

G036250

COURT OF APPEAL-4TH DIST DIV 3

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COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

THE CITY OF GARDEN GROVE,

Case No. G036250

Petitioner,

[Orange County Superior Court
Case No. GG98995]

v.

SUPERIOR COURT OF ORANGE COUNTY,

Respondent,

FELIX KHA,

Real Party in Interest.

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER

On Appeal from the Orange County Superior Court
The Honorable Linda S. Marks

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TABLE OF AUTHORITIES

FEDERAL CASES

<i>ASARCO, Inc. v. Kadish</i> , 490 U.S. 605	25
<i>Gonzales v. Oregon</i> , 126 S.Ct. 904	27
<i>Gonzales v. Raich</i> , 125 S.Ct. 2195	15, 20, 26, 27
<i>Raich</i> , 125 S.Ct. at 2210	16
<i>Mitchell v. Forsyth</i> , 472 U.S. 511	23
<i>People v. Nord</i> , 377 F.Supp.2d 945	24
<i>Printz v. United States</i> , 117 S.Ct. 2365	25
<i>United States v. Mustakeem</i> , 759 F.Supp. 1172	22
<i>United States v. Oakland Cannabis Buyers' Cooperative</i> , 532 U.S. 483	15, 27
<i>United States v. Rosenthal</i> , 266 F. Supp.2d 1068	21
<i>United States v. Rosenthal</i> , 454 F.3d 943	21

STATE CASES

<i>Anderson v. Superior Court</i> , 213 Cal.App.3d 1321	6
<i>Bailey v. City of National City</i> , 226 Cal.App.3d 1319	24
<i>Brown v. Superior Court</i> , 5 Cal.3d 509	8
<i>Chavez v. Superior Court</i> , 123 Cal.App.4th 104	4, 14, 16, 17
<i>Gershenvorn v. Superior Court</i> , 227 Cal.App.2d 361	5
<i>Ginns v. Savage</i> , 61 Cal.2d 520	17
<i>Miller v. Municipal Court of Los Angeles</i> , 22 Cal.2d 818	25
<i>Minsky v. City of Los Angeles</i> , 11 Cal.3d 113	4
<i>Nicolini v. County of Tuolumne</i> , 190 Cal.App.3d 619	24
<i>Omaha Indemnity Co.</i> , 109 Cal.App.3d at 1272-73	7
<i>Omaha Indemnity Co. v. Superior Court (Greinke)</i> , 209 Cal.App.3d 1271	5

<i>People ex rel. Department of Conservation v. El Dorado County</i> , 36 Cal.4th 971	8
<i>People v. Fisher</i> , 96 Cal.App.4th 1147	14
<i>People v. Galambos</i> , 104 Cal.App.4th 1147	10
<i>People v. Gershenhorn</i> , 225 Cal.App.2d 122	4
<i>People v. Laiwa</i> , 34 Cal.3d 711	4
<i>People v. Mower</i> , 28 Cal.4th 457	14
<i>People v. Superior Court (Shayan)</i> , 21 Cal.App.4th 621	11
<i>People v. Tilehkooh</i> , 113 Cal.App.4th 1433	18
<i>People v. Tuttle</i> , 242 Cal.App.2d 883	5
<i>Stocks v. City of Irvine</i> , 114 Cal.App.3d 520	9
<i>Suki, Inc. v. Superior Court</i> , 60 Cal.App.3d 616	4

FEDERAL STATUTES

21 U.S.C. § 802	16
21 U.S.C. § 802	20
21 U.S.C. § 812	15
21 U.S.C. §§ 823(f), 841(a)(1), 844	15
21 U.S.C. § 828	19
21 U.S.C. § 841	19
21 U.S.C. § 844	16
21 U.S.C. § 881	15

STATE STATUTES

Cal. Civ. Proc. Code § 1085	4
Cal. Civ. Proc. Code § 1086	4
Cal. Health & Safety Code § 11362.765	10
Cal. Health & Safety Code § 11475	12,13
Cal. Health & Safety Code §§11362.7, <i>et seq</i>	8
Cal. Penal Code § 1413	12
Cal. Penal Code § 1417.5	9, 12
Cal. Penal Code § 1417.6	12
Cal. Penal Code § 1538.5	5
Cal. Vehicle. Code § 23222 (b)	3
Cal. Health & Safety Code § 11362.5	13
Cal. Health & Safety Code § 11473.5	13

TABLE OF CONTENTS

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF 1

PROPOSED BRIEF OF AMICI CURIAE 2

I. AMICI CURIAE INTEREST AND BENEFIT TO COURT OF AMICI CURIAE BRIEF. 2

II. STATEMENT OF FACTS. 3

III. EXTRAORDINARY WRIT RELIEF IS PROPER AND WARRANTED. .. 4

IV. PETITIONER HAS STANDING IN THE WRIT PROCEEDING BROUGHT TO CHALLENGE THE ORDER’S VALIDITY. 7

V. THE ORDER IS A VIOLATION OF STATE AND FEDERAL LAW. 9

 A. State Law Prohibits the Return of Medical Marijuana 9

 B. Federal Law Prohibits the Return of Medical Marijuana. 14

 C. The Order Unlawfully Requires the Distribution of a Controlled Substance By Petitioner. 19

VI. FEDERAL LAW PREEMPTS THE ORDER AND THE COMPASSIONATE USE ACT. 26

VII. CONCLUSION. 28

CERTIFICATE OF COMPLIANCE 32

TO THE HONORABLE PRESIDING JUSTICE OF THE
CALIFORNIA COURT OF APPEAL:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The California State Sheriffs' Association, the California Police Chiefs' Association and the California Peace Officers' Association respectively request leave to file the attached brief of Amici Curiae in support of Petitioner, the City of Garden Grove, in order to assist this Court in resolving the important issue of law presented in this matter.

The interests of Amici are as stated in the attached brief, Part I. Applicants endeavor to provide this Court with the perspective of similarly situated law enforcement of all levels regarding the important legal issue raised in this matter, specifically the importance of officers not being subject to an invalid court order that they return illegal contraband to a criminal defendant in violation of State and Federal law.

Therefore, Applicants respectfully request leave from the Presiding Judge to file the attached brief of Amici Curiae addressing the above issue.

