative bill page

Official title:

AN ACT Relating to regulating the medical use of cannabis through nonprofit patient cooperatives, collective gardens, local government regulation of nonprofit patient cooperatives and collective gardens, security requirements for the transportation of cannabis, affirmative defense and arrest and prosecution protections, establishing a voluntary registry within the department of health, modifying the Washington state institute for public policy study, and providing technical corrections; amending

Go To Bill #

AWC Contacts

Analyst: Sheryl Dolly
Lobbyist: Candice Bock

Issue Area

Law & Justice

Additional Info:

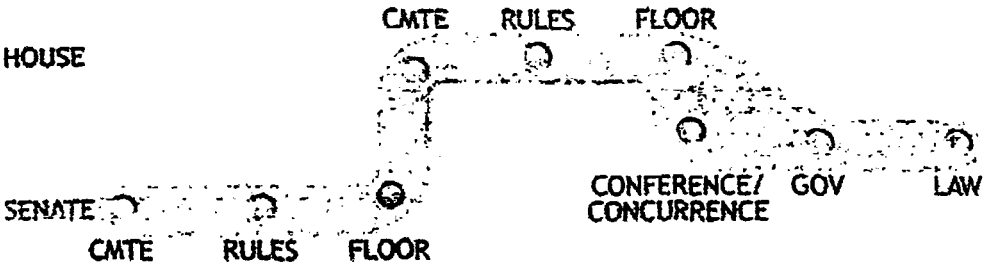
Search for AWC articles related to this bill:

6265

Bill #: 6265

Medical marijuana clarification

Companion bill #: 0



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Latest version of bill:

Hearing in Olympia to Revisit Hazy Medical Marijuana Law

0 commentsBy JasonFiled in Medical MarijuanaTagged with 2012, advocacy, cannabis, Chris Gregoire, DOR, marijuana, medical marijuana, mmj, news, SB 6255, seattle, smoking hot news, WashingtonJanuary 16th, 2012 @ 10:16 pm

Eight months after Gov. Chris Gregoire gutted the state medical-marijuana law with a partial veto, dispensaries have feasted or starved based on the real-estate axiom: location, location, location. A new bill in Olympia to legalize nonprofit dispensers could lead to a statewide dispensary boom.

By Jonathan Martin

Chris Cody tries to be a good neighbor in White Center, joining in a Christmas toy drive and local art walks, and keeping the window of his medical-marijuana dispensary as discreet as possible.

He maintains a low profile in part because his shop, Herban Legends, is a block outside the marijuana-friendly Seattle city limits. Inside Seattle, marijuana dispensaries flourish. Outside Seattle, there is no protective regulation.

"It's definitely tricky, causing for more than a little anxiety," said Cody, a 31-year-old carpenter.

Eight months after Gov. Chris Gregoire gutted the state medical-marijuana law with a partial veto, dispensaries have feasted or starved based on the real-estate axiom: location, location, location.

Seattle, Tacoma and a handful of other cities recognize storefront shops as resources for medical-marijuana patients. Most don't, though, citing a muddled state law or the federal marijuana prohibition.

Legislators, still pained by the veto but pressed by cities to fix the mess, are preparing to try again. A hearing is scheduled Wednesday on SB 6265, a bill proposed by medical marijuana's champion in Olympia, Sen. Jeanne Kohl-Welles, D-Seattle, to legalize nonprofit dispensers and kick regulation to cities.

If passed, the plan could clear a legal haze hovering over storefront shops. Although not explicitly allowed under state law, they have operated via legal loopholes, most recently under a broad interpretation of the term "collective garden."

And a new law could open the door to a statewide dispensary boom, especially in some larger cities, such as Bellevue, that have refused to allow them.

Philip Dawdy of the Washington Alternative Medicine Alliance, a medical-marijuana group, estimates about 135 dispensaries are open now, half in Seattle. He said the new proposal in Olympia is needed to end "a patchwork of regulations."

"Our goal is to have reasonably clear state law that is unambiguous and won't lead to the feds making threats," Dawdy said.

The state Department of Revenue (DOR), which last year warned dispensers they must tax their sales, said 15 marijuana-related business paid a total of $243,600 in state and local taxes in the first nine months of 2011, including $52,600 in local sales taxes.

That's nearly tenfold as much as the marijuana industry paid in 2010, "but it is unlikely it represents all the taxable sales taking place," DOR spokesman Mike Gowrylow said.

Resistance to registry

Although dispensaries say they intend to help those who need marijuana, patients are likely to oppose the legislation Wednesday.

The new bill would guarantee arrest protection if patients join a voluntary registry, an idea that is anathema to some. Those not signed up would have lesser protection — an "affirmative defense," if criminally charged.

"I don't understand why I need to register. It seems like a lot of headache, paperwork and bureaucracy," said Ric Smith, a patient advocate who is on kidney dialysis.

The registry is intended to mute law-enforcement opposition to dispensaries. Police groups favor registries, and Kohl-Welles said a registry was part of a deal to reach "the lowest common denominator of support."

Cities have clamored for lawmakers to clarify dispensaries' status after Gregoire's veto. The new plan would give cities in the nine largest counties the ability to ban dispensaries and would give cities in the 30 other, smaller counties the right to opt in.

While Bellevue is among communities that have denied licenses on the basis that marijuana is illegal, the city "may support" the new bill once the City Council sees it, city spokesman David Grant said.

Tacoma, at one point, had more dispensaries than pharmacies. The city since has installed a moratorium, pending a review of its policy.

"I'm not sure you should be allowed to ban all citizen access to something the citizens of Washington have said they want to allow," Tacoma lobbyist Randy Lewis said.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

State of Arizona; Janice K. Brewer, Governor of the State of Arizona, in her official capacity; William Humble, Director of the Arizona Department of Health Services, in his official capacity; Robert C. Halliday, Director of the Arizona Department of Public Safety, in his official capacity,

Plaintiffs,

vs.

United States of America; United States Department of Justice; Eric H. Holder, Jr., Attorney General of the United States of America, in his official capacity; Dennis K. Burke, United States Attorney for the District of Arizona, in his official capacity; Arizona Association of Dispensary Professionals, Inc., an Arizona corporation; Joshua Levine; Paula Pennypacker; Nicholas Flores; Jane Christensen; Paula Pollock; Serenity Arizona, Inc., an Arizona corporation; Holistic Health Management, Inc., an Arizona corporation; Jeff Silva; Arizona Medical Marijuana Association; Does I-X and Does XI-XX,

Defendants.

No. CV 11-1072-PHX-SRB

ORDER

The Court now resolves the Motion to Dismiss for Lack of Jurisdiction filed on behalf

of the Arizona Association of Dispensary Professionals, Inc., Joshua Levine, Paula Pennypacker, Nicholas Flores, Jane Christensen, Paula Pollock, Serenity Arizona, Inc., Holistic Health Management, Inc., Jeff Silva, and the Arizona Medical Marijuana Association (collectively, "Non-Government Defendants") by the Arizona Medical Marijuana Association ("NG Defs.' MTD") (Doc. 30) and the Motion to Dismiss for Lack of Jurisdiction filed by Dennis K. Burke, Eric H. Holder, Jr., the United States Department of Justice, and the United States of America ("Gov't Defs.' MTD") (Doc. 38). At this time the Court also rules on Maricopa County and B. Joy Rich's (collectively, "Proposed Intervenors") Motion to Intervene ("Mot. to Intervene") (Doc. 31) and Motion for Hearing on the Motion to Intervene and for Leave to File Brief in Opposition to the NG Defendants' Motion to Dismiss ("Mot. for Hr'g") (Doc. 60) and Plaintiffs' three Motions to Supplement the Record ("Mots. to Supplement") (Docs. 54, 57-58).

I. BACKGROUND

In this case, Plaintiffs seek one of two declaratory judgments: (1) that compliance with the Arizona Medical Marijuana Act ("AMMA") "provides a safe harbor from federal prosecution" under the federal Controlled Substances Act ("CSA") or (2) that "the AMMA does not provide a safe harbor from federal prosecution" because it is preempted by the CSA. (Doc. 1, Compl. ¶ 64.) Arizona voters passed the AMMA, an initiative measure, in November 2010, and it was signed into law by Governor Brewer in December 2010. (*Id.* ¶¶ 1-2.) The AMMA decriminalizes medical marijuana under certain circumstances and requires the Arizona Department of Health Services ("ADHS") to register and certify nonprofit medical marijuana dispensaries, dispensary agents, qualifying patients, and designated caregivers. (*Id.* ¶¶ 1, 3-4.) The AMMA provided time limitations within which the ADHS was to promulgate rules and regulations and begin accepting applications. (*Id.* ¶¶ 5-10.) The ADHS began accepting applications for qualifying patients and designated caregivers on April 14, 2011, and, as of May 24, 2011, had certified 3696 qualifying patients and 69 designated caregivers. (*Id.* ¶ 8.) The ADHS was to begin accepting applications for nonprofit medical marijuana dispensaries and dispensary agents on June 1, 2011. (*Id.* ¶ 11.) This

lawsuit was filed on May 27, 2011. (*Id.* at 30.)

The CSA classifies marijuana as a Schedule I controlled substance and makes it unlawful to grow, possess, transport, or distribute marijuana. (*Id.* ¶ 65); *see also* 21 U.S.C. §§ 812, 841(a), 844(a). Pursuant to the CSA, it is also unlawful to manufacture, dispense, or possess with the intent to manufacture, distribute, or dispense a controlled substance. (Compl. ¶ 66); 21 U.S.C. § 841(a). It is also unlawful to conspire to violate the CSA. (Compl. ¶ 69); 21 U.S.C. § 846. The CSA makes it a crime to knowingly open, lease, rent, use, or maintain property for the purpose of manufacturing, storing, or distributing controlled substances. (Compl. ¶ 70); 21 U.S.C. § 856(a)(1). Federal law also criminalizes aiding and abetting another in committing a federal crime, conspiring to commit a federal crime, assisting in the commission of a federal crime, concealing knowledge of a felony from the United States, or making certain financial transactions designed to promote illegal activity or conceal the source of the proceeds of illegal activity. (Compl. ¶¶ 71-75); 18 U.S.C. §§ 2-4, 371, 1956.

The Complaint alleges that, in other states with medical marijuana laws, the federal government has threatened to enforce the CSA against people who were acting in compliance with the state scheme. (Compl. ¶¶ 22-23, 77, 108-62.) Plaintiffs allege that they sought guidance from the Arizona United States Attorney's Office regarding the interaction between the AMMA and federal criminal law. (*Id.* ¶ 24.) On May 2, 2011, the then-United States Attorney for the District of Arizona, Defendant Burke, sent Plaintiff Humble a letter stating that growing, distributing, and possessing marijuana violates federal law no matter what state law permits. (*Id.* ¶ 25; *id.*, Ex. B ("Burke Letter").) The letter also stated that the federal government would continue to prosecute people who violate federal law and that compliance with state law does not create a "safe harbor." (Compl. ¶ 25; Burke Letter.) The letter did not address potential criminal liability for state employees working to implement the AMMA. (Compl. ¶ 26.)

Plaintiffs allege that "[t]he employees and officers of the State of Arizona have a mandatory duty to implement and oversee the administration of the AMMA." (*Id.* ¶ 81.)

However, Plaintiffs contend, in so doing, state employees "face a very definite and serious risk that they could be subjected to federal prosecution for aiding and abetting the use, possession, or distribution of marijuana under the CSA" or could face liability for failing to report wrongdoing. (*Id.* ¶¶ 82-83.) Plaintiffs seek relief under the Declaratory Judgment Act, requesting that the Court "declare the respective rights and duties of the Plaintiffs and the Defendants regarding the validity, enforceability, and implementation of the AMMA" and that the Court "determine whether strict compliance and participation in the AMMA provides a safe harbor from federal prosecution." (*Id.*, Prayer A-B.)

Both the Government Defendants and the Non-Government Defendants move to dismiss the Complaint in its entirety. (NG Defs.' MTD at 1; Gov't Defs.' MTD at 1.) Both pending Motions to Dismiss challenge whether Plaintiffs have sufficiently alleged a case or controversy (or, instead, whether Plaintiffs seek an improper advisory opinion from the Court) and whether Plaintiffs' claims are ripe for review. (NG Defs.' MTD at 5-7, 9-11; Gov't Defs.' MTD at 8-11, 13-17.) Both Motions also argue that the Court does not have jurisdiction over a request by state officials to declare the validity or invalidity of a state law. (NG Defs.' MTD at 7-9; Gov't Defs.' MTD at 5-7.) The Court heard oral argument on the Non-Government Defendants' Motion on December 12, 2011. (*See* Doc. 59, Minute Entry.) Ruling from the bench at the hearing, the Court dismissed all fictitious Defendants. (*Id.* at 1.)

