CASE NO. S159520

IN THE

SUPREME COURT OF CALIFORNIA

THE CITY OF GARDEN GROVE,

Petitioner and Appellant,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent;

FELIX KHA,

Real Party in Interest.

Fourth Appellate District, Division Three
Civil No. G036250

After a Decision by the Court of Appeal
Fourth Appellate District, Division Three
Case No. G036250

PETITION FOR REVIEW

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TABLE OF CONTENTS

1. ISSUE PRESENTED 1

2. WHY REVIEW SHOULD BE GRANTED 1

3. BACKGROUND FACTS AND PROCEDURAL HISTORY 3

4. DISCUSSION 4

5. CONCLUSION 10

CERTIFICATE OF WORD COUNT 11

OPINION 12

559460.1

TABLE OF AUTHORITIES

FEDERAL CASES

Cipollone v. Liggett Group, Inc.

(1992) 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 4

Gonzales v. Raich

(2005) 545 U.S. 1, 29, 125 S.Ct. 2195, 162 L.Ed.2d 1 .... passim

Hyland II v. Fukuda

(9th Cir. 1978) 580 F.2d 977 .... 8, 9

Raich v. Gonzales

(9th Cir. 2007) 500 F.3d 850 1

United States v. Cannabis Cultivators Club

(N.D. Cal. 1998) 5 F.Supp.2nd 1086 8

United States v. Oakland Cannabis Buyers' Cooperative

(2001) 532 U.S. 483, 121 S.Ct. 1711, 149 L.Ed.2d 722 .... 4, 5, 8

STATE CASES

People v. Mower

(2002) 28 Cal. 4th 457 2

FEDERAL STATUTES

21 U.S.C. section 812(b)(1) 1, 8

21 U.S.C. section 812(c) 1

21 U.S.C. section 812(c)(10) 8

21 U.S.C. section 829 8

21 U.S.C. section 841(a)(1) 1, 6

21 U.S.C. section 844(a) 1, 6, 8

21 U.S.C. section 881(a)(1) 7

559460.1

STATE STATUTES

Health and Safety Code section 11054(d)(13) 1

Health and Safety Code section 11362.5(d) 2

1. ISSUE PRESENTED

If California's medical marijuana laws are interpreted to require that police return marijuana seized from an otherwise "qualified patient," does that requirement conflict with federal drug laws which generally make the distribution and possession of any amount of marijuana illegal?

2. WHY REVIEW SHOULD BE GRANTED

This case presents a narrow but important constitutional question impacting local law enforcement officials and agencies across the state – whether local law enforcement officials can be compelled by state courts to violate federal drug laws by returning marijuana to individuals who are exempt from criminal sanctions under state law but not under federal law.

The federal Controlled Substances Act designates marijuana as a Schedule I controlled substance. (21 U.S.C. section 812(c)) It is illegal under federal law to distribute or dispense marijuana. (21 U.S.C. section 841(a)(1)) With limited exceptions not relevant here, federal law also makes it illegal to possess marijuana. (21 U.S.C. section 844(a)) When it designated marijuana as a Schedule I controlled substance, Congress found that marijuana "has a high potential for abuse", and "has no currently accepted medical use." Congress also found that "there is a lack of accepted safety and use" of marijuana "under medical supervision." (21 U.S.C. section 812(b)(1); Raich v. Gonzales (9th Cir. 2007) 500 F.3d 850, 854)

State law also designates marijuana as a Schedule I controlled substance. (Health and Safety Code section 11054(d)(13)) However, unlike federal law, state law – set forth in the Compassionate Use Act of 1996 – provides a limited immunity to, among others, individuals who use marijuana for medical purposes pursuant to the

recommendation or approval of a doctor. (Health and Safety Code section 11362.5(d); People v. Mower (2002) 28 Cal. 4th 457, 464)

The Compassionate Use Act does not expressly require that law enforcement officials return marijuana seized from an individual who subsequently establishes that he or she is entitled to immunity from state criminal sanctions under the Compassionate Use Act. Nevertheless, in this case the Court of Appeal held that as long as the amount of marijuana in question is within the limits prescribed by the Compassionate Use Act, the police can and should be compelled by the state courts to return seized marijuana to a person authorized to possess the drug under the Compassionate Use Act. The holding of the Court of Appeal creates a direct conflict between state and federal law. This conflict puts local law enforcement officials in the untenable position of violating federal law, or at the very least becoming complicit in a violation of federal law, by knowingly distributing a drug banned by federal law or risking contempt for violating a state court order.