Dated: December 18, 2006

Respectfully submitted,

JONES & MAYER

By: 

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**TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF
THE CALIFORNIA COURT OF APPEAL:**

PROPOSED BRIEF OF AMICI CURIAE

**I. AMICI CURIAE INTEREST AND BENEFIT TO COURT
OF AMICI CURIAE BRIEF.**

Amici Curiae are the California State Sheriffs' Association ("CSSA"), the California Police Chiefs' Association ("CPCA"), and the California Peace Officers' Association ("CPOA"). Each of their memberships and interests are discussed below.

CSSA represents each of the fifty-eight (58) elected California Sheriffs. CPCA represents virtually all of California's Municipal Chiefs of Police. CPOA represents more than four thousand peace officers, of all rank, throughout the State. The three Associations are interested in this case because the issue presented will have a profound impact on the members of each of the three Associations, as well as every employee under the command of the state's sheriffs and police chiefs. This includes the overwhelming majority of peace officers in the State of California.

Amici have identified this matter as one of statewide significance in which their expertise can be of assistance to the Court. This proposed brief offers a broader perspective of Amici as to the issues on appeal, namely the overarching impact of the Court's decision on law enforcement agencies generally and the officers who are, and will be, subject to orders similar to those at issue in this matter.

In particular, if the Court of Appeal finds in favor of Petitioner, then there will be resolution of an important issue affecting law enforcement throughout the state regarding the court-ordered return of confiscated “medical” marijuana that remains illegal contraband under Federal law, and, by virtue of that characterization, is not subject to return under State law.

The undersigned have been given specific authority to make this Application on behalf of Amici.

II. STATEMENT OF FACTS.

The parties agree that Real Party in Interest Felix Kha (“Kha”) was stopped by members of the Garden Grove Police Department on June 10, 2005 for failing to stop for a red traffic signal before making a right turn. See Appellant’s Opening Brief (“AOB”) at 1; Real Party in Interest’s Informal Opposition to Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief (“RPI Opp.”) at 2. As relevant to this matter, Kha was cited for a violation of the California Vehicle Code relating to possession of marijuana in his vehicle in conjunction with that traffic stop. AOB at 1 (citing Cal. Veh. Code § 23222 (b)) ; RPI Opp. at 2. This cited violation was dismissed against Kha, but the District Attorney opposed return of the confiscated marijuana. On September 1, 2005, the Trial Court ordered the return of the confiscated medical marijuana (the “Order”) and the City of Garden Grove brought this appeal to challenge that order. AOB at 1-2; RPI Opp. at 3. For purposes of this brief, Amici assume that Kha’s written recommendation

from Phillip A. Denney, M.D. satisfies the requirements of California Health and Safety Code Section 11362.5 (d) (granting a defense to individuals possessing or cultivating marijuana for medicinal purposes for their own individual use or as a primary caregiver on behalf of a qualified patient).

III. EXTRAORDINARY WRIT RELIEF IS PROPER AND WARRANTED.

As a preliminary procedural matter, writ review is appropriate where, as here, there is “not a plain, speedy, and adequate remedy in the ordinary course of law.” Cal. Civ. Proc. Code § 1086. The Order is not appealable and Petitioner is without a legal remedy in challenging the Court’s order as a violation of State and Federal law. See People v. Gershenhorn, 225 Cal. App. 2d 122, 125-6 (1964) (holding “return of property is a separate procedure from the criminal trial and is not reviewable on an appeal from an ultimate judgment of conviction”; therefore, “review by writ of mandate from this court is available”), *superseded on other grounds as stated in* People v. Laiwa, 34 Cal. 3d 711 (1983) (as to suppression of evidence motions); Chavez v. Superior Court, 123 Cal. App. 4th 104, 108 (2004) (“A writ of mandamus may issue to compel the trial court’s performance of an act which the law specifically enjoins, and mandamus is the appropriate remedy for a defendant in a criminal proceeding to compel the return of personal property wrongfully withheld by the custodial officers.”) (internal quotations and citations omitted) (citing Cal. Civ. Proc. Code § 1085 (a); Minsky v. City of Los Angeles, 11 Cal.3d 113, 123 (1974); Suki, Inc. v. Superior Court, 60 Cal. App. 3d 616, 624 (1976);

Gershenhorn v. Superior Court, 227 Cal. App. 2d 361, 366 (1964)); People v. Tuttle, 242 Cal. App. 2d 883, 885 (1964) (order denying “return of property not admitted in evidence but remaining in the custody of the police,” upheld because motion was “not directed to the criminal action resulting in defendant’s conviction,” did not affect “any substantial right subject to that action,” was “entirely separate from the criminal proceeding” and there was no right of criminal defendant to appeal order). See also, e.g., Cal. Penal Code § 1538.5 (k) (allowing *writ of mandate or prohibition* where motion to return property taken pursuant to unreasonable search and seizure).

In fact, Petitioner was not a party to the criminal proceedings. It was the District Attorney’s Office that opposed Kha’s request for return of the confiscated marijuana. (AOB, at 2; 4, ¶ 3 (“Petitioner did not appear or participate in the pre-trial conference.”)); 5, ¶ 4 (“Petitioner did not appear or participate in the continued pre-trial conference.”)). There is no apparent legal right that Petitioner had, as the custodian of the confiscated marijuana, to participate in the criminal proceedings initiated by the *District Attorney*. In fact, it is not clear from the parties’ briefs that Petitioner even had *notice* of the return of property proceedings such that it could have, if it even had the right to, participate in any meaningful way in the proceedings relating specifically to Kha’s request for the return of his “property.”

A writ petitioner often must demonstrate that he or she will suffer “irreparable injury” if the writ is not granted. Omaha Indem. Co. v. Superior Court (Greinke), 209

Cal. App. 3d 1271, 1274 (1989). This is certainly the case here, as there is no appellate right relating to the Order, as discussed above, and the Order itself compels Petitioner to violate Federal law. See *infra* Part V. Moreover, Petitioner, its Police Department and ~~personnel, including the Police Department property clerk or his or her superior, are~~ subject to contempt proceedings for refusing to comply with the Order and for complying, instead, with State and Federal law, which require Petitioner to refuse to release the confiscated marijuana. For the same reasons, prompt resolution of the issue in this matter is necessary and it is appropriate to grant writ review under such circumstances.

Anderson v. Superior Court, 213 Cal. App. 3d 1321, 1328 (1989) (claims are entitled to extraordinary relief even if appealable, when “the issues presented are of great public interest and must be resolved promptly”) (internal quotations omitted). Real Party in Interest agrees. RPI Opp. at 18-19.