After the hearing, Plaintiffs filed a Notice of Intent to File a Motion for Leave to Amend Complaint ("Pls.' Notice"). (*See* Doc. 64.) Plaintiffs informed the Court that they "will be seeking to amend their Complaint to refine their position and resolve any case or controversy issues." (*Id.* at 1-2.) Plaintiffs stated in the Notice that they plan to file their Motion to Amend by January 9, 2012, and requested that the Court delay ruling on the pending Motions to Dismiss until after that date. (*Id.* at 2.) For the reasons stated herein, the Court declines to delay resolution of the Motions to Dismiss, which have already been pending for several months. Based on the scant detail in the Notice, the Court is unconvinced that the following defects will be corrected by Plaintiffs' intended amended Complaint.

II. LEGAL STANDARDS AND ANALYSIS

A. Motions to Dismiss: Ripeness

The Court turns first to the question of ripeness, which is raised by all Defendants in the two Motions to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(1). (NG Defs.' MTD at 9-11; Gov't Defs.' MTD at 12-17.) It is not clear from Plaintiffs' Notice whether they intend to address ripeness.[1] Even if Plaintiffs were to amend the Complaint as they state they intend to do, "to refine their position and resolve any case or controversy issues," the defects identified herein would remain. (*See* Notice at 1-2); *see also Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174, 1179 (9th Cir. 2010) ("The ripeness doctrine rests, in part, on the Article III requirement that federal courts decide only cases and controversies and in part on prudential concerns.").

"Because . . . ripeness pertain[s] to federal courts' subject matter jurisdiction, [it] is properly raised in a Rule 12(b)(1) motion to dismiss." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). "The district courts of the United States, as we have said many times, are 'courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.'" *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). When deciding a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the court may weigh the evidence to determine whether it has jurisdiction. *Autery v. United States*, 424 F.3d 944, 956 (9th Cir. 2005). The burden of proof is on Plaintiffs to show that this Court has subject matter jurisdiction. *See Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990) ("The party asserting jurisdiction has the burden of proving all jurisdictional facts." (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). Unlike a Rule 12(b)(6) motion, there is no presumption of truthfulness attached to Plaintiffs' allegations. *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d

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[1] Much of the parties' arguments at the hearing were focused on whether Plaintiffs needed to "take a position" on the validity of the AMMA in order to create a live case or controversy for the Court to adjudicate.

730, 733 (9th Cir. 1979).

"The question of ripeness turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Chandler*, 598 F.3d at 1122 (internal alteration, quotation, and citation omitted). The main focus of the ripeness inquiry is "whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Richardson v. City & Cnty. of Honolulu*, 124 F.3d 1150, 1160 (9th Cir. 1997) (internal quotation and citation omitted). Courts have no subject matter jurisdiction over unripe claims and must dismiss them. *See S. Pac. Transp. Co. v. City of L.A.*, 922 F.2d 498, 502 (9th Cir. 1990).

Ripeness has both constitutional and prudential components. *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993). "The constitutional component of ripeness overlaps with the 'injury in fact' analysis for Article III standing . . . [and] [w]hether framed as an issue of standing or ripeness, the inquiry is largely the same: whether the issues presented are 'definite and concrete, not hypothetical or abstract.'" *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000)). Analysis of the prudential component weighs "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). As explained below, the Court finds that Plaintiffs have not satisfied either element of ripeness.

a. Constitutional Component

Defendants argue that Plaintiffs cannot satisfy the constitutional component of ripeness because they have not shown that a genuine threat of imminent prosecution exists. (NG Defs.' MTD at 9; Gov't Defs.' MTD at 13.) A plaintiff making a pre-enforcement challenge must demonstrate more than the "mere existence of a proscriptive statute" or a "generalized threat of prosecution" to satisfy the case or controversy requirement. *Wolfson*, 616 F.3d at 1058 (internal quotation and citation omitted). While "one does not have to await the consummation of threatened injury to obtain preventive relief," a claim is not ripe unless

the plaintiff is "subject to a *genuine* threat of *imminent* prosecution." *Id.* (internal quotations and citations omitted). To determine whether a claimed threat of prosecution is genuine, courts consider three factors: "(1) whether the plaintiff has articulated a concrete plan to violate the law in question; (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement under the challenged statute." *Id.*

The Government Defendants argue that Plaintiffs have not satisfied the first element of the test because "they do not detail any concrete plan to act in violation of the CSA." (Gov't Defs.' MTD at 14.) Plaintiffs respond that "[t]he actions to be taken by the State and its officers and employees [under the AMMA] will clearly expose them to federal criminal liability, and the Federal Defendants have provided no safe harbor or immunity for actions taken in strict compliance with the AMMA." (Pls.' Resp. to Gov't Defs.' MTD ("Pls.' Gov't Resp.") at 6-7.) Since Plaintiffs have not, as of yet, articulated their position with respect to the validity of the AMMA and their intentions regarding enforcement, the Complaint does not articulate a concrete plan to violate the law in question. (*See* Compl. ¶¶ 81-83 (explaining the obligations of state employees under the AMMA but not expressing a plan to enforce the dispensary provisions to their full extent).) However, even if the Complaint were amended to take a position *and* that position involved enforcement of the AMMA such that state employees might be at risk of violating the CSA, evaluation of the second two factors would still indicate that Plaintiffs' claims are unripe.

The Complaint alleges that "[t]he Government Defendants have communicated a specific warning or threat of criminal prosecution and other legal proceedings to Director Humble." (*Id.* ¶ 87.) However, the allegations in the Complaint that describe the letter sent by Defendant Burke to Director Humble are silent as to state employees.[2] (*See* Compl. ¶¶ 104-07.) Rather, the Complaint states that the United States Attorneys in Washington notified

[2] Plaintiffs assert that they have standing to challenge this law on behalf of the state and on behalf of state employees. (*See* Pls.' Gov't Resp. at 12-13.)

Washington's governor that state employees carrying out activities pursuant to Washington's medical marijuana law would not be immune under the CSA. (*Id.* ¶ 113; *see also id.*, Ex. A.) The Complaint also alleges that the United States Attorney in Vermont warned state lawmakers that expanding Vermont's medical marijuana law to include state-licensed dispensaries would "place the state in violation of federal law." (Compl. ¶ 153.) The actions of federal officials in relation to other states do not substantiate a credible, specific warning or threat to initiate criminal proceedings against state employees in Arizona if they were to enforce the AMMA. Even if the letters from the United States Attorneys, in Arizona or other states, are interpreted as threats or warnings, a "generalized threat" is not sufficient to satisfy this element. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1125 (9th Cir. 2009). Plaintiffs have not shown that any action against state employees in this state is imminent or even threatened. *See id.* ("[B]ecause no enforcement action against plaintiffs is concrete or imminent or even threatened, Appellees' claims against [defendant] are not ripe for review.").

Moreover, the Complaint does not detail any history of prosecution of state employees for participation in state medical marijuana licensing schemes. *See Wolfson*, 616 F.3d at 1058.[3] The Complaint fails to establish that Plaintiffs are subject to a genuine threat of imminent prosecution and consequently, the Complaint does not meet the constitutional requirements for ripeness. Therefore, Plaintiffs' claims are unripe and must be dismissed.

b. Prudential Component

Even if the Complaint had satisfied the constitutional component of ripeness, the Court would still find that the claims are not ripe for review for prudential reasons because the issues, as presented, are not appropriate for judicial review and because Plaintiffs have

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[3] The information attached to Plaintiffs' three Motions to Supplement does not alter the Court's conclusions in any way. As Defendants do not oppose these Motions and they are not improper, the Court grants Plaintiffs' Motions to Supplement. However, none of the documents Plaintiffs supply relate to prosecution of state employees or to threatened prosecutions of anyone in Arizona. (*See* Docs. 54, 57-58.)

not shown that they will endure any particular hardship as a result of withholding judicial consideration at this time. *See Stormans*, 586 F.3d at 1126. "'A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.'" *Id.* (quoting *US W. Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999)). Although "pure legal questions that require little factual development are more likely to be ripe, a party bringing a preenforcement challenge must nonetheless present a concrete factual situation . . . to delineate the boundaries of what conduct the government may or may not regulate without running afoul of the Constitution." *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007) (internal quotation and citation omitted). Plaintiffs do not challenge any specific action taken by any Defendant. Plaintiffs also do not describe any actions by state employees that were in violation of the CSA or any threat of prosecution for any reason by federal officials. These issues, as presented, are not appropriate for judicial review.

Furthermore, Plaintiffs have not satisfied the requirement that they demonstrate hardship in the absence of court intervention. "To meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *US W. Commc'ns*, 193 F.3d at 1118 (internal quotation and citation omitted). "Although the constitutional and prudential considerations are distinct, the absence of any real or imminent threat of enforcement, particularly criminal enforcement, seriously undermines any claim of hardship." *Thomas*, 220 F.3d at 1142. In fact, the Ninth Circuit Court of Appeals has observed that requiring defendants to defend a law "in a vacuum and in the absence of any particular victims" creates a hardship for the defendant. *Id.* Plaintiffs' claims are not specific enough to satisfy this element of the prudential ripeness test. As explained above, the Complaint details no concrete or imminent threat of enforcement, nor does it describe with any credible detail a state employee at risk of federal prosecution under the CSA. Plaintiffs have not satisfied the prudential component of ripeness.

B. Proposed Intervenors' Motions

Maricopa County and B. Joy Rich seek to intervene in this matter and seek a hearing on their Motion and to oppose Defendants' Motions to Dismiss. (Mot. to Intervene at 1; Mot. for Hr'g at 1.) As the Court dismisses the Complaint in its entirety, both of the Proposed Intervenors' Motions are denied without prejudice at this time. There is currently no active case in which to intervene, and a hearing on this question would not be helpful. Briefing on Defendants' Motions to Dismiss and on the Motion to Intervene closed months ago, and the Proposed Intervenors may not now have an opportunity to respond to Defendants' arguments.

III. CONCLUSION

Because Plaintiffs have not satisfied either the constitutional or prudential components of ripeness, the Complaint must be dismissed. Plaintiffs' stated intention to amend the Complaint by January 9, 2011, in order to attempt to resolve "any case or controversy issues" does not appear likely to remedy this defect. The Court dismisses the Complaint without prejudice, and Plaintiffs may amend within 30 days; however, if they choose to replead their claims, Plaintiffs must resolve the problems described in this Order.

IT IS THEREFORE ORDERED granting the Motion to Dismiss for Lack of Jurisdiction filed on behalf of all named non-government Defendants by the Arizona Medical Marijuana Association (Doc. 30) and the Motion to Dismiss for Lack of Jurisdiction filed by Dennis K. Burke, Eric H. Holder, Jr., the United States Department of Justice, and the United States of America (Doc. 38) and dismissing the Complaint without prejudice.

IT IS FURTHER ORDERED granting Plaintiffs 30 days, including the date of entry of this Order, to file any amended Complaint.

IT IS FURTHER ORDERED denying without prejudice Maricopa County and B. Joy Rich's Motion to Intervene (Doc. 31) and Motion for Hearing on the Motion to Intervene and for Leave to File Brief in Opposition to the NG Defendants' Motion to Dismiss (Doc. 60).

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IT IS FURTHER ORDERED granting Plaintiffs' Motions to Supplement the Record (Docs. 54, 57-58).

DATED this 4th day of January, 2012.

Susan R. Bolton
United States District Judge

APPENDIX C

Filed 7/31/08

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO et al., Plaintiffs and Appellants, v. SAN DIEGO NORML et al., Defendants and Respondents; WENDY CHRISTAKES et al., Interveners and Respondents.	D050333 (Super. Ct. Nos. GIC860665, GIC861051)

APPEAL from a judgment of the Superior Court of San Diego County, William R. Nevitt, Jr., Judge. Affirmed.

John J. Sansone, County Counsel (San Diego), Thomas D. Bunton and C. Ellen Pilsecker, Deputy County Counsel, for Plaintiff and Appellant County of San Diego.

Ruth E. Stringer, County Counsel (San Bernardino), Alan L. Green, Charles J. Larkin and Dennis Tilton, Deputy County Counsel, for Plaintiffs and Appellants County of San Bernardino and Gary Penrod.

American Civil Liberties Union Foundation, Adam B. Wolf, Allen Hopper; ACLU of San Diego & Imperial Counties and David Blair-Loy for Defendants and Respondents San Diego NORML, Wo/Men's Alliance for Medical Marijuana and Dr. Stephen O'Brien.

Edmund G. Brown, Jr., Attorney General, Christopher E. Krueger, Assistant Attorney General, Jonathan K. Renner and Peter A. Krause, Deputy Attorneys General, for Defendants and Respondents State of California and Sandra Shewry.

Americans for Safe Access and Joseph D. Elford for Interveners and Respondents Wendy Christakes, Norbert Litzinger, William Britt, Yvonne Westbrook and Americans for Safe Access.

In 2003, the California Legislature enacted the Medical Marijuana Program Act. (Health & Saf. Code, §§ 11362.7-11362.9, hereafter MMP.)[1] Among other provisions, the MMP imposed on counties the obligation to implement a program permitting a limited group of persons--those who qualify for exemption from California's statutes criminalizing certain conduct with respect to marijuana (the exemptions)--to apply for and obtain an identification card verifying their exemption.

