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Up in Smoke: Federal Preemption and Medicinal Marijuana ID Cards in *County of San Diego v. San Diego NORML*¹

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.²

I. INTRODUCTION

In 1976, Peter Tosh released his debut album *Legalize It*.³ The lyrics from the title track of the album encourage listeners to: “legalize it—don’t criticize it.”⁴ From the remainder of the song it becomes clear that “it” refers to marijuana. Tosh’s song continues: “doctors smoke it; nurses smoke it; judges smoke it; even the lawyers too.”⁵ The track quickly “became an anthem to supporters of marijuana legalization.”⁶ Although the song was released over thirty years ago, the battle for legalizing marijuana continues today.

This Note will focus on the battle between federal law and California state law, and the ramifications surrounding these two standards related to the cultivation, possession, and use of medicinal marijuana. It will not discuss whether marijuana should (or should not) be legalized for medicinal use. The purpose of this Note is to highlight the battle between state and federal legislation, not the battle between proponents and opponents of legalizing medicinal marijuana.

*County of San Diego v. San Diego NORML*⁷ is one of the most recent cases to arise out of the controversy between federal drug laws—which

1. *County of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461 (Cal. Ct. App. 2008).

2. U.S. CONST. art. VI, cl. 2.

3. PETER TOSH, *LEGALIZE IT* (CBS Records 1976).

4. *Id.*

5. *Id.*

6. Sola Balogun, *Peter Tosh: Fourteen years after Stepping Razor*, THE SUN NEWS ONLINE, Oct. 31, 2008, <http://www.sunnewsonline.com/webpages/features/showtime/2008/oct/31/showtime-31-10-2008-001.htm>.

7. *San Diego NORML*, 81 Cal. Rptr. 3d 461.

ban the cultivation, possession, and use of marijuana—and certain state laws that have eliminated criminality (or limited penalties) for cultivation, possession, or use of medicinal marijuana. The issues in *San Diego NORML* were (1) whether a county—as a political subdivision of a state—may challenge the constitutionality of a state law, and if so, what is the extent of its standing;⁸ and (2) whether a state law forcing counties to distribute medical marijuana ID cards is preempted by federal law.⁹ The primary focus of this Note will be *San Diego NORML*'s analysis of the federal preemption standard applied to a new California law requiring counties to process applications and provide ID cards to persons with medicinal marijuana prescriptions. In the face of glaring conflict between federal law and California state law, this Note will compare the decision of *San Diego NORML* to similar Supreme Court decisions regarding medicinal marijuana¹⁰ and federal preemption.¹¹

San Diego NORML held that (1) a county may challenge the constitutionality of a state law if the law imposes duties on or injuries to the county (i.e., standing is contingent upon imposition of duties or injuries);¹² (2) in order for a state law to be preempted by the Controlled Substances Act (“CSA”),¹³ the two laws must be in such conflict that they cannot simultaneously stand together;¹⁴ and (3) a state law requiring counties to distribute medicinal marijuana identification cards is not federally preempted.¹⁵

This Note will argue that *San Diego NORML* correctly held that a county must have standing in order to challenge the constitutionality of a state law, but that the court came to the wrong decision in holding that a state law requiring counties to distribute medicinal marijuana ID cards

8. *Id.* at 471.

9. *Id.* at 475.

10. See, e.g., *Gonzalez v. Raich*, 545 U.S. 1 (2005); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001).

11. See *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008) (holding that the Federal National Labor Relations Act preempted California legislation prohibiting private employers that received more than \$10,000 in state funds from using the money to assist, deter, or promote unions); *Preston v. Ferrer*, 128 S. Ct. 978 (2008) (holding that Federal Arbitration Act superseded state law granting primary jurisdiction in a different forum); *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008) (holding that FDA approval preempted state common law claims against manufacturers); *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989 (2008) (holding that the Federal Aviation Administration Authorization Act preempted state requirements and restrictions on tobacco transportation); *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008) (holding that the Clean Water Act's penalties for water pollution did not preempt common law maritime claims for punitive damages).

12. *San Diego NORML*, 81 Cal. Rptr. 3d at 474–75.

13. 21 U.S.C. §§ 801–904 (2003).

14. *San Diego NORML*, 81 Cal. Rptr. 3d at 480–81.

15. *Id.* at 481.

does not positively conflict with the CSA. The argument is not that states ought to be categorically proscribed from enacting ID systems to enforce state laws, but rather that the medicinal marijuana ID card system in California is preempted by federal law. In the *San Diego NORML* rulings, the California court system has supported the proposition that states should have the power to govern themselves, but these decisions have not resolved the conflict and ambiguity between federal and state drug laws. This conflict could be resolved if Congress relaxed its prohibitions on marijuana and allowed states to choose whether to legalize medicinal marijuana use, or if states, such as California, simply eliminated the penalty for using marijuana medicinally, rather than legalizing medicinal marijuana altogether.