Petitioner, its Police Department and Police Department personnel face contempt for failing and refusing to comply with the court-ordered release to Kha of personal property, namely confiscated marijuana, in violation of State and Federal law;¹ the legal

¹ Kha’s attorney, Joseph Elford, is a Staff Attorney with Americans for Safe Access. He communicated by way of letter to the City Attorney of Garden Grove, dated October 20, 2005, wherein he stated that the organization was “prepared to initiate contempt proceedings in the Superior Court if the City of Garden Grove Police do not soon notify [him] of its intent to honor the attached court order for the return of property.”

See http://www.safeaccessnow.org/downloads/Kha_ASA_Letter.pdf. The threat to Petitioner could not be more real. See also, Appendix in Support of Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief, filed on November 1, 2006 (hereafter “Appendix”), at 010 (Letter from Joseph D. Elford to John Shaw,

issue to be decided in this matter could not be of greater public interest and urgency. The issue presented in Petitioner's appeal is of great importance and broad application, warranting this Court's extraordinary relief, as the issue of federal supremacy and police officers' dual duty to honor both State and Federal law are at stake.

In addition, the harm is more than simply the threat of Petitioner's officers being held in contempt of court or being prosecuted for a violation of the CSA; the reputation of Petitioner's officers, as well as the efficient functioning of Petitioner's Police Department is at stake. See infra Part V.C. Finally, writ review in this matter will not cause any of the dilemmas in the effective administration of justice as identified by the Court of Appeal in Omaha Indem. Co.; namely, there will be no delay in a pending proceeding or any piecemeal litigation, since the criminal action has already been dismissed in the Superior Court. Omaha Indem. Co., 109 Cal. App. 3d at 1272-73. Therefore, it is both necessary and proper for this Court to consider this matter and to grant the writ requested by Petitioner.

IV. PETITIONER HAS STANDING IN THE WRIT PROCEEDING BROUGHT TO CHALLENGE THE ORDER'S VALIDITY.

Petitioner's challenge relates to the validity of a *specific order* directed at Petitioner, as the custodian of the confiscated marijuana. Therefore, Petitioner's interest is not hypothetical or conjectural and is not an abstract challenge to the validity of the

City Attorney, City of Garden Grove, dated October 20, 2005)

Compassionate Use Act² generally. Petitioner has a present duty and obligation to forthwith comply with the Order and the Order is in direct conflict with both Federal *and* State law. The Order requires Petitioner, through its Police Department and personnel, to ~~transmit marijuana, a controlled substance, in violation of Federal law to a criminal~~ defendant. Brown v. Superior Court, 5 Cal. 3d 509, 514 (1971) (finding that Secretary of State was beneficially interested sufficient to establish standing where he bore overall responsibility for administering the disclosure laws which were being challenged on their constitutionality, in order to determine his public responsibilities); People ex rel. Dept. of Conservation v. El Dorado County, 36 Cal. 4th 971, 991-992 (2005) (finding director of California Department of Conservation was beneficially interested, as executive officer charged with powers and responsibilities relating to reclamation plans and financial assurances for surface mining operations, to challenge board's approval of allegedly illegal and deficient plans).

In fact, Petitioner is more *directly* interested in the validity of the Order than even Kha himself is. Although Kha certainly has *an* interest in the subject of the Order, namely the disposition of his "property," it is *Petitioner* that is *subject* to the Order itself. There is no other individual or entity more directly concerned with the validity of the

² For ease of reference, Amici refer to the California medical marijuana statutes collectively as the "Compassionate Use Act," even though the Act was really the enactment of California Health and Safety Code Section 11362.5. Subsequent sections of the Health and Safety Code were later added or modified by the Legislature and are included within Amici's reference to the "Act." See Cal. Health & Safety Code §§11362.7, *et seq.*

Order than Petitioner. The Court's finding that Petitioner has standing in this matter does not "stray too far towards the advisory opinion hazard . . . where standing may be conferred on a plaintiff whose only concern is concern itself." Stocks v. City of Irvine, 114 Cal. App. 3d 520, 530 (Cal. Ct. App. 1981) (internal quotations omitted). Because Petitioner is directed by the Order to return the confiscated marijuana to Kha, which Order is illegal and in excess of the Trial Court's legitimate authority under both State and Federal law, Petitioner's concern is not only "concern itself," but is a particularized interest sufficient to confer standing.

**V. THE ORDER IS A VIOLATION OF STATE
AND FEDERAL LAW.**

The Order requires the return of "property" which is contraband under Federal law, and State law only protects property which is not "prohibited by law" and which is "lawfully possessed." Since both Federal and State law do not protect the confiscated marijuana, Kha has no legally cognizable property interest in the contraband and it was an abuse of discretion for the Trial Court to order its return.

A. State Law Prohibits the Return of Medical Marijuana.

Generally, a court is required to order the release of exhibits from criminal proceedings when "the person from whom the exhibits were taken into custody . . . was in *lawful possession* of the exhibits." Cal. Penal Code § 1417.5 (emphasis added).

Notwithstanding the Compassionate Use Act, however, the possession of marijuana is

prohibited by Federal law for *all purposes*, except limited instances not applicable here.

See Part V.B. below.

In addition, the Compassionate Use Act provides only a *defense* to the state ~~criminal provisions relating to the possession or cultivation of medical marijuana,~~ specifically under California Health and Safety Code Sections 11357 and 11358. Section 11356.2 does *not* make it generally *lawful* to possess medical marijuana and certainly does not make it legal to possess marijuana pursuant to California Vehicle Code Section 23222 (b), which was the section Kha was charged for violating. Cal. Health & Safety 11362.5 (d).

The Compassionate Use Act also specifically prohibits “*criminal liability* under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570” relating to the *transportation* of medical marijuana for a patient’s personal use. Cal Health & Safety Code § 11362.765 (emphasis added). However, Kha was not charged with only a violation of the Health and Safety Code, but also for a violation of the *Vehicle* Code, prohibiting the possession of marijuana in a vehicle. The Compassionate Use Act, specifically permitting a defense to criminal actions brought *only* under the Health and Safety Code, has no bearing on criminal charges brought for violation of the *Vehicle* Code. People v. Galambos, 104 Cal. App. 4th 1147, 1167 (2002) (“Under the familiar rule of construction, *expressio unius est exclusio alterius*, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed, absent a

discernible and contrary legislative intent. . . . We may not infer exceptions to our criminal laws when legislation spells out the chosen exceptions with such precision and specificity.”) (internal quotations and citations omitted). Therefore, Kha was not in ~~lawful possession of the marijuana that has been ordered released to him, whether under~~ Federal or State law.