In this action, plaintiffs County of San Diego (San Diego) and County of San Bernardino (San Bernardino) contend that, because the federal Controlled Substances Act (21 U.S.C. §§ 801-904, hereafter CSA) prohibits possessing or using marijuana for any purpose, certain provisions of California's statutory scheme are unconstitutional under the

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1 All statutory references are to the Health and Safety Code unless otherwise specified.

Supremacy Clause of the United States Constitution. San Diego and San Bernardino (together Counties) did not claim below, and do not assert on appeal, that the exemption from state criminal prosecution for possession or cultivation of marijuana provided by California's Compassionate Use Act of 1996 (§ 11362.5, hereafter CUA) is unconstitutional under the preemption clause. Instead, Counties argue the MMP is invalid under preemption principles, arguing the MMP poses an obstacle to the congressional intent embodied in the CSA.

The trial court below rejected Counties' claims, concluding the MMP neither conflicted with nor posed an obstacle to the CSA. On appeal, Counties assert the trial court applied an overly narrow test for preemption, and the MMP is preempted as an obstacle to the CSA. We conclude Counties have standing to challenge only those limited provisions of the MMP that impose specific obligations on Counties, and may not broadly attack collateral provisions of California's laws that impose no obligation on or inflict any particularized injury to Counties. We further conclude, as to the limited provisions of the MMP that Counties *may* challenge, those provisions do not positively conflict with the CSA, and do not pose any added obstacle to the purposes of the CSA not inherent in the distinct provisions of the exemptions from prosecution under California's laws, and therefore those limited provisions of the MMP are not preempted. We also reject San Bernardino's claim that the identification card provisions of the MMP are invalid under the California Constitution.

I

THE STATUTORY FRAMEWORK

A. California Law

The CUA

In California, marijuana is classified as a Schedule I controlled substance (see § 11054, subd. (d)(13)), and its possession is generally prohibited. However, when California voters adopted the CUA, California adopted an exemption from state law sanctions for medical users of marijuana. The CUA, codified in section 11362.5, provides:

> "(b)(1) The people of the State of California hereby find and declare that the purposes of the [CUA] are as follows:
>
> "(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.
>
> "(B) To 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.
>
> "(C) To 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.
>
> "(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

"(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

"(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's 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.

"(e) For the purposes of this section, 'primary caregiver' means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person."

The MMP

In 2003, the Legislature enacted the MMP to "address issues not included in the CUA." (*People v. Wright* (2006) 40 Cal.4th 81, 85.) Among the MMP's purposes was to " 'facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers.' " (*Id.* at p. 93.) To that end, the MMP included provisions establishing a voluntary program for the issuance of identification cards to persons qualified to claim the exemptions provided under California's medical marijuana laws. (§§ 11362.7, subd. (f), 11362.71.) Participation in the identification card program, although not mandatory, provides a significant benefit to its participants: they are not subject to arrest for violating California's laws relating to the possession, transportation, delivery or cultivation of marijuana, provided they meet the conditions outlined in the MMP. (§ 11362.71, subd. (e).)

Although the bulk of the provisions of the MMP confer no rights and impose no duties on counties,[2] one set of provisions under the MMP--the program for issuing identification cards to qualified patients and primary caregivers--does impose certain obligations on counties. (§ 11362.71 et seq.) Under the identification card program, the California Department of Health Services is required to establish and maintain a program under which qualified applicants may voluntarily apply for a California identification card identifying them as qualified for the exemptions; the program is also to provide law enforcement a 24-hour a day center to verify the validity of the state identification card. (§ 11362.71, subd. (a).) The MMP requires counties to provide applications to applicants, to receive and process the applications, verify the accuracy of the information contained on the applications, approve the applications of persons meeting the state qualifications and issue the state identification cards to qualified persons, and maintain the records of the program. (§§ 11362.71-11362.755.)

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2 For example, the MMP's exemptions encompass a broad list of specified drug offenses from which qualified patients and primary caregivers would be immune. The MMP provides that exempt persons would not " 'be subject, on that sole basis, to criminal liability under Section 11357 [possession of marijuana], 11358 [cultivation of marijuana], 11359 [possession for sale], 11360 [transportation], 11366 [maintaining a place for the sale, giving away or use of marijuana], 11366.5 [making available premises for the manufacture, storage or distribution of controlled substances], or 11570 [abatement of nuisance created by premises used for manufacture, storage or distribution of controlled substance].' (§ 11362.765, subd. (a).)" (*People v. Wright, supra*, 40 Cal.4th at p. 93.) The MMP also contains definitional provisions for those entitled to the protections of the MMP (§ 11362.7), imposes obligations on applicants and holders of identification cards (§§ 11362.715, 11362.76, 11362.77, 11362.81), and contains several other miscellaneous provisions.

The identification card program is voluntary and a person need not obtain an identification card to be entitled to the exemptions provided by state law. (§ 11362.765, subd. (b); *People v. Wright, supra*, 40 Cal.4th at pp. 93-94 [the MMP applies to both cardholders and noncardholders].)

B. Federal Law - the CSA

The CSA provides it is "unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice . . . ." (21 U.S.C. § 844(a).) The exception regarding a doctor's prescription or order does not apply to any controlled substance Congress has classified as a Schedule I drug (see 21 U.S.C. § 812(c)), including marijuana. (*Gonzales v. Raich* (2005) 545 U.S. 1, 14-15.) Schedule I drugs are so categorized because they have (1) a high potential for abuse, (2) no currently accepted medical use in treatment in the United States, and (3) a lack of accepted safety for use under medical supervision. (21 U.S.C. § 812(b)(1).)

Possession of marijuana for personal use is a federal misdemeanor. (21 U.S.C. § 844a(a).) The legislative intent of Congress to preclude the use of marijuana for medicinal purposes is reflected in the statutory scheme of the CSA:[3] "By classifying

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3 Counties also note the United States is a party to a treaty, the Single Convention on Narcotic Drugs, 1961 (see 21 U.S.C. § 801(7)), which includes prohibitions on marijuana. However, this treaty is not self-executing, and Counties do not explain how the treaty lends any added weight to the preemption questions presented here.

marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study. [Citations.]" (*Gonzales v. Raich, supra,* 545 U.S. at p. 14.)

Although the use of marijuana for medical purposes has found growing acceptance among the states (*Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 643 [noting "Alaska, Arizona, Colorado, Maine, Nevada, Oregon and Washington have followed California in enacting medical marijuana laws by voter initiative"]), marijuana remains generally prohibited under the CSA. (*Conant,* at p. 640; *Gonzales v. Raich, supra,* 545 U.S. at p. 15, fn. 23 [efforts to reclassify marijuana to permit medicinal uses have been unsuccessful].)

II

PROCEDURAL BACKGROUND

In 2006 San Diego filed a complaint against the State of California and Sandra Shewry, in her former capacity as Director of the California Department of Health Services (together State), as well as the San Diego chapter of the National Organization for the Reform of Marijuana Laws (NORML). San Diego's complaint alleged it had declined to comply with its obligations under the MMP and NORML had threatened to file suit against San Diego for its noncompliance. Accordingly, San Diego sought a judicial declaration that it was not required to comply with the MMP, arguing the entirety of the MMP and the CUA (except for section 11362.5, subsection (d)) was preempted by

federal law. San Bernardino filed its suit raising the same preemption claims, and its complaint was subsequently consolidated with that of San Diego. The County of Merced intervened in San Diego's action and alleged, as an additional ground for relief, that the MMP was invalid because it amended the CUA in violation of Article II, section 10, subdivision (c) of the California Constitution.[4] Additional parties, composed of medical marijuana patients and others qualified for exemptions under the CUA and MMP, also intervened in the action.

State demurred to Counties' complaints, alleging in part that Counties did not have standing to prosecute the claims, but its demurrer was overruled. The parties subsequently filed cross-motions for judgment on the pleadings, which were consolidated for hearing in November 2006. The court ruled the CUA and MMP were not preempted by federal law and the MMP was not invalid under the California Constitution, and entered judgment accordingly. Counties appeal.

III

THE STANDING ISSUE

State argues on appeal that Counties do not have standing to assert the CUA and MMP are unconstitutional.[5] State's argument presents two distinct issues. The first issue

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4 County of Merced is not a party to this appeal and its complaint in intervention is not part of the record on appeal. However, we grant State's unopposed motion for judicial notice of County of Merced's complaint in intervention.

5 The issue of standing, raised at trial, is a jurisdictional issue that may be raised at any time notwithstanding the absence of a cross-appeal. (*Citizens for Uniform Laws v. County of Contra Costa* (1991) 233 Cal.App.3d 1468, 1472.)

is whether a political subdivision of California, charged with the ministerial obligation to enforce or carry out state laws, may ever challenge a state enactment as unconstitutional. Must the entity comply with a state law until a court has declared the law unconstitutional, or may it instead bring a declaratory relief action challenging the constitutionality of that law? The second issue, which assumes a local governmental entity *may* challenge a state law as unconstitutional, is the extent of its standing. Does the entity have standing to challenge an entire statutory scheme--including those aspects of the scheme that impose no obligations on the entity--or is it limited to challenging only those aspects that impose specific obligations on or inflict particularized injury to the local governmental entity?

A. General Principles

A declaratory relief action requires an "actual controversy relating to the legal rights and duties of the respective parties." (Code Civ. Proc., § 1060.) Courts will decline to resolve lawsuits that do not present a justiciable controversy, and justiciability "involves the intertwined criteria of ripeness and standing." (*California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 22.)

"As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication *because he or she has either suffered or is about to suffer an injury of sufficient magnitude* reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator. [Citations.] To have standing, a party must be

beneficially interested in the controversy; that is, he or she must have 'some special interest to be served or some particular right to be preserved or protected *over and above the interest held in common with the public at large.*' [Quoting *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796.] The party must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical." (*Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 314-315, italics added.)

When a party asserts a statute is unconstitutional, standing is not established merely because the party has been impacted by the statutory scheme to which the assertedly unconstitutional statute belongs. Instead, the courts have stated that "[a]t a minimum, standing means a party must ' "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . .' [Quoting *Valley Forge College v. Americans United* (1982) 454 U.S. 464, 472.] . . . ' "[I]t is well-settled law that the courts will not give their consideration to questions as to the constitutionality of a statute unless such consideration is necessary to the determination of a *real and vital controversy between the litigants in the particular case before it.* It is incumbent upon a party to an action or proceeding who assails a law invoked in the course thereof to show that the provisions of the statute thus assailed are applicable to him and that he is injuriously affected thereby." [Citations.]' [Quoting *Worsley v. Municipal Court* (1981) 122 Cal.App.3d 409, 418.]" (*In re Tania S.* (1992) 5 Cal.App.4th 728, 736-737.)

This court's analysis in *Tania S.* demonstrates that a party does not have standing to raise hypothetical constitutional infirmities of a statute when the statute, as applied to the party, does not occasion any injury to the party. In *Tania S.*, the appellant's children were declared dependents and removed from his custody when the court found, under Welfare and Institutions Code section 300, subdivision (b), that appellant's inability or failure to protect the children created a substantial risk of serious physical harm to them. (*In re Tania S., supra,* 5 Cal.App.4th at pp. 732-733.) The appellant did not challenge the constitutionality of the portion of section 300, subdivision (b), under which the juvenile court made its jurisdictional findings, but instead asserted a second aspect of section 300, subdivision (b) (which cautioned that an allegation of willful failure to provide adequate medical treatment based on religious beliefs required a court to give some deference to the parent's religious practices) improperly created two classes of parents--those who injure their children out of a religious belief and those who injure their children for nonreligious reasons--making the entirety of section 300, subdivision (b), unconstitutional. (*Tania S.*, at pp. 735-736.) This court rejected the appellant's standing to raise the claim because the proceedings were not based on an allegation he did not provide the children adequate medical treatment or provided spiritual treatment through prayer. This court concluded that because the appellant "has not demonstrated he suffered any direct injury resulting from the assertedly unconstitutional portion of [the statute]," "we do not determine the substantive merits of [appellant's] claim the challenged portion of [the statute] is unconstitutional. Such determination will be made

only if the claim is raised by one with standing." (*In re Tania S.*, at pp. 736-737, fn. omitted.)

B. Limitations on Governmental Entities

Plaintiffs here are local governmental entities that sought in the proceedings below, and seek in this appeal, a determination that they are not obligated to comply with their duties under the statutory scheme because the statutory scheme is unconstitutional. We must evaluate the extent to which a local governmental entity of the state may attack the constitutionality of the laws it is obligated to administer.