Recently, a disconnect has arisen between the federal preemption doctrine as articulated by the Supreme Court and state laws permitting medicinal marijuana. This disconnect has created problems with enforcement and punishment. Ultimately, this unjustly affects—and harms—California citizens. State and federal laws need to be harmonized in order to protect the people whom both governments are purportedly trying to help.

This Note will analyze the decision by the California Court of Appeals in relation to federal preemption and congressional authority under the Commerce Clause. It argues that *San Diego NORML* took an excessively narrow approach on the federal preemption issue presented in this case. Additionally, it argues that *San Diego NORML* further complicated the relationship between federal law and state law and between federal enforcement and state enforcement. This complication is widening the gap between two judicial jurisdictions: California state courts and the federal courts.

Part II of this Note will provide background information on the medicinal marijuana debate and the issues in *San Diego NORML*. Part III is divided into four sections (A–D). Part III.A will deal directly with two of the preliminary issues of *San Diego NORML*: (1) 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”; and (2) if a political subdivision may challenge a state law as unconstitutional, may it challenge the entire law, or is it limited to challenging only those provisions that place specific obligations on the local governmental entity.¹⁶ Part III.B will discuss the “four species of

16. *San Diego NORML*, 81 Cal. Rptr. 3d at 471.

federal preemption”¹⁷ and analyze the facts of *San Diego NORML* in relation to these four categories. Part III.C will address how the holding of *San Diego NORML* is flawed, particularly in its assertion that federal preemption under the CSA can only occur when it is impossible for a state statute to coexist with the CSA. Part III.D will suggest possible solutions to the federal preemption issue including a solution for California in the face of conflicting state and federal laws on medical marijuana. Finally, Part IV will provide a brief conclusion.

II. CONTEXT AND BACKGROUND

On November 5, 1996, California voters passed Proposition 215 by a margin of 56% to 44%.¹⁸ Proposition 215 legalized the cultivation, possession, and use of medicinal marijuana by seriously ill Californians.¹⁹ When codified, Proposition 215 became known as the Compassionate Use Act (“CUA”).²⁰ The CUA allows those with serious illnesses²¹ to obtain a prescription to use marijuana for medical purposes. This prescription not only allows the patient to use medicinal marijuana, but it allows the patient (or the patient’s primary caregiver) to cultivate and possess marijuana.²²

Currently, at least thirteen states have legalized the use of medicinal marijuana.²³ However, state laws legalizing medicinal marijuana are

17. *Id.* at 475.

18. *State Propositions*, S.F. CHRON., Nov. 6, 1996, at A9.

19. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007).

20. § 11362.5(a) (naming this provision the Compassionate Use Act).

21. The code identifies certain illnesses that may be treated with medical marijuana. These include “the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.” § 11362.5(b)(1)(A).

22. § 11362.5. The code specifies that anyone with a serious illness—or those acting as the primary caregiver of a person with a serious illness—and a prescription will not be subject to criminal prosecution or sanction. § 11362.5(b)(1)(B). Furthermore, the code protects doctors from punishment. § 11362.5(c) (“[N]o physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.”).

23. See The National Organization for the Reformation of Marijuana Laws (NORML) Web site, http://norml.org/index.cfm?Group_ID=5441 (last visited Feb. 28, 2009). The thirteen states that have legalized marijuana are: Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Mexico, Rhode Island, Vermont, and Washington. *Id.* at http://norml.org/index.cfm?Group_ID=3391#top.

Maryland has passed a medical marijuana defense act, which allows a defendant to use the defense as a mitigating factor in marijuana-related state prosecution. *Id.* Michigan was the thirteenth state to legalize medicinal marijuana. *Id.* at <http://blog.norml.org/2008/11/05/truth-prevails/>. Michigan voters approved Proposition 1 on November 4, 2008, with more than 60 percent of the votes. *Id.* It is interesting to note that Massachusetts loosened punishments on the possession of small amounts of marijuana (not necessarily for medicinal use) to a citation-only offense. *Id.*

currently inconsistent with federal law.²⁴ The U.S. Supreme Court continues to support congressional power to prohibit the possession and consumption of marijuana.²⁵ Accordingly, the Supreme Court has also rejected a necessity defense for the use of marijuana by seriously ill patients.²⁶ Federal law classifies marijuana as a Schedule I drug.²⁷ Congress identifies Schedule I drugs as those with (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 of the drug or other substance under medical supervision.”²⁸

The extent to which the Controlled Substances Act preempts state drug laws is limited by the following provision:

No provision of this title 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 . . . *unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.*²⁹

Many courts have referred to this provision as a non-preemption clause.³⁰

Despite the classification of section 903 as a non-preemption clause, California courts recognize that there are “many confusing aspects of the current tension between California marijuana laws and those of the federal government.”³¹ While the non-preemption clause allows states to create their own drug laws, state laws are still preempted by this clause when there are positive conflicts between the state law and federal law.³²

24. 21 U.S.C. §§ 801, 841(a), 844(a) (2003).