Notably, the Order relies specifically upon Kha’s declaration that the “Property is not considered contraband.” Appendix at 004 (Petition and Order for Return of Property). However, based upon both State *and* Federal law, as discussed herein, the confiscated marijuana *is* contraband, which cannot be returned to Kha.

Furthermore, it does not appear from the parties’ briefs that the Trial Court made any substantive evaluation or determination of where or how Kha came into possession of the confiscated marijuana. If he did not cultivate the marijuana himself, or otherwise obtain it in a manner permitted by the Compassionate Use Act, then the marijuana was also not *lawfully possessed* by Kha in the first instance. It was an abuse of discretion for the Trial Court not to have fully evaluated whether the marijuana was *lawfully obtained* by Kha such that his *possession* of it was even within the protections of the Compassionate Use Act. See, e.g., People v. Superior Court (Shayan), 21 Cal. App. 4th 621, 629 (1993) (holding writ of mandamus proper where superior court erred in ordering unconditional return of stereo parts with serial numbers removed in violation of State law

prior to court determining true character of equipment).³

More importantly, destruction of the contraband is *required* by California Law. California law provides for the disposition of exhibits (Cal. Penal Code § 1417.5) and ~~provides that a police property clerk may return property to an owner where there is proof~~ of ownership (Cal. Penal Code § 1413), but such provisions do “not apply to any property subject to forfeiture under *any* provision of law” and does “not apply to . . . any property of any kind or character whatsoever the possession of which is *prohibited by law* and . . . that the defendant had upon his or her person at the time of the defendant’s arrest.” Cal. Penal Code § 1413 (b) (emphasis added). Similarly, the statutory duties of a police property clerk to return property to the owner do “not apply to any property subject to forfeiture under *any provision of law.*” Cal. Penal Code § 1417.6 (a) (emphasis added).

Statutory provisions require that “[a]ll seizures of controlled substances . . . which are in possession of any city, county, or state official . . . as the result of a case in which

³ If the marijuana in Kha’s possession was “manufactured, distributed, dispensed, or acquired” in violation of the Health & Safety Code relating to controlled substances, then it is subject to forfeiture pursuant to Health and Safety Code Section 11470. See also Cal. Health & Safety Code § 11475 (“Controlled substances listed in Schedule I that are possessed, transferred, sold, or offered for sale in violation of this division are contraband and shall be seized and summarily forfeited to the state.”). It appears that there was evidence that Kha was *not* lawfully in possession of the confiscated marijuana. Appendix, at 006 (Kha “was not able to produce any paperwork showing where had had received the marijuana”; officer inquired of Kha “where he purchased the marijuana and he told me in a lab in Long Beach”).

no trial was had or which has been disposed of by way of dismissal or otherwise than by way of conviction, shall be *destroyed* by order of the court, unless the court finds that the controlled substances, . . . were *lawfully possessed* by the defendant.” Cal. Health & Safety Code § 11473.5 (a) (emphasis added). California Health & Safety Code Section 11475 similarly provides for the forfeiture of seized schedule I drugs: “Controlled substances listed in Schedule I that are possessed, transferred, sold, or offered for sale in violation of this division are contraband and shall be seized and summarily forfeited to the state.”

Whether the confiscated marijuana was lawfully possessed by Kha under State law has no bearing on whether it was lawfully possessed under *Federal* law. Each of the above provisions, by reference to “law” generally, necessarily incorporate Federal law, which prohibits virtually all possession, for any purpose, of marijuana. Since Kha’s possession of the confiscated marijuana was a violation of Federal law, see below, it was not *lawfully possessed* and is to be destroyed by order of the court, as contraband, pursuant to *State* law.

In fact, Defendant’s possession of marijuana was not lawful even under California law. The Compassionate Use Act does not *exempt* medical marijuana from the prohibition against the possession of marijuana; it does not make Defendant’s possession of the substance “lawful.” Instead, the Act provides a *defense* for anyone prosecuted for possessing medical marijuana. Cal. Health & Safety Code § 11362.5 (*penalty* for

possession “shall not apply” to a patient or caregiver). See also, Chavez v. Superior Court, 123 Cal. App. 4th 104, 110 (2004) (“Defining the boundaries of the Compassionate Use Act, the Supreme Court has held section 11362.5 does not afford a ~~patient-absolute-immunity-from-arrest-and-prosecution, but only limited-immunity~~ allowing the patient or primary caregiver to raise the medical use *defense* to set aside an information, indictment, or as a defense at trial.”) (emphasis added) (citing People v. Mower, 28 Cal.4th 457, 470 (2002)); People v. Fisher, 96 Cal. App. 4th 1147, 1152 (2002) (“[T]he exception constitutes an *affirmative defense* to be proven by the defendant at trial. This conclusion comports with the rebuttal argument against Proposition 215, the initiative measure enacting section 11362.5, contained in the ballot pamphlet, which reads: ‘Police officers can still arrest anyone who grows too much, or tries to sell it. . . . [P] . . . Police officers can still *arrest anyone for marijuana offenses*. Proposition 215 simply gives those arrested a *defense* in court, if they can prove they used marijuana with a doctor’s approval.’ (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) rebuttal to argument against Prop. 215, p. 61.)”) (omissions and addition in original) (emphasis added). Especially where, as here, the criminal defendant was charged with a violation of the Vehicle Code (for which the Compassionate Use Act *defense* does *not* apply), the *unlawful* possession of marijuana requires its forfeiture and destruction under *State* law.

B. Federal Law Prohibits the Return of Medical Marijuana.

Federal law provides both that the possession of marijuana is prohibited, and also

that such material is subject to forfeiture. 21 U.S.C. § 812, schedule 1 (c)(10) (identifying marijuana as a schedule I drug).⁴ See also, 21 U.S. C. § 881(a) (“The following shall be subject to forfeiture to the United States and *no property right shall exist in them*: (1) All ~~controlled substances which have been manufactured, distributed, dispensed, or acquired~~ in violation of this subchapter. . . . (8) All controlled substances which have been possessed in violation of this subchapter.”) (emphasis added); 21 U.S.C. § 881 (f) (“(1) All controlled substances in schedule I or II that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter; . . . shall be deemed *contraband* and seized and *summarily forfeited* to the United States.”) (emphasis added).