As a general rule, a local governmental entity "charged with the ministerial duty of enforcing a statute[] generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the [entity's] view that it is unconstitutional." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1082, fn. omitted.) In *Lockyer*, the court rejected the entity's argument that because the entity believed certain statutes (limiting marriage to a union between a man and a woman) were unconstitutional, it could bring the issue into court by defying state law and issuing licenses to same-sex couples. *Lockyer* noted that, although there may be limited circumstances in which a public entity might refuse to enforce a statute as a means of bringing the constitutionality of the statute before a court for judicial resolution, the exception does not apply when there exists "a clear and readily available means, other than the officials' wholesale defiance of the applicable statutes, to ensure that the constitutionality of the current marriage statutes would be decided by a

court." (*Id.* at p. 1099.) *Lockyer* noted that if the local officials charged with the ministerial duty of issuing marriage licenses and registering marriage certificates believed the state's current marriage statutes are unconstitutional and should be tested in court, "they could have denied a same-sex couple's request for a marriage license and advised the couple to challenge the denial in superior court. *That* procedure--a lawsuit brought by a couple who has been denied a license under existing statutes--is the procedure that was utilized to challenge the constitutionality of California's antimiscegenation statute . . . . The city cannot plausibly claim that the desire to obtain a judicial ruling on the constitutional issue justified the wholesale defiance of the applicable statutes that occurred here." (*Lockyer,* at pp. 1098-1099, fn. omitted.)

However, under some limited circumstances, a public entity threatened with injury by the allegedly unconstitutional operation of an enactment may have standing to raise the challenge in the courts. For example, in *County of Los Angeles v. Sasaki* (1994) 23 Cal.App.4th 1442, one enactment (Sen. Bill No. 1135) reallocated property tax revenues away from the county and to school and community college districts, while a second enactment (Sen. Bill No. 399) affected the formulas for determining the amount of moneys to be applied by the state for the support of school and community college districts. (*Id.* at pp. 1447-1448.) The court concluded the county could challenge Senate Bill No. 1135's reallocation of funds away from the county. However, the court concluded the county did not have standing to challenge Senate Bill No. 399, stating:

> "Without mentioning [Senate Bill No.] 399, the County alleged in its complaint that the state will use the funds reallocated pursuant to

> [Senate Bill No.] 1135 to fulfill its responsibilities for the financial support of schools as mandated by Proposition 98. On appeal, the County contends the 'State's action' was invalid because 'it mandated a major shift in the use of local property taxes for a specific State purpose, to fulfill the State's obligation under Proposition 98 to provide a constitutionally prescribed minimum amount of public education funding 'from state revenues.'" Thus, the County seeks to challenge both [Senate Bill No.] 1135 . . . and [Senate Bill No.] 399 . . . . [¶] The constitutionality of [Senate Bill No. 399] is not before us on this appeal. This appeal deals only with the reallocation of property tax revenues from local governments and special districts to school and community college districts. The County's concern is with the loss of property tax revenue to it because of the [Senate Bill No.] 1135 reallocation. How the state treats the reallocation in connection with the mandate of California Constitution, article XVI, section 8 (Proposition 98), is of possible concern to the educational entities which are beneficiaries of the constitutional mandate, but not the County. In short, there is simply no theory based on Proposition 98 and/or the effect of [Senate Bill No.] 399 upon it, which would, even assuming there were no other obstacles, entitle the County to a writ of mandate compelling compliance with County Ordinance No. 1993-0045, and negating [Senate Bill No.] 1135. The County lacks standing to raise the issue." (*Id.* at p. 1449.)

The other courts that have granted standing to local public entities to raise constitutional challenges to enactments they were otherwise bound to enforce have similarly done so in the limited context of enactments that imposed duties directly on or denied significant rights to the entity itself. (See, e.g., *Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 5-10 [state law provided exemption from local taxation for business inventories of foreign origin; county had standing to assert exemption violated commerce clause "because . . . the agencies experienced significant revenue loss"]; *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355 [entity asserted materials it seized from medical marijuana user could not be returned because

federal preemption principles barred return of marijuana; standing to raise issue recognized because entity had specific duty at issue under the statutory scheme and issue was limited to whether that duty violated preemption principles].) However, the courts have declined to confer standing on the entity to raise constitutional challenges to enactments that had no direct impact on the entity but instead affected only the entity's constituency. (See, e.g., *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 59-63 [standing denied where enactment imposed no obligations on entity and only imposed restrictions on officials of entity].)

C. Analysis

State, relying on *Lockyer, supra,* 33 Cal.4th 1055 and *Tania S., supra,* 5 Cal.App.4th 728, argues that because Counties have suffered no cognizable injury from the exemptions for medical marijuana users provided by the MMP or CUA, the action should be dismissed because Counties' "mere dissatisfaction with . . . or disagreement with [state] policies does not constitute a justiciable controversy" and does not confer standing on Counties to raise constitutional complaints about the MMP or CUA. (*Zetterberg v. State Dept. of Public Health* (1974) 43 Cal.App.3d 657, 662.) Counties, relying on *Star-Kist Foods, Inc. v. County of Los Angeles, supra,* 42 Cal.3d 1 and *City of Garden Grove v. Superior Court, supra,* 157 Cal.App.4th 355, assert they have standing because they will suffer harm--by being required to establish and operate the apparatus to

process and issue identification cards--from statutory obligations they argue are preempted by the CSA.[6]

The standing principles distilled from the cases convince us Counties do not have standing to challenge those portions of the MMP and CUA that are not applicable to them and that do not injuriously affect them. (*In re Tania S., supra,* 5 Cal.App.4th at 737.) Accordingly, because major portions of the MMP and CUA neither impose obligations on nor inflict direct injury to Counties, we reject Counties' effort to obtain an advisory opinion declaring the *entirety* of the MMP and the bulk of the CUA are invalid under preemption principles.[7] However, because limited portions of the MMP--i.e. those statutes requiring counties to adopt and operate the identification card system--*do* impose obligations on Counties, which obligations would be obviated were those statutes

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6 Counties, citing *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432 and *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, appear also to assert that standing exists when the party has a sufficient interest in the litigation to ensure the matter will be prosecuted with vigor. However, these cases did not hold a person willing to litigate a claim intensely acquires standing that is otherwise absent, and we are not aware of any case law suggesting that a willingness to fervently pursue a cause is the sine qua non of standing to litigate that cause.

7 Our decision to limit Counties' constitutional challenge to those portions of the CUA and MMP that directly affect them is consonant with "[w]ell-settled principles of judicial restraint [that establish] when a case must be decided upon constitutional grounds, a court should strive to resolve the matter as narrowly as possible, and should avoid expansive constitutional pronouncements that inevitably prejudge future controversies and may have unforeseen and questionable consequences in other contexts. [Citations.]" (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 116 [conc. opn. of George, J.].) This principle of jurisprudential restraint cautions against deciding broad constitutional questions raised, as here, by persons not injuriously affected by the challenged statute. (See generally *Longval v. Workers' Comp. Appeals Bd.* (1996) 51 Cal.App.4th 792, 802.)

preempted by federal law, we conclude Counties have standing to raise preemption claims insofar as the MMP establishes the identification card system. Accordingly, we reach Counties' preemption arguments as to those statutes, and *only* those statutes, that require Counties to implement and administer the identification card system.[8]

IV

THE PREEMPTION ISSUE

A. General Principles

Principles of preemption have been articulated by numerous courts. " 'The supremacy clause of article VI of the United States Constitution grants Congress the power to preempt state law. State law that conflicts with a federal statute is " 'without effect.' " [Citations.] It is equally well established that "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' " [Citation.] Thus, " ' "[t]he purpose of Congress is the

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8 Specifically, we examine Counties' preemption claims only as to sections 11362.71, subdivision (b) (requiring counties to administer the identification card system established by the Department of Health Services), 11362.72 (specifying counties' obligations upon receipt of application for identification card), 11362.735 (specifying contents of identification card issued by counties), 11362.74 (specifying grounds and procedures for denying application), 11362.745 (specifying renewal procedures for cards), and section 11362.755 (permitting counties to establish fees to defray cost of administering system), which impose obligations on Counties. We conclude Counties do not have standing to challenge (and therefore we do not evaluate) whether the remaining sections, and in particular sections 11362.5, subdivision (d), and 11362.765 (providing specified persons with exemptions from state law penalties for specified offenses), are preempted by the CSA.

ultimate touchstone" ' " of pre-emption analysis." [Citation.]' " (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949.)

The California Supreme court has identified "four species of federal preemption: express, conflict, obstacle, and field. [Citation.] [¶] First, express preemption arises when Congress 'define[s] explicitly the extent to which its enactments pre-empt state law. [Citation.] Pre-emption fundamentally is a question of congressional intent, [citation], and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.' [Citations.] Second, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. [Citations.] Third, obstacle preemption arises when ' "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ' [Citations.] Finally, field preemption, i.e., 'Congress' intent to pre-empt all state law in a particular area,' applies 'where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.' [Citations.]" (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935-936, fn. omitted (*Viva!*).)

The parties agree, and numerous courts have concluded, Congress's statement in the CSA that "[n]o 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" (21

U.S.C. § 903) demonstrates Congress intended to reject express and field preemption of state laws concerning controlled substances. (See, e.g., *People v. Boultinghouse* (2005) 134 Cal.App.4th 619, 623 [21 U.S.C. § 903's "express statement by Congress that the federal drug law does *not* generally preempt state law gives the usual assumption against preemption additional force"]; *Gonzales v. Oregon* (2006) 546 U.S. 243, 289 [dis. opn. of Scalia, J.] [characterizing section 903 as a "nonpre-emption clause"]; *City of Hartford v. Tucker* (Conn. 1993) 621 A.2d 1339, 1341 [describing 21 U.S.C. § 903 and "the antipreemption provision of the Controlled Substances Act"].) When Congress has expressly described the scope of the state laws it intended to preempt, the courts "infer Congress intended to preempt no more than that absent sound contrary evidence." (*Viva!, supra,* 41 Cal.4th at p. 945.)

B. Conflict and Obstacle Preemption

Although the parties agree that neither express nor field preemption apply in this case, they dispute whether title 21 United States Code section 903 signified a congressional intent to displace only those state laws that positively conflict with the provisions of the CSA, or also signified a congressional intent to preempt any laws posing an obstacle to the fulfillment of purposes underlying the CSA.

Conflict Preemption

Conflict preemption will be found when "simultaneous compliance with both state and federal directives is impossible." (*Viva!, supra,* 41 Cal.4th at 936.) In *Southern Blasting Services v. Wilkes County, NC* (4th Cir. 2002) 288 F.3d 584, the court construed

the effect of a federal preemption clause substantively identical to title 21 United States Code section 903.[9] In rejecting the plaintiffs' argument that the local ordinances were invalid because they were in "direct and positive conflict" with the federal law, the *Southern Blasting* court concluded that "[t]he 'direct and positive conflict' language in 18 U.S.C. § 848 simply restates the principle that state law is superseded in cases of an actual conflict with federal law such that 'compliance with both federal and state regulations is a physical impossibility.' [Quoting *Hillsborough County v. Automated Medical Labs.* (1985) 471 U.S. 707, 713]. Indeed, § 848 explains that in order for a direct and positive conflict to exist, the state and federal laws must be such that they 'cannot be reconciled or consistently stand together.' " (*Southern Blasting, supra*, at p. 591; accord *Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 142-143 [state law preempted where "compliance with both federal and state regulations is a physical impossibility"].)

Congress has the power to permit state laws that, although posing some obstacle to congressional goals, may be adhered to without requiring a person affirmatively to violate federal laws. (*Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 872 [dicta].) In *Gonzales v. Oregon, supra,* 546 U.S. 243, the court considered whether the

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9 The preemption clause evaluated by the *Southern Blasting* court provided that, "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." (18 U.S.C. § 848.)

CSA, by regulating controlled substances and making some substances available only pursuant to a prescription by a physician "issued for a legitimate medical purpose" (21 C.F.R. § 1306.04(a)), permitted the federal government to effectively bar Oregon's doctors from prescribing drugs pursuant to Oregon's assisted suicide law by issuing a federal administrative rule (the Directive) that use of controlled substances to assist suicide is not a legitimate medical practice and dispensing or prescribing them for this purpose is unlawful under the CSA. The majority concluded the CSA's preemption clause showed Congress "explicitly contemplates a role for the States in regulating controlled substances" (*Gonzales v. Oregon,* at p. 251), including permitting the states latitude to continue their historic role of regulating medical practices. In dissent, Justice Scalia concluded title 21 United States Code section 903 was "embarrassingly inapplicable" to the majority's preemption analysis because the preemptive impact of section 903 reached only state laws that affirmatively mandated conduct violating federal laws. (*Gonzales v. Oregon, supra,* 546 U.S. at p. 289, dis. opn. of Scalia, J.)[10] Thus, it appears Justice Scalia's interpretation suggests a state law is preempted by a federal

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10 Justice Scalia explained that title 21 United States Code section 903 only "affirmatively *prescrib*[*ed*] federal pre-emption whenever state law creates a conflict. In any event, the Directive does not purport to pre-empt state law in any way, not even by conflict pre-emption--unless the Court is under the misimpression that some States *require* assisted suicide. The Directive merely interprets the CSA to prohibit, like countless other federal criminal provisions, conduct that happens not to be forbidden under state law (or at least the law of the State of Oregon)." (*Gonzales v. Oregon, supra,* 546 U.S. at pp. 289-290, dis. opn. of Scalia, J.)

"positive conflict" clause, like 21 U.S.C. section 903, only when the state law affirmatively requires acts violating the federal proscription.