25. *Gonzalez v. Raich*, 545 U.S. 1, 9 (2005) (holding that the Controlled Substances Act criminalizing the use, cultivation, or possession of marijuana does not violate the Commerce Clause).

26. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 486 (2001) (holding that there is not a “medical necessity exception” to the Controlled Substances Act).

27. *See Raich*, 545 U.S. at 15.

28. 21 U.S.C. § 812(b)(1).

29. 21 U.S.C. § 903 (emphasis added).

30. *See Gonzalez v. Oregon*, 546 U.S. 243, 289 (2006) (“[N]onpre-emption clause . . . merely disclaims field pre-emption, and affirmatively *prescribes* federal pre-emption.”) (emphasis in original); *Nat'l Pharmacies, Inc., v. De Melecio*, 51 F. Supp. 2d 45, 54 (D.P.R. 1999) (“[E]xpress statement by Congress that the federal drug law does *not* generally preempt state law gives the usual assumption against preemption additional force.”) (emphasis in original); *City of Hartford v. Tucker*, 621 A.2d 1339, 1341 (Conn. 1993) (identifying § 903 as “the antipreemption provision of the Controlled Substances Act”).

31. *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 658 (Cal. Ct. App. 2007).

32. 21 U.S.C. § 903.

The first question that is raised by section 903 is whether California's CUA directly conflicts with the federal CSA. A federal district court has specifically answered this question.³³ In *United States v. Cannabis Cultivators Club*, the court held that 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."³⁴ Yet the CUA does purport to legalize conduct prohibited by federal law.³⁵ The CUA does more than merely remove a penalty for medicinal marijuana use, it gives "seriously ill Californians . . . the right to obtain and use marijuana."³⁶ But the language of the CUA carefully avoids proactive legalization of medicinal marijuana; it just removes all penalties for medicinal possession or use.³⁷

Although *Cannabis Cultivators Club* held that there is not a direct conflict, inconsistencies remain. California law does not criminalize medicinal marijuana, while federal law does. As a result, federal agents are left to enforce federal marijuana laws in California.³⁸ It appears illogical to claim that a California law granting a "right" to medicinal marijuana use is not in positive conflict with federal law classifying marijuana as a Schedule I drug and criminalizing all medicinal marijuana use.

The story of Winslow and Abraham Norton further exposes the problems associated with federal laws criminalizing conduct that California law has recognized as legal and permissible.³⁹ The Norton brothers opened Compassionate Collective of Alameda County in 2004.⁴⁰ Compassionate Collective of Alameda County was a large-scale marijuana distribution center.⁴¹ The brothers got a medical marijuana

33. See *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086 (N.D. Cal. 1998).

34. *Id.* at 1100. There is a strong argument that the CUA on its face makes medicinal use of marijuana legal, and this is directly prohibited by federal law. See 21 U.S.C. §§ 801, 841(a), 844(a). This appears to be a direct conflict. However, whether there is a direct conflict between the CUA and the CSA is not the subject of this Note; rather, I will focus on the possible conflict between the Medical Marijuana Program Act (discussed *infra* Part II) and the CSA.

35. See CAL. HEALTH & SAFETY CODE § 11362.5.

36. § 11362.5(b)(1)(A) (emphasis added).

37. § 11362.5(d).

38. Phillip Matier & Andrew Ross, *Matier & Ross: Feds Go After Wildly Successful Medical Pot Sellers*, S.F. CHRON., Nov. 5, 2007, at B1. See also, *Printz v. United States*, 521 U.S. 898 (1997) ("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.").