The United States Supreme Court has indicated that, “[b]y classifying 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 pre-approved research study.” Gonzales v. Raich, 125 S. Ct. 2195, 2204 (2005) (emphasis added) (*citing* 21 U.S.C. §§ 823(f), 841(a)(1), 844(a); United States v. Oakland Cannabis Buyers’ Cooperative, 532 U.S. 483, 490 (2001)). The Raich Court further specifically found that “[t]he regulatory scheme [of the Controlled Substances Act] is designed . . . to prohibit

⁴ Schedule I drugs are the most regulated and have the following characteristics: (A) The drug or other substance has a high potential for abuse. (B) The drug or other substance has no currently accepted medical use in treatment in the United States. (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision. 21 U.S.C. § 812 (b)(1).

entirely the possession or use of substances listed in Schedule I, except as a part of a strictly controlled research project.” Raich, 125 S. Ct. at 2210 (2005) (emphasis added).

Furthermore, 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*.” 21 U.S. C. § 844 (a) (emphasis added). The term “practitioner” is defined under Federal law as “a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.” 21 U.S. C. § 802 (21). Kha did not obtain marijuana from anyone who would fall within the definition of a “practitioner” under Federal law.

Although Kha presented a successful defense as to his possession of marijuana under the Compassionate Use Act (such that the charges against him were dismissed by the District Attorney), such *defense* does not translate into *lawful possession* of marijuana pursuant to either State law, as set forth above, or as to Federal law. In fact, the Compassionate Use Act makes no provision or requirement for the return of confiscated marijuana. See Chavez v. Superior Court, 123 Cal. App. 4th 104, 108 (2004) (denying writ of mandate and upholding trial court’s refusal to return confiscated marijuana upon dismissal of criminal complaint, based upon Health & Safety Code provisions, the fact

that destruction did not violate the Compassionate Use Act and that the court was without authority to return contraband).

The Court of Appeal in Chavez contrasted the California Compassionate Use Act with provisions of Oregon's Medical Marijuana Act, which, the Court noted, *specifically* provides that seized medical marijuana not be destroyed or forfeited and is to be immediately returned. Id. at 111 n.3 (citing ORS § 475.323 (2); State v. Kama, 39 P.3d 866 (2002)). The Chavez Court found “*noticeably absent* from the statute [the Compassionate Use Act] is a provision which *requires*, or *authorizes*, the court to return confiscated marijuana.” Id. at 111 (emphasis added).⁵

⁵ It matters not that the *amount* of marijuana at issue in Chavez was an amount *exceeding* the permissible limits of personal medical marijuana prescribed by State law. The fact that the Court's analysis focused on the facts before it has no bearing on the different facts presented by the instant appeal. Ginns v. Savage, 61 Cal. 2d 520, 524 (1964) (“Language used in any opinion is of course to be understood in the light of the *facts and the issue then before the court*, and an opinion is *not authority* for a proposition not therein considered.”) (emphasis added). Kha claims that the Chavez Court did not did not [sic] foreclose the possibility of marijuana being returned to a qualified patient in all cases; indeed, had this been the holding of Chavez, it would have been unnecessary for this Court to scrutinize the quantity of marijuana possessed by Chavez so carefully.” RPI Opp. at 7. Kha suggests that Chavez should have been decided more broadly, but a decision beyond the facts was clearly not necessary; there was no need in Chavez to consider whether *all* medical marijuana is unlawfully possessed, since there was *no question* in Chavez that his particular possession was outside the protection of the Compassionate Use Act because of the large quantity Chavez had. If the opinion in Chavez had gone beyond its facts it could have been disregarded on that basis. See Achen v. Pepsi-Cola Bottling Co., 105 Cal. App. 2d 113, 125 (Cal. Ct. App. 1951) (“It is a maxim not to be disregarded, that general expressions, in every opinion, are

Kha relies upon the opinion in People v. Tilehkooh, 113 Cal. App. 4th 1433 (2003), to claim that his possession of marijuana was lawful and that the state court may not *enforce* Federal law. Real Party in Interest misses the mark. This case is not about ~~the People trying to enforce Federal law, but Petitioner attempting to be free of an order~~ that *violates* State and Federal law and *compels* Petitioner to violate Federal law.

Tilehkooh involved the People's attempt to revoke probation based on the defendant's possession of medical marijuana. Here there is no probation violation and Petitioner is not attempting to compel the criminal defendant to conform his conduct to Federal law. Instead, the provisions of Federal and State law dictate the *character* of the "property" ordered to be returned to Kha. That "property" was not lawfully possessed under either Federal or State law (and State law, by its terms, incorporates Federal law). Petitioner is faced with the untenable position of being required to return "property" which is contraband under Federal law, was not lawfully possessed under Federal law, is prohibited from being returned by State law and is required to be forfeited and destroyed by both Federal and State law. This is untenable both because police officers are generally held to a high ethical standard and because they often cooperate with and assist in federal drug enforcement. It is quite a double standard for Petitioner's officers to be

to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.'").

enforcing federal drug laws on one hand and to be directly violating them on the other.

In addition, if this Court were to hold that the Order was valid, then a whole host of paradoxes would be created. For instance, could Petitioner be required to compensate Kha for any damage or loss to his “property?” Is Kha entitled to due process as to “property” for which there is no legally cognizable property interest under Federal law? The dilemma is clear, as is the necessary resolution, which rectifies the direct conflict created by California’s adoption of medical marijuana statutes that appear to allow the use, possession, cultivation, transportation, etc. of marijuana, in the face of Federal Law banning virtually all use, possession, transportation, etc. of marijuana.