Obstacle Preemption

Obstacle preemption[11] will invalidate a state law when " ' "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ' [Citations.]" (*Viva!, supra,* 41 Cal.4th at p. 936.) Under obstacle preemption, whether a state law presents "a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects: [¶] 'For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished--if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect--the state law must yield to the regulation of Congress within the sphere of its delegated power.' " (*Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 373.)

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11 The parties dispute whether obstacle preemption is merely an alternative iteration of conflict preemption, or whether obstacle preemption requires an analytical approach distinct from conflict preemption. Our Supreme Court, although recognizing that the courts have often "group[ed] conflict preemption and obstacle preemption together in a single category" (*Viva!, supra,* at pp. 935-936, fn. 3), has concluded the two types of preemption are "analytically distinct and may rest on wholly different sources of constitutional authority [and] we treat them as separate categories . . . ." (*Ibid.*)

C. The State Identification Card Laws and Preemption

The parties below disputed the effect of the language of title 21 United States Code section 903, which 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*." (Italics added.)

In the proceedings below, State and other respondents contended this language evidenced a congressional intent to preempt only those state laws in direct and positive conflict with the CSA so that compliance with both the CSA and the state laws is impossible. Counties asserted this language was merely intended to eschew express and field preemption and should be construed as declaring Congress's intent to preempt any state laws that posed a substantial obstacle to the fulfillment of purposes underlying the CSA in addition to those in direct conflict. The trial court, after concluding title 21 United States Code section 903 was intended to preserve all state laws except insofar as compliance with both the CSA and the state statute was impossible, found the MMP and CUA were not preempted because they did not mandate conduct violating the CSA.

21 U.S.C. Section 903 Limits Preemption to Positive Conflicts

The intent of Congress when it enacted the CSA is the touchstone of our preemption analysis. (*Jevne v. Superior Court, supra,* 35 Cal.4th at p. 949.) When Congress legislates in a "field which the States have traditionally occupied[,] . . . 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." (*Rice v. Santa Fe Elevator Corporation* (1947) 331 U.S. 218, 230.) Because the MMP and CUA address fields historically occupied by the states--medical practices (*Medtronic v. Lohr* (1996) 518 U.S. 470, 485) and state criminal sanctions for drug possession (*City of Garden Grove v. Superior Court, supra,* 157 Cal.App.4th at pp. 383-386)--the presumption against preemption informs our resolution of the scope to which Congress intended the CSA to supplant state laws, and cautions us to narrowly interpret the scope of Congress's intended invalidation of state law. (*Medtronic, supra.*)

Our evaluation of the scope of Congress's intended preemption examines the text of the federal law as the best indicator of Congress's intent and, where that law "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.' " (*Sprietsma v. Mercury Marine* (2002) 537 U.S. 51, 62-63.) Because "[i]n these cases, our task is to identify the domain expressly pre-empted [citation] . . . 'an express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to pre-empt other matters [citation].' " (*Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 541; accord, *Viva!, supra*, 41 Cal.4th at pp. 944-945 [inference that express definition of preemptive reach means Congress did not intend to preempt other matters "is a simple corollary of ordinary statutory interpretation principles and in particular 'a variant of the familiar principle of

expressio unius est exclusio alterius: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.' ")

The language of title 21 United States Code section 903 expressly limits preemption to only those state laws in which there "is a *positive conflict* between [the federal and state law] *so that the two cannot consistently stand together.*" (Italics added.) When construing a statute, the courts seek to attribute significance to every word and phrase (*United States v. Menasche* (1955) 348 U.S. 528, 538-539) in accordance with their usual and ordinary meaning. (*Strong v. State Bd. of Equalization* (2007) 155 Cal.App.4th 1182, 1193.) The phrase "positive conflict," particularly as refined by the phrase that "the two [laws] cannot consistently stand together," suggests that Congress did not intend to supplant all laws posing some conceivable obstacle to the purposes of the CSA, but instead intended to supplant only state laws that could not be adhered to without violating the CSA. Addressing analogous express preemption clauses, the court in *Southern Blasting Services v. Wilkes County, NC, supra,* 288 F.3d 584 held the state statute was not preempted because compliance with both the state and federal laws was not impossible, and the court in *Levine v. Wyeth* (Vt. 2006) 944 A.2d 179, 190-191 construed a federal statute with an analogous express preemption clause (which preserved state laws unless there is a direct and positive conflict) as "essentially remov[ing] from our consideration the question of whether [state law] claims [are preempted as] an obstacle to the purposes and objectives of Congress." Because title 21 United States Code section 903 preserves state laws except where there exists such a *positive* conflict

that the two laws *cannot* consistently stand together, the *implied* conflict analysis of obstacle preemption appears beyond the intended scope of title 21 United States Code section 903.

Counties argue this construction is too narrow, and we should construe Congress's use of the term "conflict" in section 903 as signifying an intent to incorporate both positive and implied conflict principles into the scope of state laws preempted by the CSA. Certainly, the United States Supreme Court has concluded that federal legislation containing an express preemption clause and a savings clause does not necessarily preclude application of implied preemption principles. (See *Geier v. American Honda Motor Co., supra,* 529 U.S. 861; *Buckman Co. v. Plaintiffs' Legal Comm.* (2001) 531 U.S. 341; *Sprietsma v. Mercury Marine, supra,* 537 U.S. 51.) However, none of Counties' cited cases examined preemption clauses containing the "positive conflict" language included in title 21 United States Code section 903, and thus provide little guidance here.[12] Indeed, Counties' proffered construction effectively reads the term

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12 In *Geier* and *Sprietsma*, the express preemption clauses precluded a state from establishing any safety standard regarding a vehicle (*Geier*) or vessel (*Sprietsma*) not identical to the federal standard, but separate "savings" clauses specified that compliance with the federal safety standards did not exempt any person from any liability under common law. (*Geier v. American Honda Motor Co., supra,* 529 U.S. at pp. 867-868; *Sprietsma v. Mercury Marine, supra,* 537 U.S. at pp. 58-59.) The analysis of the interplay between two statutes, as addressed by the *Geier* and *Sprietsma* courts, bears no resemblance to the issues presented here. In *Buckman Co. v. Plaintiffs' Legal Comm., supra,* 531 U.S. 341, the issues examined by the court are even more remote from the issues we must resolve. First, the *Buckman* court specifically recognized that the preemption issue there involved "[p]olicing fraud against federal agencies[, which] is hardly 'a field which the States have traditionally occupied,' [citation] such as to warrant a presumption against finding federal pre-emption of a state-law cause of action."

"positive" out of section 903, which transgresses the interpretative canon that we should accord meaning to every term and phrase employed by Congress. (*United States v. Menasche, supra,* 348 U.S. at 538-539.) Moreover, when Congress has intended to craft an express preemption clause signifying that *both* positive and obstacle conflict preemption will invalidate state laws, Congress has so structured the express preemption clause. (See 21 U.S.C. 350e(e)(1) [Congress declared that state requirements would be "preempted if-- [¶] (A) complying with [the federal and state statutes] is not possible; or (B) the requirement of the State . . . as applied or enforced is an obstacle to accomplishing and carrying out [the federal statute]".) Where statutes involving similar issues contain language demonstrating the Legislature knows how to express its intent, " 'the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes.' " (*In re Jennings* (2004) 34 Cal.4th 254, 273.)

Because Congress provided that the CSA preempted only laws positively conflicting with the CSA so that the two sets of laws could not consistently stand together, and omitted any reference to an intent to preempt laws posing an obstacle to the CSA, we interpret title 21 United States Code section 903 as preempting only those state laws that positively conflict with the CSA so that simultaneous compliance with both sets of laws is impossible.

(*Buckman,* at p. 347.) Moreover, *Buckman* effectively relied on field preemption concerns to delimit state fraud claims. (*Id.* at pp. 348-353.) Neither of these aspects of *Buckman* is relevant to the issues we must resolve.

The Identification Laws Do Not Positively Conflict With the CSA

Counties do not identify any provision of the CSA necessarily violated when a county complies with its obligations under the state identification laws.[13] The identification laws obligate a county only to process applications for, maintain records of, and issue cards to, those individuals entitled to claim the exemption. The CSA is entirely silent on the ability of states to provide identification cards to their citizenry, and an entity that issues identification cards does not engage in conduct banned by the CSA.

Counties appear to argue there is a positive conflict between the identification laws and the CSA because the card issued by a county confirms that its bearer may violate or is immunized from federal laws.[14] However, the applications for the card expressly state the card will not insulate the bearer from federal laws, and the card itself does not imply the holder is immune from prosecution for federal offenses; instead, the card merely identifies those persons California has elected to exempt from California's

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13 San Bernardino concedes on appeal that compliance with California law "may not require a violation of the CSA," although it then asserts it "encourages if not facilitates the CSA's violation." However, the *Garden Grove* court has already concluded, and we agree, that governmental entities do not incur aider and abettor liability by complying with their obligations under the MMP (*City of Garden Grove v. Superior Court, supra,* 157 Cal.App.4th at 389-392), and we therefore reject San Bernardino's implicit argument that requiring a county to issue identification cards renders that county an aider and abettor to create a positive conflict with the CSA.

14 San Diego also cites numerous subdivisions of the CUA and MMP, which contain a variety of provisions allegedly authorizing or permitting persons to engage in conduct expressly barred by the CSA, to show the CUA and MMP in positive conflict with the CSA. However, none of the cited subdivisions are contained in the statutes that Counties have standing to challenge (see fn. 8, *ante*), and we do not further consider Counties' challenges as to those provisions.

sanctions. (Cf. *U.S. v. Cannabis Cultivators Club* (N.D. Cal. 1998) 5 F.Supp.2d 1086, 1100 [California's CUA "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"].) Because the CSA law does not compel the states to impose criminal penalties for marijuana possession, the requirement that counties issue cards identifying those against whom California has opted not to impose criminal penalties does not positively conflict with the CSA.

Accordingly, we reject Counties' claim that positive conflict preemption invalidates the identification laws because Counties' compliance with those laws can "consistently stand together" with adherence to the provisions of the CSA.

D. The Identification Card Laws and Obstacle Preemption

Although we conclude title 21 United States Code section 903 signifies Congress's intent to maintain the power of states to elect "to 'serve as a laboratory' in the trial of 'novel social and economic experiments without risk to the rest of the country' " (*United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 502 [conc. opn. of Stevens, J.]) by preserving all state laws that do not positively conflict with the CSA, we also conclude the identification laws are not preempted even if Congress had intended to preempt laws posing an obstacle to the CSA. Although state laws may be preempted under obstacle preemption when the law " ' "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" ' " (*Viva!, supra,* 41 Cal.4th at p. 936), not every state law posing some de minimus impediment will be

preempted. To the contrary, "[d]isplacement will occur only where, as we have variously described, a *'significant conflict'* exists between an identifiable 'federal policy or interest and the [operation] of state law,' [citation] or the application of state law would 'frustrate specific objectives . . .' [citation]." (*Boyle v. United Technologies Corp.* (1988) 487 U.S. 500, 507, italics added.) Indeed, *Boyle* implicitly recognized that when Congress has legislated in a field that the states have traditionally occupied, rather than in an area of unique federal concern, obstacle preemption requires an even sharper conflict with federal policy before the state statute will be invalidated. (*Ibid.*)

We conclude the identification card laws do not pose a significant impediment to specific federal objectives embodied in the CSA. The purpose of the CSA is to combat recreational drug use, not to regulate a state's medical practices. (*Gonzalez v. Oregon, supra,* 546 U.S. at pp. 270-272 [holding Oregon's assisted suicide law fell outside the preemptive reach of the CSA].) The identification card laws merely provide a mechanism allowing qualified California citizens, if they so elect, to obtain a form of identification that informs state law enforcement officers and others that they are medically exempted from the state's criminal sanctions for marijuana possession and use. Although California's decision to enact statutory exemptions from state criminal prosecution for such persons arguably undermines the goals of or is inconsistent with the CSA--a question we do not decide here--any alleged "obstacle" to the federal goals is presented by those California statutes that *create the exemptions*, not by the statutes providing a system for rapidly identifying exempt individuals. The identification card

statutes impose no significant *added* obstacle to the purposes of the CSA not otherwise inherent in the provisions of the exemptions that Counties do not have standing to challenge, and we therefore conclude the limited provisions of the MMP that Counties *may* challenge are not preempted by principles of obstacle preemption.

We are unpersuaded by Counties' arguments that the identifications laws, standing alone, present significant obstacles to the purposes of the CSA.[15] For example, Counties assert that identification cards make it "easier for individuals to use, possess, and cultivate marijuana" in violation of federal laws, without articulating why the absence of such a card--which is entirely voluntary and not a prerequisite to the exemptions available for such underlying conduct--renders the underlying conduct significantly more difficult.