Since the adoption of the Compassionate Use Act, a number of federal and state courts have struggled with the interplay between the Compassionate Use Act and federal drug laws. This Court is currently considering the question of whether California employers can be compelled to accommodate the medical use of marijuana by employees notwithstanding the federal prohibition against that use. (Ross v. RagingwireTelecommunications, Supreme Court Case No. S138130)

The Court should accept review of this case to resolve the conflict created by the decision of the Court of Appeal and ensure that police officers and other law enforcement officials are not unnecessarily placed in the position of having to decide

between compliance with a state court order and violating or aiding in the violation of federal law.

3. BACKGROUND FACTS AND PROCEDURAL HISTORY

In 2005, a Garden Grove police officer stopped and cited Real Party in Interest Felix Kha ("Kha") for a red light violation. (Appendix, Exhibit D) During the traffic stop, the officer noticed less than an ounce of marijuana in Kha's vehicle. The marijuana was seized, and Kha was also cited for violation of state laws prohibiting the transportation of marijuana. (Appendix, Exhibit D)

During the subsequent criminal proceedings on the possession charge, Kha submitted a statement from a doctor indicating that Kha suffered from an unspecified serious medical condition that could benefit from the use of medical marijuana. (Appendix, Exhibit B) After confirming the authenticity of the doctor's statement, the prosecutor dismissed the possession charge. (Appendix, Exhibit A, p. 2) But the prosecutor opposed Kha's request for the return of the marijuana. (Id.) Although the record does not disclose the reasoning of the trial court, the trial court granted Kha's request, and ordered the Garden Grove Police Department to return the seized marijuana. (Id.)

The City of Garden Grove filed a petition for writ of mandate seeking appellate review of the trial court's decision. On November 28, 2007, Division Three of the Fourth District Court of Appeal issued a published decision affirming the trial court's order requiring the return of Kha's marijuana. In so holding, the Court of Appeal noted that the case raised an important issue regarding California's medical marijuana laws. (Opinion, p. 12) The appellate court noted that the issue raised by the case – whether local law enforcement agencies must return lawfully seized marijuana once state

criminal proceedings have been terminated -- has produced inconsistent outcomes at the trial court level throughout the state.

The appellate court concluded that Kha legally possessed the medical marijuana under state law, and therefore acquired a property right in the marijuana protected by due process. (Opinion, 34-37) The Court of Appeal concluded that neither the creation of this state property right nor the requirement that the police return the marijuana to Kha created any conflict between state and federal law. (Opinion, pp. 26-24)

The City did not petition the Court of Appeal for rehearing.

4. DISCUSSION

Under the Supremacy Clause of the United States Constitution, if there is any conflict between federal and state law, federal law must prevail. (Gonzales v. Raich (2005) 545 U.S. 1, 29, 125 S.Ct. 2195, 162 L.Ed.2d 1) Federal preemption occurs when: 1) Congress enacts a statute that explicitly preempts state law; 2) state law actually conflicts with federal law; or 3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field. (Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407) When Congress adopts a statute that provides a reliable indication of congressional intent regarding preemption, the scope of federal preemption is determined by the statute. (Id. at 517)

The United States Supreme Court has twice considered the impact of California's medical marijuana laws on the federal Controlled Substances Act. In the first case, United States v. Oakland Cannabis Buyers' Cooperative (2001) 532 U.S. 483, 121 S.Ct. 1711, 149 L.Ed.2d 722, the Court considered whether a "medical necessity" defense must be read into the Controlled Substances Act such that a cooperative distributing

medical marijuana under California law would also be protected from prosecution under federal law. The Court rejected the medical necessity defense, finding that the defense would be at odds with the express terms of the Controlled Substances Act. (532 U.S. at 491) The Court explained:

> "In the case of the Controlled Substances Act, the statute reflects a determination that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project). Whereas some other drugs can be dispensed and prescribed for medical use (see 21 U.S.C. § 829), the same is not true for marijuana. Indeed, for purposes of the Controlled Substances Act, marijuana has 'no currently accepted medical use' at all. § 812" (532 U.S. at 491)

The Court continued:

> "It is clear from the text of the Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception. The statute expressly contemplates that many drugs 'have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people,' § 801(1), but it includes no exception at all for any medical use of marijuana." (532 U.S. at 493)

The second case was Gonzales v. Raich, supra, 545 U.S. 1. In that case, several individuals who used medical marijuana filed suit against the federal government seeking to preclude the government from enforcing the Controlled Substances Act against their possession, manufacture and/or acquisition of marijuana

for their own personal medical use. The Court rejected that plea, concluding that the fact that the State of California has chosen to exempt some marijuana users from criminal sanctions under state law cannot protect those users from sanctions under federal law. The Court noted that a primary purpose of the Controlled Substances Act is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. (545 U.S. at 12-13) The Court had "no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the" Controlled Substances Act. (545 U.S. 22) The Court stated:

> ". . . limiting the activity to marijuana possession and cultivation 'in accordance with state law' cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be." (545 U.S. 29)

With certain exceptions not relevant here, the Controlled Substances Act makes it a federal crime to knowingly or intentionally distribute or dispense a controlled substance, including marijuana. (21 U.S.C. section 841(a)(1)) It is also unlawful to possess a controlled substance except as provided under the Controlled Substances Act. (21 U.S.C. section 844(a)) Congress has expressly determined that "no property right shall exist in" any controlled substance manufactured, distributed, dispensed or

acquired in violation of federal law. (21 U.S.C. section 881(a)(1)) Controlled substances manufactured, distributed, dispensed or acquired in violation of federal law are subject to forfeiture (Id.), not return to the person from whom they were seized.

In this case, the Court of Appeal concluded that California's medical marijuana laws create a property interest in medical marijuana in favor of qualified patients. The appellate court concluded that the creation of this property interest mandates that marijuana seized from qualified patients be returned when state criminal charges are dropped. (Opinion, pp. 34-37) That holding creates a direct conflict between state and federal law. Under the Supremacy Clause, state law must give way to federal law.

The Court of Appeal determined that there was no conflict between state and federal law because California's medical marijuana laws are, in effect, regulations of the medical profession and Congress did not express an intent to preempt such regulations. This assertion misses the mark for two reasons. First, California's medical marijuana laws are not regulations of the medical profession. Instead, the laws create exceptions from criminal prosecution for what would otherwise be criminal actions even under California law – the cultivation, distribution and possession of limited amounts of marijuana.

Second, while Congress obviously did not intend through the enactment of the Controlled Substances Act to preempt all state laws regarding prescriptions for drugs generally, Congress did make very explicit findings regarding marijuana. Congress recognized that many drugs, even those regulated by federal law, have valid medicinal purposes. Therefore, as a general rule, the Controlled Substances Act contains an exception allowing individuals to possess controlled substances prescribed by a medical

practitioner. (21 U.S.C. section 844(a)) However, when Congress included marijuana within Schedule I, Congress found that marijuana has a "high potential for abuse", has no "currently accepted medical use in treatment" and that there is "a lack of accepted safety for use . . . under medical supervision." (21 U.S.C. section 812(b)(1)) As the Court of Appeal recognized, by classifying marijuana as a Schedule I drug, Congress took marijuana out of the class of drugs which could legally be possessed with a valid prescription. (21 U.S.C. section 812(c)(10); 21 U.S.C. section 829; United States v. Oakland Cannabis Buyers' Cooperative, supra, 532 U.S. 483, 492, fn. 5) Thus, while Congress has not occupied the entire field of medical regulations, it has made specific and explicit findings regarding the lack of any legitimate medical uses for marijuana.