C. The Order Unlawfully Requires the Distribution of a Controlled Substance By Petitioner.

Most critically and notwithstanding the above, the Order *requires* that Petitioner and its Police Department, which has current custody of the property, *release* the confiscated marijuana to Kha. Regardless of whether Defendant’s possession of marijuana is protected by the Compassionate Use Act and, assuming *arguendo* that he is entitled to continued possession of the confiscated controlled substance, the Order affirmatively and impermissibly requires the *Garden Grove Police Department* to “distribute” marijuana, in direct violation of Federal law. 21 U.S.C. § 841 (a) (1) (unlawful for any person knowingly or intentionally to distribute a controlled substance). See also, 21 U.S.C. § 828 (a) (“It shall be unlawful for any person to distribute a

controlled substance in schedule I or II to another except in pursuance of a written order of the person to whom such substance is distributed, made on a form to be issued by the Attorney General in blank in accordance with subsection (d) and regulations prescribed by him pursuant to this section.”). The “term ‘distribute’ means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical. The term ‘distributor’ means a person who so delivers a controlled substance or a listed chemical.” 21 U.S.C. § 802 (11).

The Order, therefore, is a violation of Federal law both because it requires the return of a controlled substance not “lawfully possessed” under Federal law or State law (which incorporates federal law), but also because it directly requires Petitioner to distribute a controlled substance in violation of Federal law. As such, the Order cannot stand. Gonzales v. Raich, 125 S. Ct. 2195, 2212 (2005) (“The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, *federal law* shall prevail.”) (emphasis added).

Kha claims that the “immunity” provided within the Controlled Substances Act nullifies this claim. He asserts that there can be no “civil or criminal liability under the federal Controlled Substances Act (‘CSA’) for the implementation of state law relating to controlled substances.” RPI Opp. at 10. Kha’s argument fails for several important reasons.

First, the immunity is not so broad as Kha claims; his claims are belied by his

quotation of the immunity provision itself. The “immunity” provided to local officials is to those “lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.” RPI Opp. at 10 (quoting 21 U.S.C. § 885 (d)). Petitioner’s return of the confiscated marijuana does not constitute “enforcement” of a law relating to controlled substances. See United States v. Rosenthal, 454 F.3d 943, 948 (9th Cir. 2006) (“[E]nforcement’ means ‘to compel compliance with the law . . . At best, Rosenthal was implementing or facilitating the purpose of the statute; he was not compelling anyone to do or not to do anything.’”).⁶ As the District Court noted in Rosenthal, and the Court of Appeal affirmed, for

an official to be ‘lawfully engaged’ in the enforcement of a law relating to controlled substances, and therefore entitled to immunity, the law which the municipal official is ‘enforcing’ must itself be *consistent with federal law*. Chapter 8.42, to the extent it provides for the cultivation and distribution of medical marijuana, is *not lawful* under *federal or state law*.

United States v. Rosenthal, 266 F. Supp. 2d 1068, 1078 (D. Cal. 2003), *aff’d. in pertinent part by United States v. Rosenthal*, 454 F.3d 943, 948 (9th Cir. 2006).

As the District Court in Rosenthal specifically concluded, “[l]awfully engaged’ in ‘enforcing a law related to controlled substances’ must mean engaged in enforcing, that

⁶ The Order cannot be said to be “enforcement” of California controlled substances laws either, since the State’s controlled substances statutes do *not* require the return of confiscated “medical” marijuana. See United States v. Rosenthal, 454 F.3d 943, 948 (9th Cir. 2006) (distinguishing State of Oregon v. Kama, 39 P.3d 866 (2002), based on fact that “state law *mandated* the return of marijuana to the individual from whom the marijuana had been seized”)(emphasis added).

is, compelling compliance with, a law related to controlled substances which is *consistent*--or at least *not inconsistent*--with the Controlled Substances Act. Section 885(d) cannot reasonably be read to cover acting pursuant to a law which itself is in *conflict* with the Act.” Id. (emphasis added) (noting that Congress determined that there are *no* medical benefits worthy of an exception prohibiting *any* possession, cultivation, distribution, transportation, etc. of marijuana, except as part of government-approved research).

This immunity was designed to apply to direct enforcement actions and is not intended to apply to law enforcement *providing* contraband to criminal defendants on a regular basis and not part of an investigative effort to curtail drug trafficking. See, e.g., United States v. Mustakeem, 759 F. Supp. 1172, 1176 (D. Pa. 1991) (“Undercover operations shall not include the furnishing of a controlled substance except in extraordinary cases after consultation with the appropriate United States Attorney”).

Notably, the medical marijuana laws in the State of Oregon in State of Oregon v. Kama, 39 P.3d 866 (2002), on which Kha places reliance for his immunity claim, specifically contains a provision which *mandates* the return of confiscated medical marijuana under certain circumstances, so that the Court could conclude that law enforcement personnel were *enforcing* State law relating to controlled substances. Id. at 867-868. In addition, the Kama Court did *not* decide whether the Oregon law mandating the return of confiscated marijuana was *preempted* by Federal law. Id. at 868. See infra

Part VI.

Second, and equally important, the applicability of the immunity provision is not settled in this context. Kha cannot, nor can any other party or any amicus curiae, state with any certainty, sufficient to alleviate Petitioner's legitimate concerns, that Petitioner's officials and/or officers would be *entitled* to immunity under Section 885 as to the return of the confiscated marijuana to Kha.

Third, "immunity" is not a sufficient remedy to the ordered violation of Federal law by Petitioner. The fact that Petitioner might be immune from prosecution under the Controlled Substances Act for its compliance with the Order is small consolation when Petitioner's officers, despite such "immunity" possibly applying after-the-fact, are still compelled to violate Federal law and may still be subject to *suit*, at the very least, for violating the CSA. In contrast to other immunities, Section 885 is not an immunity from *suit*, but is only an immunity from *liability*. Cf. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).⁷

⁷ Immunity from suit prevents "consequences" [to public employees, which] . . . are not limited to liability for money damages; they also include 'the general costs of subjecting officials to the risks of trial -- distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. . . .[;] even such pretrial matters as discovery are to be avoided if possible, as 'inquiries of this kind can be peculiarly disruptive of effective government.'" Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (discussing nature of qualified immunity from suit). An immunity from liability clearly does not prevent these "consequences" and they would certainly contribute to the harm suffered by Petitioner as to the efficient functioning of its Police Department as a result of being compelled to comply with the Order.