Counties also appear to assert the identification card laws present a significant obstacle to the CSA because the bearer of an identification card will not be arrested by California's law enforcement officers despite being in violation of the CSA. However, the unstated predicate of this argument is that the federal government is entitled to conscript a state's law enforcement officers into enforcing federal enactments, over the objection of that state, and this entitlement will be obstructed to the extent the identification card precludes California's law enforcement officers from arresting medical

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15 The bulk of Counties' arguments on obstacle preemption focus on statutory provisions other than the identification card statutes. Because Counties do not have standing to challenge those statutes, we decline Counties' implicit invitation to issue an advisory opinion on whether those statutes are preempted by the CSA, and instead examine only those aspects of the statutory scheme imposing obligations on Counties.

marijuana users. The argument falters on its own predicate because Congress does not have the authority to compel the states to direct their law enforcement personnel to enforce federal laws. In *Printz v. United States* (1997) 521 U.S. 898, the federal Brady Act purported to compel local law enforcement officials to conduct background checks on prospective handgun purchasers. The United States Supreme Court held the 10th Amendment to the United States Constitution deprived Congress of the authority to enact that legislation, concluding that "in [*New York v. United States* (1992) 505 U.S. 144 we ruled] that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. 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." (*Printz,* at p. 935.)[16] Accordingly, we conclude the fact that

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16 San Diego argues the anti-commandeering doctrine discussed in *Printz* is inapplicable because the court in *Hodel v. Virginia Surface Mining & Recl. Assn.* (1981) 452 U.S. 264, 289-290 explicitly rejected the assertion the Tenth Amendment delimited Congress's ability under the Commerce Clause to displace state laws. However, *Printz* rejected an analogous claim when it held that, although the Commerce Clause authorized Congress to *enact* legislation concerning handgun registration, the Brady Act's *direction of the actions of state executive officials* was not constitutionally valid under Article I, § 8, as a law "necessary and proper" to the execution of Congress's Commerce Clause power to regulate handgun sales, because when "a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier [citation] it is not a "La[w] . . . *proper* for carrying into Execution the Commerce Clause.' " (*Printz, supra,* at pp. 923-924.) Thus, although the Commerce Clause permits Congress to *enact* the CSA, it does not permit Congress to *conscript state officers* into arresting persons for violating the CSA.

California has decided to exempt the bearer of an identification card from arrest by state law enforcement for state law violations does not invalidate the identification laws under obstacle preemption. (Cf. *Conant v. Walters, supra,* 309 F.3d at p. 646 [conc. opn. of Kozinski, J.] ["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."].)

We conclude that even if Congress intended to preempt state laws that present a significant obstacle to the CSA, the MMP identification card laws are not preempted.

V

THE AMENDMENT ISSUE

The CUA was adopted by initiative when the voters adopted Proposition 215. (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 767.) Article II, section 10, subdivision (c) of the California Constitution provides the Legislature 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." San Bernardino asserts on appeal that the identification laws, which are among the statutes adopted by the Legislature without voter approval when it enacted the MMP, are invalid because they amend the CUA.

This issue, although not pleaded in the complaints filed by either San Bernardino or San Diego, was initially raised by County of Merced's (Merced) complaint in

intervention. State argues on appeal that because Merced has not appealed, and only Merced formally pleaded the Article II, section 10, subdivision (c), issue, we may not on appeal consider San Bernardino's arguments as to this issue. During oral arguments on the motions for judgment on the pleadings, San Bernardino adopted and joined in Merced's arguments, without objection by State that the arguments were beyond the scope of San Bernardino's pleadings. Additionally, the trial court's judgment, after noting that one of the issues raised by Merced and joined in by San Bernardino was the Article II, section 10, subdivision (c), issue, specifically noted in its judgment that "[a]t oral argument, each party agreed that all plaintiffs win or lose together," and thereafter ruled on the Article II, section 10, subdivision (c), issue. Under these circumstances, we conclude that because (1) the parties litigated the matter below on the understanding that San Diego and San Bernardino were properly asserting the additional ground of invalidity raised by Merced, and (2) the trial court's judgment against San Bernardino included a rejection of all of the arguments raised by all co-plaintiffs, San Bernardino may litigate this issue on appeal. (See, e.g., *Jones v. Dutra Construction Co.* (1997) 57 Cal.App.4th 871, 876-877.)

Although legislative acts are entitled to a strong presumption of constitutionality, the Legislature cannot amend an initiative, including the CUA, unless the initiative grants the Legislature authority to do so. (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1251-1253.) Because the CUA did not grant the Legislature the authority to amend it without voter approval, and the identification laws were enacted without voter

approval, those laws are invalid if they *amend* the CUA within the meaning of Article II, section 10, subdivision (c) of the California Constitution.

The proscription embodied in Article II, section 10, subdivision (c) of the California Constitution is designed to " 'protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.' " (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484.) "[L]egislative enactments related to the subject of an initiative statute may be allowed" when they involve a "related but distinct area" (*Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 43) or relate to a subject of the initiative that the initiative "does not specifically authorize *or* prohibit." (*People v. Cooper* (2002) 27 Cal.4th 38, 47.)

The identification laws do not improperly amend the provisions of the CUA.[17] The MMP's identification card system, by specifying participation in that system is voluntary and a person may "claim the protections of [the CUA]" without possessing a card (§ 11362.71, subd. (f)), demonstrates the MMP's identification card system is a

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17 We recognize the Second District Court of Appeal has concluded that one statute enacted as part of the MMP--Section 11362.77, subdivision (a) (establishing a ceiling on the amount of marijuana a qualified patient or primary caregiver may possess)--was an improper amendment of the CUA. (See *People v. Kelly* (May 22, 2008, B195624) ___ Cal.App.4th ___, 2008 Cal.App. Lexis 768.) Although it is unclear either that the *Kelly* court was required to reach the issue or that its resolution of the issue was correct, *Kelly* did not purport to hold the entire MMP invalid but instead severed the quantity limitations of Section 11362.77, subdivision (a) from the balance of the MMP and determined only that the severed aspect of the MMP was an unconstitutional amendment of the CUA. Because we here address different aspects of the MMP from that considered in *Kelly*, the conclusion in *Kelly* is inapposite to our task.

discrete set of laws designed to confer distinct protections under California law that the CUA does *not* provide without limiting the protections the CUA *does* provide. For example, unlike the CUA (which did not immunize medical marijuana users from arrest but instead provided a limited "immunity" defense to prosecution under state law for cultivation or possession of marijuana, see *People v. Mower* (2002) 28 Cal.4th 457, 468-469), the MMP's identification card system is designed to protect against unnecessary arrest. (See § 11362.78 [law enforcement officer must accept the identification card absent reasonable cause to believe card was obtained or is being used fraudulently].) Additionally, the MMP exempts the bearer of an identification card (as well as qualified patients as defined by the MMP) from liability for other controlled substance offenses not expressly made available to medical marijuana users under the CUA. (Compare § 11362.5, subd. (d) [sections 11357 and 11358 do not apply to patient or primary caregiver if substance possessed or cultivated for personal medical purposes] with § 11362.765, subd. (a) [specified persons not subject to criminal liability for sections 11359, 11360, 11366.5 or 11570 in addition to providing exemptions from sections 11357 and 11358, which parallel the CUA's exemption].)

Counties, relying on *Franchise Tax Board v. Cory* (1978) 80 Cal.App.3d 772,[18] asserts that any legislation that adds provisions to an initiative statute, for purposes of

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18 San Bernardino appears to rely on *Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187 for the proposition that legislative action constitutes an amendment of a prior initiative statute in violation of Article II, section 10, subdivision (c), of the California Constitution if its purpose is to clarify or correct uncertainties in existing law. However, the *Planned Parenthood Affiliates* court evaluated whether the legislation

either correcting it or clarifying it, is amendatory within the proscriptions of Article II, section 10, subdivision (c).[19] However, in *Franchise Tax Board,* the court invalidated the legislative enactment because the initiative statute required audits of financial reports of candidates for public office, and the legislative enactment both added to the audit requirements of the initiative statute (by specifying the standards to be employed by the audit) and by "significantly restricting the manner in which audits are to be conducted." (*Franchise Tax Board v. Cory, supra,* 80 Cal.App.3d at p. 777.)

Here, although the legislation that enacted the MMP added statutes regarding California's treatment of those who use medical marijuana or who aid such users, it did not add statutes or standards *to the CUA*. Instead, the MMP's identification card is a part of a separate legislative scheme providing separate protections for persons engaged in the medical marijuana programs, and the MMP carefully declared that the protections

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under consideration violated the single subject rule of Article IV, section 9 of the California Constitution, and had no occasion to consider whether the statute was invalid under Article II, section 10, subdivision (c).

19 San Bernardino also quotes, without citation to the record, certain statements of legislative intent allegedly declaring the intent of the MMP was to "clarify the scope" of the CUA and "address issues that were not included in the [CUA]." Even were we to consider this argument (but see *Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 826-827, fn. 1 [failure of party to cite record permits appellate court to disregard matter]), it ignores that other legislative history accompanying adoption of the MMP specified "[n]othing in [the MMP] shall amend or change Proposition 215, nor prevent patients from providing a defense under Proposition 215 . . . . *The limits set forth in [the MMP] only serve to provide immunity from arrest for patients taking part in the voluntary ID card program, they do not change Section 11362.5 (Proposition 215).*" Thus, the legislative history suggests the MMP was *not* intended to alter or affect the rights provided by the CUA.

provided by the CUA were preserved without the necessity of complying with the identification card provisions. (§ 11362.71, subd. (f).) The MMP, in effect, amended provisions of the Health and Safety Code regarding regulation of drugs adopted by the Legislature, not provisions of the CUA. Because the MMP's identification card program has no impact on the protections provided by the CUA, we reject Counties' claim that those provisions are invalidated by Article II, section 10, subdivision (c), of the California Constitution.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

McDONALD, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.

APPENDIX D

Notices

Federal Register
Vol. 62, No. 28
Tuesday, February 11, 1997

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

EXECUTIVE OFFICE OF THE PRESIDENT

Office of National Drug Control Policy

Administration Response to Arizona Proposition 200 and California Proposition 215

AGENCY: Office of National Drug Control Policy, Executive Office of the President.

ACTION: Notice.

SUMMARY: This notice lists the Federal government response to the recent passage of propositions which make dangerous drugs more available in California and Arizona. These measures pose a threat to the National Drug Control Strategy goal of reducing drug abuse in the United States. At the direction of the President, the Office of National Drug Control Policy (ONDCP) developed a coordinated administration strategy to respond to the actions in Arizona and California with the other agencies of the Federal Government to minimize the tragedy of drug abuse in America.

FOR FURTHER INFORMATION CONTACT: Comments and questions regarding this notice should be directed to Mr. Dan Schecter, Office of Demand Reduction, ONDCP, Executive Office of the President, 750 17th Street N.W., Washington, D.C. 20503, (202) 395–6733.

SUPPLEMENTARY INFORMATION: A Federal interagency working group chaired by ONDCP met four times in November and December. In developing this strategy, the inter-agency group gave due consideration to two key principles: federal authority vis a vis that of the states, and the requirement to ensure American citizens are provided safe and effective medicine. The President has approved this strategy, and Federal drug control agencies will undertake the following coordinated courses of action:

A. Objective 1—Maintain Effective Enforcement Efforts Within the Framework Created by the Federal Controlled Substances Act and the Food, Drug, and Cosmetic Act

Department of Justice's (DOJ) position is that a practitioner's action of recommending or prescribing Schedule I controlled substances is not consistent with the "public interest" (as that phrase is used in the federal Controlled Substances Act) and will lead to administrative action by the Drug Enforcement Administration (DEA) to revoke the practitioner's registration.

DOJ and Department of Health and Human Services (HHS) will send a letter to national, state, and local practitioner associations and licensing boards which states unequivocally that DEA will seek to revoke the DEA registrations of physicians who recommend or prescribe Schedule I controlled substances. This letter will outline the authority of the Inspector General for HHS to exclude specified individuals or entities from participation in the Medicare and Medicaid programs.

DOJ will continue existing enforcement programs using the following criteria: (a) the absence of a bona fide doctor-patient relationship; (b) a high volume of prescriptions or recommendations of Schedule I controlled substances; (c) the accumulation of significant profits or assets from the prescription or recommendation of Schedule I controlled substances; (d) Schedule I controlled substances being provided to minors; and/or (e) special circumstances, such as when death or serious bodily injury results from drugged driving. The five U.S. Attorneys in California and Arizona will continue to review cases for prosecution using these criteria.

DEA will adopt seizures of Schedule I controlled substances made by state and local law enforcement officials following an arrest where state and local prosecutors must decline prosecution because of the Propositions. Once in DEA's possession the drugs can be summarily forfeited and destroyed by DEA. State and local law enforcement officials will be encouraged to continue to execute state law to the fullest extent by having officers continue to make arrests and seizures under state law, leaving defendants to raise the medical use provisions of the Propositions only as a defense to state prosecution.

Department of the Treasury (Treasury) and the Customs Service will continue to protect the nation's borders and take strong and appropriate enforcement action against imported or exported marijuana and other illegal drugs. The Customs Service will continue to: (a) seize unlawfully imported or exported marijuana and other illegal drugs; (b) assess civil penalties against persons violating federal drug laws; (c) seize conveyances facilitating the illegal import or export of marijuana and other illegal drugs; and (d) arrest persons committing Federal drug offenses and refer cases for prosecution to the appropriate Federal or state prosecutor.