The Court of Appeal also reasoned that there is no direct conflict between a state law that exempts certain behavior from state criminal prosecution and a federal law that subjects the same behavior to federal prosecution. (United States v. Cannabis Cultivators Club (N.D. Cal. 1998) 5 F.Supp.2nd 1086, 1100) But the City of Garden Grove is not challenging the general constitutionality of California's medical marijuana laws. The question of whether the exemption from state criminal prosecution conflicts with federal law is not relevant in this case. The question presented here is much more narrow – whether an interpretation of California law to require the return of seized marijuana is preempted by federal law.

The case of Hyland II v. Fukuda (9th Cir. 1978) 580 F.2d 977 is instructive. In that case, a previously convicted felon sued the State of Hawaii when the state refused to consider his application for a job which would have required him to carry a gun. Hawaii law exempted the plaintiff from the state prohibition against the possession of

firearms by felons. Federal law, however, contains no such exemption. The Hyland court concluded that there was no direct conflict between the Hawaii law, which chose not to prohibit certain conduct, and the federal law, which did prohibit that conduct. (580 F.2d at 981)

But more importantly for purposes of this case, the Hyland court also concluded that the State of Hawaii correctly determined that the federal prohibition against felons carrying firearms precluded the state from hiring the plaintiff even if state law did not. (580 F.2d at 981) The court did not conclude that the plaintiff could be employed by the state notwithstanding the requirements of federal law. Applied to this case, the Hyland decision suggests that while the State of California can choose not to prosecute individuals for the distribution or possession of marijuana under certain circumstances, the state cannot require law enforcement officials to ignore federal law by returning seized marijuana.

The Court of Appeal also concluded that the federal government does not have a significant interest in regulating individual use of medical marijuana within California because the amounts at issue are so small that they likely would have no impact on the federal war on drugs. (Opinion, p. 31) That is a determination that must be left to Congress, not the courts. The United States Supreme Court has already determined that Congress could reasonably have concluded that regulating the intrastate cultivation, possession and use of controlled substances, including marijuana, *does* have a significant enough impact on interstate drug activities to warrant federal regulation of the subject. (Gonzales v. Raich, supra, 545 U.S. 1, 22) The Court stated:

"The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected." (545 U.S. at 30)

5. CONCLUSION

The City of Garden Grove does not seek a review of the constitutionality of California's medical marijuana laws in general. Instead, the City seeks review only of the narrow question of whether police officers can be compelled to return marijuana to individuals that the state has exempted from criminal prosecution despite the fact that federal drug laws generally prohibit the distribution or possession of *any* amount of marijuana for *any* purpose. The City submits that interpreting California's laws to require the return of controlled substances expressly prohibited by federal law creates a direct conflict with federal law, and that federal law must prevail.

Respectfully submitted,

DATED: January 7, 2008

WOODRUFF, SPRADLIN & SMART, APC

By:
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1).)

The text of this brief, including footnotes, consists of 2,626 words as counted by the Microsoft Word 2003 word processing program used to generate the brief.

DATED: January 7, 2008

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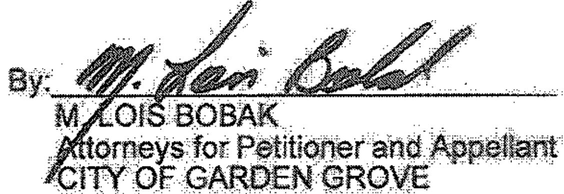
By: 

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of 18 and not a party to the within action; I am employed by WOODRUFF, SPRADLIN & SMART in the County of Orange at 555 Anton Bl., Suite 1200, Costa Mesa, CA 92626.

On January 7, 2008, I served the foregoing document(s) described as PETITION FOR REVIEW by placing true copies thereof enclosed in sealed envelope(s), as follows:

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☐ **(BY FACSIMILE)** I caused the above-referenced document to be transmitted to the interested parties via facsimile transmission to the fax number(s) as stated on the attached service list.

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☐ **(PERSONAL SERVICE)** I delivered such envelope(s) by hand to the offices of the addressee(s).

☑ **(STATE)** 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. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 7, 2008 at Costa Mesa, California.

BOBBIE MARSH

CITY OF GARDEN GROVE V. SUPERIOR COURT OF ORANGE COUNTY
CALIFORNIA SUPREME COURT
CASE NO. S159520

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