In addition and as discussed previously, police officers are held to a high moral standard and very often cooperate extensively with federal drug enforcement. See, e.g., People v. Nord, 377 F. Supp. 2d 945 (2005) (local law enforcement officers acting on task force with federal Drug Enforcement Agency personnel). These roles are undermined by the return of confiscated marijuana to a criminal defendant by Petitioner's Police Department. See, e.g., Bailey v. City of National City, 226 Cal. App. 3d 1319, 1328 (1991) ("the unique position occupied by police officers subjects them to an even higher standard of conduct than other employees"); Nicolini v. County of Tuolumne, 190 Cal. App. 3d 619, 630 (Cal. Ct. App. 1987) (upholding termination of officer for "failure of good behavior either during or outside of duty hours which is of such nature that it causes discredit to the county"). Actions of police officers that are a violation of Federal law on their face compromise the effectiveness and credibility of the officers and their Department, since they are, generally, enforcers and administrators of the laws of the land.

The Order equally undermines Departmental authority and morale, regardless of any immunity which may later prevent liability for those actions. Petitioner is faced with the dilemma of informing its officers which laws are to be followed and which are to be ignored with impunity. The Order requires the latter as to the federal government's characterization of marijuana as a controlled substance, without medical benefits, and which is prohibited for any purpose.

Real Party in Interest claims that it is not the business of this Court to enforce or determine Federal law. State courts, however, do have authority to “render binding judicial decisions that rest on their own interpretations of federal law.” ASARCO, Inc. v. Kadish, 490 U.S. 605, 617 (1989). In addition, it most certainly is the business of this Court to ensure that the orders of the Orange County Superior Court for the State of California do not violate the United States Constitution or federal statutes. Specifically, Article VI, clause two, provides, in pertinent part, that “the Judges in every State shall be bound [by the Constitution and the Laws of the United States].” The Judges of the Orange County Superior Court, whether bound to *enforce* Federal law, are certainly required not to issue orders which *violate* Federal law. See Printz v. United States, 117 S. Ct. 2365, 2374 (1997) (“[T]he duty owed to the National Government, on the part of all state officials, [is] to enact, enforce, and interpret State law in such fashion as not to *obstruct* the operation of Federal law, and the attendant reality that all state actions constituting such obstruction, even legislative acts, are ipso facto *invalid*.”) (emphasis added); Miller v. Municipal Court of Los Angeles, 22 Cal. 2d 818, 842 (1943) (“the state courts would have concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited[;] . . . the States are the instruments upon which the Union must frequently depend for the force and execution of its powers”) (internal quotations and citations omitted) (quoting the framers as to proposed federal Constitution). Being both a violation of Federal and State law, the Order cannot stand.

**VI. FEDERAL LAW PREEMPTS THE ORDER AND
THE COMPASSIONATE USE ACT.**

The United States Supreme Court has found that Congress was well within its Commerce Clause power in regulating marijuana as a controlled substance under the Controlled Substances Act. Gonzales v. Raich, 125 S. Ct. 2195, 2212 (2005). The United States Supreme Court found that marijuana -- *any* marijuana in *any* amount and for *any* purpose, is contraband under Federal law. Gonzales v. Raich, 125 S. Ct. 2195, 2211 (2005) (“The CSA [Controlled Substances Act] designates marijuana as contraband for *any* purpose.”) (emphasis in original). Notwithstanding the fact that the Controlled Substances Act permits States to *also* regulate controlled substances, the CSA specifically limits that permission to instances not involving “a positive conflict” between a State’s regulations and the CSA “so that the two cannot consistently stand together.” The State cannot satisfy this explicit statutory provision where an order of the Superior Court *requires* that a *Police Department* return a substance which is illegal contraband under Federal law to a criminal defendant. The fact that the State has determined that individuals will not be *prosecuted* under *State law* for the possession or cultivation of a controlled substance has no bearing on whether a law enforcement agency can be *ordered* to release that contraband to a criminal defendant. Gonzales v. Raich, 125 S. Ct. 2195, 2213 (2005) (“state action cannot circumscribe Congress’ plenary commerce power”).

Kha ignores the plain language of the United States Supreme Court opinion in

Raich. The Raich Court found as follows: “the mere fact that marijuana--like virtually every other controlled substance regulated by the CSA--is used for *medicinal purposes* cannot possibly serve to distinguish it from the core activities regulated by the CSA.”

Gonzales v. Raich, 125 S. Ct. 2195, 2212 (2005) (emphasis added).

The Order and the CUA *directly* conflict with the CSA. Therefore, the former are preempted by the latter, by necessity. This is completely consistent with the purposes of the CSA in “controlling the legitimate and illegitimate traffic in controlled substances.

Gonzales v. Oregon, 126 S. Ct. 904, 911 (2006).

As to the CUA, which purports to generally permit the use, possession, cultivation and transportation of “medical” marijuana, the placement of this substance in Schedule I of the CSA dictates that there *is no* medicinal use of marijuana. Gonzales v. Oregon, 126 S. Ct. 904, 922 (2006) (“Congress’ express determination that marijuana had no accepted medical use foreclosed any argument about statutory coverage of drugs available by a doctor’s prescription.”) (*citing* United States v. Oakland Cannabis Buyers’ Cooperative, 532 U.S. 483 (2001)).

In contrast to the facts here, the Court in Gonzales v. Oregon found that Oregon’s Death with Dignity Act did not conflict with the CSA, despite allowing the prescribing of lethal doses of controlled substances. However, the controlled substances at issue in Gonzales v. Oregon were *Schedule II* drugs, which were substances available by *prescription*. Id. at 912. In contrast, marijuana, as a *Schedule I* drug, is *not* available by

prescription under the CSA. While, under Gonzales v. Oregon, the United States Supreme Court may have found that States retained the ability to control *medical* uses for *Schedule II* drugs that could legitimately be prescribed by doctors registered with the federal government for purposes of dispensing drugs under the CSA, the Supreme Court did *not* find that the same intent existed with respect to *Schedule I* drugs that *cannot* be prescribed by physicians *at all*. As to Schedule I drugs, Congress clearly had the intent to occupy the entire field, whether assertedly medical or not. Therefore, the State's attempt to allow "medicinal" use of a Schedule I controlled substance under the CSA is fully preempted by the CSA.

VII. CONCLUSION.

In summary, Amici urge this Court to find the Order invalid as a violation of Federal and State law, as well as finding that the Compassionate Use Act is preempted by the Controlled Substances Act and finding in favor of Petitioner on the following underlying issues. First, Petitioner's writ of mandate is the proper procedural mechanism for challenging the Order, since there is no adequate, speedy remedy available to Petitioner; there is no right of appeal as to the Order; and Petitioner, although beneficially interested in the disposition of the confiscated marijuana, was not a party to the proceedings resulting in the Order.