Treasury and the Internal Revenue Service (IRS) will continue the enforcement of existing Federal tax laws which discourage illegal drug activities.

IRS will enforce existing Federal tax law as it relates to the requirement to report gross income from whatever source derived, including income from activities prohibited under Federal or state law.

Treasury will recommend that the IRS issue a revenue ruling, to the extent permissible under existing law, that would deny a medical expense deduction for amounts expended for illegal operations or treatments and for drugs, including Schedule I controlled substances, that are illegally procured under Federal or state law.

IRS will enforce existing Federal tax law as it relates to the disallowance of expenditures in connection with the illegal sale of drugs. To the extent that state laws result in efforts to conduct sales of controlled substances prohibited by Federal law, the IRS will disallow expenditures in connection with such sales to the fullest extent permissible under existing Federal tax law.

U.S. Postal Service will continue to pursue aggressively the detection and seizure of Schedule I controlled substances mailed through the US mails, particularly in California and Arizona, and the arrest of those using the mail to distribute Schedule I controlled substances.

DEA together with other Federal, state and local law enforcement agencies will work with private mail, parcel and freight services to ensure continuing compliance with internal company

policies dictating that these companies refuse to accept for shipment Schedule I controlled substances and that they notify law enforcement officials of such activities. Federal investigations and prosecutions will be instituted consistent with appropriate criteria.

B. Objective 2—Ensure the Integrity of the Medical-Scientific Process by Which Substances are Approved as Safe and Effective Medicines in Order to Protect Public Health

The Controlled Substances Act embodies the conclusion of the Congress, affirmed by DEA and HHS, that marijuana, as a Schedule I drug, has "high potential for abuse" *and* "no currently accepted medical use in treatment in the United States." To protect the public health, all evaluations of the medical usefulness of any controlled substance should be conducted through the Congressionally established research and approval process managed by the National Institutes of Health (NIH) and the Food and Drug Administration (FDA). Currently there are a few patients who receive marijuana through FDA approved investigations.

HHS to ensure the continued protection of the public health will: (a) examine all medical and scientific evidence relevant to the perceived medical usefulness of marijuana; (b) identify gaps in knowledge and research regarding the health effects of marijuana; (c) determine whether further research or scientific evaluation could answer these questions; and (d) determine how that research could be designed and conducted to yield scientifically useful results.

HHS will undertake discussions with medical organizations throughout the nation: (a) to address the "compassionate use" message; and (b) to educate medical and public health professionals by underscoring the dangers of smoked marijuana and explaining the views of NIH that a variety of approved medications are clinically proven to be safe and effective in treating the illnesses for which marijuana is purported to provide relief, such as pain, nausea, wasting syndrome, multiple sclerosis, and glaucoma.

C. Objective 3—Preserve Federal Drug-Free Workplace and Safety Programs

Transportation Workers: Department of Transportation (DOT) has issued a formal advisory to the transportation industry that safety-sensitive transportation workers who test positive under the Federally-required drug testing program may not under any circumstance use state law as a legitimate medical explanation for the presence of prohibited drugs. DOT is encouraging private employers to follow its example.

General Contractors and Grantees: Under the Drug-Free Workplace Act, the recipients of Federal grants or contracts must have policies that prohibit the use of illegal drugs. Each Federal agency will issue a notice to its grantees and contractors to remind them: (a) of their responsibilities; (b) that any use of marijuana or other Schedule I controlled substances remains a prohibited activity; and (c) that the failure to comply with this prohibition will make the grantee or contractor subject to the loss of eligibility to receive Federal grants and contracts. Further, Federal agencies will increase their efforts to monitor compliance with the provisions of the Act, and to institute suspension or debarment actions against violators—with special priority given to states enacting drug medicalization measures.

Federal Civilian Employees: HHS will issue policy guidance to all 130 Federal Agency Drug-Free Workplace program coordinators, the 72 laboratories certified by HHS to conduct drug tests, and trade publications that reach medical review officers. This policy guidance states that the Propositions do not change the requirements of the Federal Drug-Free Workplace Program, which will continue to be fully enforced for federal civilian employees nationwide. Medical Review Officers will not accept physician recommendations for Schedule I substances as a legitimate explanation for a positive drug test.

Department of Defense (DOD) and the Military Services: DOD will instruct civilian employees and military personnel in the active, reserve and National Guard components, that DOD is a drug-free organization, a fact that is not changed by the Propositions. The requirement that all DOD contractors maintain drug-free workplaces will continue to be enforced.

Nuclear Industry Workers: The Nuclear Regulatory Commission will continue to demand drug-free employees in the nuclear power industry, and will develop a formal advisory to emphasize that its drug free workplace regulations continue to apply.

Public Housing: The Propositions will not affect the Department of Housing and Urban Development's (HUD) continued aggressive execution of the "One Strike and You're Out" policy to improve the safety and security of our nation's public housing developments. HUD's principal tool for implementing "One Strike" will be the systematic evaluation of public housing agencies screening and evictions efforts through the Public Housing Management Assessment Program. This program will give HUD a standard measurement of the progress of all public housing authorities in developing effective law enforcement, screening, and occupancy policies to reduce the level of drug use, crime, and drug distribution and sales in their communities.

Safe Work Places: Department of Labor (DOL) will continue to implement its Working Partners Initiative, providing information to small businesses about workplace substance abuse prevention programs, focusing specific attention on trade and business organizations located in California and Arizona. DOL will accelerate its effort to post its updated Substance Abuse Information Database (SAID) on the Internet. SAID will provide information to businesses about workplace substance abuse and how to establish workplace substance abuse prevention programs. DOL will give priority to its efforts in California and Arizona.

DOL's Occupational Safety and Health Administration (OSHA) will send letters to the California and Arizona Occupational Safety and Health Administrations reiterating the dangers of drugs in the workplace and providing information on programs to help employers address these problems.

DOL's Mine Safety and Health Administration will continue to strictly enforce the prohibition on the use of alcohol and illegal drugs notwithstanding these Propositions.

D. Objective 4—Protect Children from Increased Marijuana Availability and Use

HHS and the Department of Education will educate the public in both Arizona and California about the real and proven dangers of smoking marijuana. A message will be tailored for preteens, teens, parents, educators, and medical professionals. Research demonstrates that, marijuana: (a) harms the brain, heart, lungs, and immune system; and (b) limits learning, memory, perception, judgment, and the ability to drive a motor vehicle. In addition, research shows that marijuana smoke typically contains over 400 carcinogenic compounds and may be addictive. The message will remind the public there is no medical use for smoked marijuana and will educate the public about strategies to prevent marijuana use. The message will also remind the public that the production, sale, and distribution of marijuana for medical uses not approved by DEA violates the

Controlled Substances Act and the Federal Food, Drug, and Cosmetic Act.

HHS will analyze all available data on marijuana use, expand ongoing surveys to determine current levels of marijuana use in California and Arizona, and track changes in marijuana use in those states.

HHS will develop the survey capacity to assess trends in drug use in all states on a state-by-state basis.

The Department of Education (Education) will use provisions of the Safe and Drug Free Schools Act to reinforce the message to all local education agencies receiving Federal Safe and Drug Free School funds that any drug possession or use will not be tolerated in schools. This affects approximately 95% of school districts. Notwithstanding the passage of the two Propositions, local education agencies must continue to: (a) develop programs which prevent the use, possession, and distribution of tobacco, alcohol, and illegal drugs by students; (b) develop programs which prevent the illegal use, possession, and distribution of such substances by school employees; and (c) ensure that programs supported by and with Federal Safe and Drug Free Schools funds convey the message that the illegal use of alcohol and other drugs, including marijuana, is wrong and harmful.

Education will review with educators in Arizona and California the effect Propositions 200 and 215 will have on drug use by students. They will also communicate nationally with school superintendents, administrators, principals, boards of education, and PTAs about the Arizona and California Propositions and the implications for their states.

Education will develop a model policy to confront "medical marijuana" use in schools and outline actions educators can take to prevent illicit drugs from coming into schools.

Education will develop model drug prevention programs to discourage marijuana use. These models will be disseminated to the states at a Spring 1997 conference.

ONDCP and DOT will provide recommendations pursuant to the October 19, 1996 Presidential directive to deter teen drug use and drugged driving through pre-license drug testing, strengthened law enforcement and other means. The recommendations will underscore the point that the use of marijuana for *any* reason endangers the health and safety of the public.

Legislative Enactments: ONDCP, HHS and DOJ will work with Congress to consider changes to the Federal Food, Drug, and Cosmetic Act and the Controlled Substances Act, as appropriate, to limit the states" ability to rely on these and similar medical use provisions. The Administration believes that working with Congress is the course of action that will affirm the national policy to control substances that have a high potential for abuse and no accepted medical use. The objective is to provide a uniform policy which preserves the integrity of the medical-scientific process by which substances are approved as safe and effective medicines. We will also consider additional steps, including conditioning Federal funds on compliance with the Controlled Substances Act and the National Drug Control Strategy. ★

Signed at Washington, D.C. this 15th day of January, 1997.

Barry R. McCaffrey,

Director.

[FR Doc. 97-3334 Filed 2-10-97; 8:45 am]

BILLING CODE 3180-02-P

Designation of New High Intensity Drug Trafficking Areas ★

AGENCY: Office of National Drug Contol Policy, Executive Office of the President.

ACTION: Notice.

SUMMARY: This notice lists the five new High Intensity Drug Trafficking Areas (HIDTAs) designated by the Director, Office of National Drug Control Policy. HIDTAs are regions identified as having the most critical drug trafficking problems that adversely affect the United States. These new HIDTAs are designated pursuant to 21 U.S.C. 1504(c), as amended, to promote more effective coordination of drug control efforts. The additional resources provided by Congress enable task forces of local, State, and Federal officials to assess regional drug threats, design strategies to combat the threats, develop initiatives to implement the strategies, and evaluate effectiveness of these coordinated efforts.

FOR FURTHER INFORMATION CONTACT: Comments and questions regarding this notice should be directed to Mr. Richard Y. Yamamoto, Director, HIDTA, Office of National Drug Control Policy, Executive Office of the President, 750 17th Street N.W., Washington, D.C. 20503, (202) 395-6755.

SUPPLEMENTARY INFORMATION: In 1990, the Director of ONDCP designated the first five HIDTAs. These original HIDTAs, areas through which most illegal drugs enter the United States, are Houston, Los Angeles, New York/New Jersey, South Florida, and the Southwest Border. In 1994, the Director designated the Washington/Baltimore HIDTA to address the extensive drug distribution networks serving hardcore drug users. Also in 1994, the Director designated Puerto Rico/U.S. Virgin Islands as a HIDTA based on the significant amount of drugs entering the United States through this region.

In 1995, the Director designated three more HIDTAs in Atlanta, Chicago, and Philadelphia/Camden to target drug abuse and drug trafficking in those areas, specifically augmenting Empowerment Zone programs.

The five new HIDTAs will build upon the effective efforts of previously established HIDTAs. In Fiscal Year 1997, the HIDTA program will receive $140 million in Federal resources. The program will support more than 150 co-located officer/agent task forces; strengthen mutually supporting local, State, and Federal drug trafficking and money laundering task forces; bolster information analysis and sharing networks; and, improve integration of law enforcement, drug treatment, and drug abuse prevention programs. The states and counties included in the five new HIDTAs are:

(1) Cascade HIDTA: State of Washington; King, Pierce, Skagit, Snohomish, Thurston, Whatcom, and Yakima counties; ★

(2) Gulf Coast HIDTA: State of Alabama; Baldwin, Jefferson, Mobile, and Montgomery counties; State of Louisiana; Caddo, East Baton Rouge, Jefferson, and Orleans parishes; and State of Mississippi; Hancock, Harrison, Hinds, and Jackson counties.

(3) Lake County HIDTA: State of Indiana; Lake County.

(4) Midwest HIDTA: State of Iowa; Muscatine, Polk, Pottawattamie, Scott, and Woodbury counties; State of Kansas; Cherokee, Crawford, Johnson, Labette, Leavenworth, Saline, Seward, and Wyandotte counties; State of Missouri; Cape Girardeau, Christian, Clay, Jackson, Lafayette, Lawrence, Ray, Scott, and St. Charles counties, and the city of St. Louis; State of Nebraska; Dakota, Dawson, Douglas, Hall, Lancaster, Sarpy, and Scott's Bluff counties; State of South Dakota; Clay, Codington, Custer, Fall River, Lawrence, Lincoln, Meade, Minnehaha, Pennington, Union, and Yankton counties.

(4) Rocky Mountain HIDTA: State of Colorado; Adams, Arapahoe, Denver, Douglas, Eagle, El Paso, Garfield, Jefferson, La Plata, and Mesa counties; State of Utah; Davis, Salt Lake, Summit, Utah, and Weber counties; and State of Wyoming; Laramie, Natrona, and Sweetwater counties.

VNET

Contract/ASD #s	M12-34021-002	26267	**Project (DBA):**	Valley Narcotics Enforcement Team (VNE	
Contract Agency	Auburn, City of		Program	Drug-Gang Multi-Jurisdictional Task Force	
Department	Police Department		SWV#		
Str Addr	220 4th Avenue South		TIN#		
City, State ZIP+4	Kent WA	98032-5838	UBI#		
			DUNS (CCR)	Till:	OK
Status	OK		EPLS Status	OK	As of: OK

Service Area	South King County					
Districts	KeyCong'l	9	Cong'l	1, 7, 8, 9		

	From	To	Lapsed
Leg 5, 11, 30, 31, 33, 36, 37, 41, 47	7/1/12	6/30/13	76%
	$207,200.00	$114,878.80	55%
	Award	Expended	%Expd

Purpose Stmt: To provide local and tribal governments with U.S. Department of Justice, Bureau of Justice Assistance funds to interdict gang activity and drug trafficking through the multi-jurisdiction efforts of law enforcement and prosecution.

Contacts/Exec Brd Mbrs

Role	Person (& Agency)	Phone- Extn	Alt Phone	Email
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Mbr	Ken Thomas, Kent P.D.	253-856-5888		KThomas@kentwa.gov
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Mbr	Jim Pugel, Seattle P.D	206-684-5459		james.pugel@seattle.gov

As of: Q2

FTE Contributing Agency	Position/Title	Hrs=1.0 FTE	Spt'd By: Grant	Spt'd By: Match	Other Local	Other Funds	Total	Qual Tng	CTFLI Tng
Auburn P.D.	Cmdr	520			1.00		1.00	ok	ok
DEA	Supv	520				1.00	1.00	ok	ok
Auburn P.D.	Detective	520			1.00		1.00	ok	ok
Federal Way P.D.	Detective	520			1.00		1.00	ok	ok
Kent P.D.	Detective	520			1.00		1.00	ok	ok
Renton P.D.	Detective	520			1.00		1.00	ok	ok
Port of Seattle P.D.	Detective	520			2.00		2.00	ok	ok
Seattle P.D.	Detective	520			1.00		1.00	ok	ok
Tukwila P.D.	Detective	520			1.00		1.00	ok	ok
Port of Seattle P.D.	Detective (K-9)	520			1.00		1.00	ok	ok
DEA	Detective	520				2.00	2.00	ok	ok
Kent P.D.	Spt Stf	520	1.00				1.00	ok	ok
DEA	Spt Stf	520				1.00	1.00	ok	ok
King County Prosecutor	Prosecutor	520	1.00				1.00	ok	ok

Appendix B1

County Drug Court Profiles:

King County Drug Court
Program Profile

KING COUNTY ADULT DRUG COURT

PROGRAM PROFILE

June 2000

BACKGROUND

The King County Drug Court program, the oldest in the State, began operation in August, 1994, under the auspices of the King County Superior Court. A Drug Court Planning Grant from the Office of Justice Programs/ Department of Justice funded the development and early implementation of the program. Judge Ricardo Martinez, the first judge of the Drug Court, was a leading member of the development and implementation team and served as Drug Court Judge until August, 1997. The program in King County is a pre-adjudication program in which defendants enter the program prior to sentencing. Individuals who choose to enter Drug Court waive their trial rights, agree to stipulated facts in the police report, and enter into a treatment contingency contract with the Court. Upon successful completion of the program, the charges are dismissed. If the defendant fails to meet program requirements, s/he is sentenced on the standing charges.

For the first three years of the program, August 1994-August 1997, Central Seattle Recovery Center (CSRS), a private non-profit treatment agency in King County, was the lead agency in a consortium of local treatment providers that formed in response to a request for proposals for a Drug Court treatment program. In addition to providing treatment for a number of Drug Court participants, CSRS served as gatekeeper to treatment services and liaison between consortium members and the Drug Court. Two program evaluations were done during the first three years of operation. The first, completed in September 1995, (Urban Policy Institute) examined the development and implementation of the Drug Court during the first year of operation. The second study (Bell, 1998) focused on participant characteristics and outcomes of drug court participation as well as the costs and cost offsets of the program.

In August 1997, a number of significant program changes occurred. Judge Martinez, a major influence in shaping the initial program, left the Drug Court and was replaced by Judge Nicole MacInnes who was replaced by Judge Michael Trickey in February 2000. CSRC was replaced by King County Treatment Alternatives to Street Crime (TASC) as the manager or "gatekeeper" of the treatment program, which remained a consortium of the seven original treatment agencies. This program description will focus on the Drug Court program as it has evolved since the changes implemented in August 1997. The earlier evaluations are a rich source of information about the development, implementation, participant characteristics, and outcomes of the first three years of the King County Drug Court Program.

DRUG COURT PROGRAM CHARACTERISTICS

Funding Source(s)

The Office of Justice Programs/Department of Justice funds provided the major resources for the initiation and early operation of the King County Drug Court. While these funds are still important to Drug Court operation they are time limited and are decreasing. As DOJ funds have decreased the major funding sources have become the BRYNE grant (a Federal program administered by the State Community Trade and Economic Development Commission), City of Seattle and King County funds, and the High Intensity Drug Trafficking Area (HIDTA). This funding mix is adequate to support the current program through 2000. Any growth in the program would require additional funding. Without continuation of Department of Justice funding beyond 2000 adequate funding is less certain. The Drug Court Team is currently working diligently to secure additional funding from the State, County, and City, as well as continued support for treatment services from BRYNE grant funds, to replace Department of Justice funding.

Planning Process

Who were the players?

Initial planning for the Court was initiated by the Prosecutor's Office and continued for a year before the

do the initial screening and referral and to provide other case management services as appropriate.

Funding

Treatment services are funded in a number of ways. In addition to the funding for treatment included in the DOJ Drug Court Grant, every effort is made to fund eligible low-income/indigent participants through state contracts such as ADATSA or Title 19 programs such as TANF (Temporary Assistance for Needy Families). Veteran Administration benefits are used for participants who are eligible for VA services. Participants who have insurance or the resources for private payment are expected to pay for treatment. BRYNE, HIDTA, and City and County funds are also used for treatment services. All participants are required to contribute to the cost of treatment to the extent that they are able. In addition, participants are required to pay a $100.00 participant fee to the court at graduation.

Overall Treatment Services

Although the core treatment approach is out-patient services, a comprehensive continuum of services is available among the agencies. Services include detoxification, in-patient treatment, a range of out-patient services including group and individual counseling, education, and relapse prevention, and a methadone program. Central Seattle Recovery Center is the primary provider of detoxification services while Cedar Hills provides the majority of in-patient treatment. Residential treatment is also available at Seadrunar. Evergreen Treatment Center is the sole provider of methadone treatment. Treatment agencies vary in the support and ancillary services such as case management, vocational and job related assistance, and assistance with housing that they provide.

Treatment Program

While there are program differences among treatment agencies, all work within a program structure specified by the Drug Court. This structure and related program requirements are based on recommendations and standards from the National Institute of Justice (NIJ), Center for Substance Abuse Treatment, US Department of Health and Human Services (1996), and the National Association of Drug Court Professionals (1997), and are common to drug court programs across the country.

Treatment is expected to last between 1 year and 18 months and is divided into three levels or phases. Unlike some other drug court programs, King County Drug Court does not have specific criteria for movement between levels or for graduation. The time the participant spends in each level is determined by the Judge based on the Drug Court team's assessment of the participant's progress.

Treatment in Level 1 is focused on developing abstinence and engagement in the treatment process. Although not common, Level 1 may include detoxification or in-patient services. Out-patient treatment expectations typically include group or individual counseling 3-4 times weekly as well as two random urine tests each week. In addition, participants are expected to attend 3 treatment-approved sober support group meetings each week. While in Level 1 the participant returns to Court on a monthly basis although frequency of Court appearances may be increased if the Judge feels more supervision and support is indicated.

Treatment in Level 2 is focused on stabilization and establishing a drug free life style. Frequency of contact with the treatment agency may be reduced to 2-3 group meetings weekly and groups such as anger management, social skills, relapse prevention, and vocational readiness may be included. Urine testing is continued on a twice weekly basis. The requirement for 3 weekly sober support group meetings is also continued. Typically, participants remain in Level 2 for 90 to 120 days. Court appearance are reduced to every 6 weeks depending on participant progress.

The focus of treatment in Level 3 is on developing the skills and abilities important to maintaining a drug free life style. Relapse prevention, vocational and other educational programs, and employment placement and support are key activities during Level 3 treatment. The frequency of individual and/or group counseling is reduced to weekly, and urine testing is done weekly. Court appearances usually occur at 6 week intervals. Upon successful completion of Level 3 the participant is eligible for graduation from Drug Court. To successfully complete Level 3 and graduate from Drug Court the participant must either be employed, be in an approved job training program, or be enrolled in school.

(28)

CONFIDENTIALITY NOTE

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MEMORANDUM

PREPARED FOR: Community Anti-Drug Coalition of America
PREPARED BY: Rutan & Tucker, LLP
Paul Marx, Esq.
Doug Dennington, Esq.

DATE: January 21, 1997

RE: Congressional Power to Preempt Proposition 200 and Proposition 215

QUESTION:

Does Congress have the power to expressly preempt the provisions of California's Proposition 215 and Arizona's Proposition 200?

Conclusion

Congress cannot compel states to enact or administer federal programs, nor does Congress have the power to force states to legislate. Congress may, however, expressly preempt any state law which regulates an area occupied by federal law, provided that the federal law was enacted pursuant to Congress' powers under the Constitution. Alternatively, Congress may offer states the choice of regulating the activity according to federal standards or having state law preempted by federal law.

Background

On November 5, 1996, the voters of California and Arizona adopted Proposition 215 and Proposition 200, respectively, which purport to decriminalize the possession of Schedule I

substances for certain "medical" purposes. The federal Controlled Substances Act embodied in 21 U.S.C. § 801 et seq. provides that there is no currently accepted medical use for Schedule I substances and makes it a federal crime to possess or prescribe such substances. The federal Controlled Substances Act acknowledges the validity of consistent state regulation of controlled substances, and preempts only those state laws presenting a positive conflict with federal law. (21 U.S.C. § 903.) The following analysis addresses the ability of Congress to expressly preempt the provisions of the Propositions.

Analysis

Congress cannot compel states to "enact or enforce" federal programs. (New York v. United States (1992) 120 L.Ed.2d 120, 144.)

> [E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. (Id. at 144.)

Where, however, Congress has enacted legislation within its constitutional limits, it has the power to expressly preempt any state law regulating within that same field, regardless of whether the state law is consistent with the federal law. (Rice v. Santa Fe Elevator Corp. (1947) 331 U.S. 218, 237.) In lieu of expressly preempting all state law in the given field, Congress may "simply condition state involvement in a pre-emptible area on consideration of federal proposals." (FERC v. Mississippi (1982) 456 U.S. 742, 765.)

> [W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation. (New York, supra, 120 L.Ed.2d at 144-145.)

Congress enacted the federal Controlled Substances Act embodied in 21 U.S.C. §801 et seq. pursuant to its power to regulate interstate commerce under the Commerce Clause of the United States Constitution. (See 21 U.S.C., §801(3)-(5); see also, U.S. v. Lopez (5th Cir.

1972) 459 F.2d 949, cert. denied 409 U.S. 878.) Accordingly, Congress could have expressly preempted any state laws regulating in the field of controlled substances. (See Hillsborough County v. Automated Med. Labs. (1985) 471 U.S. 707, 713.)

To encourage the states to work with the federal government in preventing the illicit diversion of controlled substances and drug abuse, Congress expressly provided that the federal laws would not preempt state laws regulating controlled substances except to the extent that the state laws presented a "positive conflict" with federal laws. (21 U.S.C., §903.) Whether the provisions of Proposition 200 and Proposition 215 present a positive conflict sufficient to invoke the preemption doctrine rooted in the Supremacy Clause is a question of first impression and any court challenges to the Propositions may be met with significant hurdles. Congress, of course, has the power to amend 21 U.S.C. Section 903 to expressly preempt all state laws regulating in the field of controlled substances.[1]

Alternatively, Congress could amend section 903 to provide that the federal Controlled Substances Act establishes minimum standards for the regulation of controlled substances. (See New York v. United States, supra, 120 L.Ed.2d at 144 [stating that Congress has authority to offer the states the choice of regulating in accordance with federal standards or having state laws preempted by federal laws].) Congress has previously enacted similar legislation in the Clean Air Act. (42 U.S.C. § 7543(a); see also, The Motor Vehicle Manufacturers Ass'n of the United States v. New York (2d Cir. 1996) 79 F.3d 1298, 1302 [acknowledging that the federal Clean Air Act preempts any state regulation of automobile tailpipe emissions other than California

[1] Such an amendment would probably not serve federal interests. The federal policies embodied in the Controlled Substances Act are to share with the state the responsibility of controlling drug abuse. To expressly preempt all state laws regulating controlled substances would strip the states of any power to police substance abuse. This would require the federal government to expend astronomical resources to enforce its laws in those areas previously regulated by the states.