Second, Petitioner has standing to challenge the Order's validity. Since Petitioner is subject to the Order, and is directed by the Order to violate State and Federal law

relating to the return of the confiscated marijuana to Kha, Petitioner's interest in the outcome of this matter is not conjectural or remote.

Third, the Order violates both Federal and State law. There is no dispute that Federal law prohibits the use, possession, cultivation, transportation, etc. of marijuana, except in instances not applicable under the facts presented in this matter. Federal law provides that there is no property interest in controlled substances. In fact, any Schedule I substances (of which marijuana is a part), not possessed in conjunction with an authorized research project, are simply deemed contraband for any purpose.

In addition, the Order actually requires Petitioner to *violate* Federal law, since Petitioner is required to "distribute" a controlled substance. Any "immunity" which may apply to Petitioner and its officers and employees does not negate the existence of this violation, since the immunity provided by the Controlled Substances Act is inadequate, uncertain, and likely inapplicable to actions which are based upon State law *inconsistent* with Federal law.

Similarly, State law prohibits the return of confiscated controlled substances that are not "lawfully possessed." Since State law generically incorporates Federal law, State law also specifically requires the forfeiture and destruction of the confiscated marijuana.

In fact, the Compassionate Use Act does not purport to make it *lawful* to possess or transport medical marijuana, but only grants a defense to prosecution for the violation of certain sections of the Health and Safety Code. Notably, Kha was cited for a violation of

the *Vehicle* Code relating to the possession of marijuana in a *vehicle*.

Finally, the Controlled Substances Act clearly preempts the use, possession, transportation, etc. of marijuana, whether supposedly “medicinal” under State law or not. Even if this Court were to find that the Controlled Substances Act did not *generally* prohibit the Compassionate Use Act, the conclusion that the Order *directly conflicts* with the Controlled Substances Act, by requiring the distribution of the confiscated marijuana by Petitioner, would still be inescapable.

In its essence, this is a case about a law enforcement agency being required to *violate* Federal law by returning confiscated marijuana, which is illegal contraband, to a criminal defendant. This is not a matter of state officers being required to *enforce* Federal law. Instead, it is a straightforward question of whether the Order can *violate* and *contradict* Federal law and whether the Order can directly require *Petitioner* to violate Federal law by ordering Petitioner to distribute a controlled substance in violation of the Controlled Substances Act.

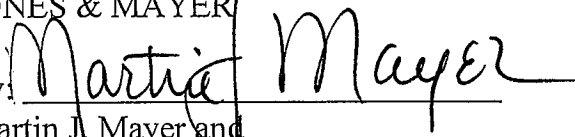
In determining that the Order is invalid, this Court will be upholding the integrity of law enforcement and the Courts of the State of California. Petitioner will no longer be subject to an Order that is a direct violation of both Federal and State law, and the Order will no longer be in violation of the Constitution, which requires that all judges are bound by Federal law. In addition, the unreconciled conflict between the Controlled Substances Act and the Compassionate Use Act, as to the use, possession, transportation, etc. of

marijuana can be resolved by this Court's definitive determination that the latter is preempted by the former, since the Compassionate Use Act interferes with Congress' explicit and all-encompassing regulation of marijuana as a Schedule I controlled substance for any purpose whatsoever.

For all of the foregoing reasons, this Court is respectfully urged to grant Petitioner's appeal, finding that its petition for writ of mandate was proper and should have been granted.

Dated: December 18, 2006

Respectfully submitted,
JONES & MAYER

By: 

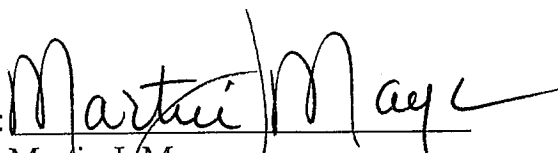
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CERTIFICATE OF COMPLIANCE

I, MARTIN J. MAYER, certify that the attached application and proposed brief consist of 7,961 words, including footnotes. I have relied on the word count of the computer program used to prepare the brief.

Dated: December 18, 2006

JONES & MAYER

By: 
Martin J. Mayer
Attorneys for Amici

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 3777 North Harbor Boulevard, Fullerton, California. On December 18, 2006, I served the foregoing document described as:

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

on the parties or attorneys for parties in this action who are identified on the attached service list, using the following means of service. (If more than one means of service is checked, the means of service used for each party is indicated on the attached service list).

_____ **BY PERSONAL SERVICE.** I placed ___ the original or ___ a true copy of the foregoing document in sealed envelopes individually addressed to each of the parties on the attached service list, and caused such envelope to be delivered by hand to the offices of each addressee.

_____ **BY FACSIMILE TRANSMISSION.** I caused ___ the original or ___ a true copy of the foregoing document to be transmitted to each of the parties on the attached service list at the facsimile machine telephone number as last given by that person on any document which he or she has filed in this action and served upon this office.

_____ **BY MAIL.** I placed ___ the original or ___ a true copy of the foregoing document in a sealed envelope individually addressed to each of the parties on the attached service list, and caused each such envelope to be deposited in the mail at 300 South Grand Avenue, Eighth Floor, Los Angeles, California 90071-3119. Each envelope was mailed with postage thereon fully prepaid. I am readily familiar with this firm's practice of collection and processing of correspondence for mailing. Under that practice, mail is deposited with the United States Postal Service the same day that it is collected in the ordinary course of business.

_____ **BY EXPRESS MAIL.** I placed ___ the original or ___ a true copy of the foregoing document in a sealed envelope individually addressed to each of the parties on the attached service list, and caused such envelope or package to be deposited in the.

x
_____ **BY OVERNIGHT EXPRESS.** I placed ___ the original or x a true copy of the foregoing documents in a sealed envelope or package designated by Overnight Express with delivery fees paid or provided for, individually addressed to each of the parties on the attached service list, and caused such envelope or package to be delivered to an authorized courier or driver authorized by Overnight Express to receive documents.

x (State) I declare under penalty of perjury under the laws of the State of California
_____ that the foregoing is true and correct.

_____ (Federal) I declare that I am employed in the office of a member of the bar of this
_____ court, at whose direction the service was made.

Executed on December 18, 2006 at Fullerton, California 92835.



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