39. *Id.*

40. *Id.*

41. *Id.*

permit from Alameda County to legally open and operate the business.⁴² In order to ensure the business continued to operate in accordance with California law, the business received regular visits from county sheriffs.⁴³ By all accounts, the brothers were successful in their business endeavors. They only provided marijuana to patients who had legitimate prescriptions, they paid state and federal taxes, they gave their employees good salaries and benefits, and they even voluntarily participated in community service projects.⁴⁴ This all came to an end when agents from the Drug Enforcement Administration (DEA) felt that the brothers were “out of control” and decided to raid the brothers’ business and homes.⁴⁵ The DEA issued an indictment of twenty-three felony counts, including one count of conspiracy to distribute more than one hundred kilograms of marijuana,⁴⁶ two counts of possession with intent to distribute,⁴⁷ and one count of maintaining a drug-involved premise.⁴⁸ The brothers face a minimum prison term of five years, and could get a maximum of forty years, a \$2 million fine, and at least five years of supervised release.⁴⁹

Charles Lynch is another California citizen impacted by the conflict between the CUA and the CSA. Recently, Lynch was found guilty in federal court of five counts of distributing drugs.⁵⁰ The conviction came after the DEA raided Lynch’s medicinal marijuana dispensary in Morro Bay, California.⁵¹ Lynch faces a minimum of five years in prison,⁵² and could face as many as one hundred years.⁵³ Lynch has vocally questioned the DEA’s motives stating: “They don’t come down on the state legislatures that gave us these laws. They don’t come down on the city officials that let me operate the dispensary. They come down on the little guy. Me.”⁵⁴ Lynch’s sentencing is scheduled for March 23, 2009.⁵⁵

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Press Release, U.S. Dep’t of Justice, IRAs Seized as Part of Marijuana Investigation: Marijuana, IRAs, Bank Accounts, High-Value Vehicles, and Real Property Seized; 2 Arrested in Hayward Operation (Oct. 30, 2007) (on file with the author). *See also*, 21 U.S.C. § 846.

47. Press Release, U.S. Dep’t of Justice, *supra* note 46. *See also*, § 841(a)(1).

48. Press Release, U.S. Dep’t of Justice, *supra* note 46. *See also*, § 856(a)(1).

49. Press Release, U.S. Dep’t of Justice, *supra* note 46.

50. Scott Glover, *Morro Bay Pot Dispensary Owner Found Guilty of Federal Charges*, L.A. TIMES, Aug. 6, 2008, <http://articles.latimes.com/2008/aug/06/local/me-pot6>.

51. *Id.*

52. *Id.*

53. John Stossel & Andrew Sullivan, *Jail For Selling Medical Marijuana*, ABC NEWS, Mar. 10, 2009, <http://abcnews.go.com/2020/Stossel/Story?id=7041286&page=1>.

54. *Id.*

55. *Id.*

The prosecution of the Nortons and the conviction of Lynch are prime examples of the harms that can occur to citizens who operate a legal business—according to state law—but who are in violation of federal law and subject to its penalties. The situation would be much different if federal law prohibited the cultivation, possession, and use of medicinal marijuana, while California law was silent on the issue. But California laws are far from silent. As stated above, California effectively legalized medicinal marijuana cultivation, possession, and use.⁵⁶ This inconsistency has injured many California residents who have been told by the State of California that their actions were legal, but are now awaiting federal penalties because of a direct conflict.

The Supreme Court has affirmed Congress's authority to prohibit medicinal marijuana cultivation, possession, or use.⁵⁷ In *Gonzalez v. Raich*, the Supreme Court held that Congress has the power to prohibit local cultivation of medicinal marijuana in California.⁵⁸ Accordingly, California officials approached the State Attorney General after the *Raich* decision because state officials recognized that *Raich* did not answer the questions of whether medicinal marijuana use was permitted under California law, or whether the State of California could establish an identification system to identify those who are seriously ill.⁵⁹

In keeping with California's understanding of *Raich*'s limited holding, California's Department of Health Services resumed its medical marijuana ID card program, as designated by the Medical Marijuana Program Act ("MMP") passed in 2003.⁶⁰ The MMP detailed the organization and procedures that counties would have to enact to allow those with medicinal marijuana prescriptions to get an ID card.⁶¹ The medical marijuana ID card would identify those with valid medicinal marijuana prescriptions and allow them to possess, cultivate, and use marijuana in California.⁶² The purpose behind the MMP was to make it easier for California law enforcement officers to enforce laws prohibiting cultivation, possession, or use by those without a legal prescription for marijuana by creating a system that would identify those permitted to legally use the drug.⁶³ Presumably, those individuals who voluntarily

56. See CAL. HEALTH & SAFETY CODE § 11362.71.

57. See *Gonzalez v. Raich*, 545 U.S. 1 (2005).

58. *Id.* at 9.

59. See Press Release, Cal. Dep't of Health Servs., Resumes Medical Marijuana ID Card Program (July 18, 2005) (on file with author).

60. CAL. HEALTH & SAFETY CODE, §§ 11362.7–62.8.

61. § 11362.71.

62. § 11362.715.

63. § 11362.71(e).

applied for a medicinal marijuana ID card would be able to show the ID card to law enforcement officials and thus be protected from a potential arrest and avoid having to prove legal marijuana use. Under the MMP, a rebuttable presumption of legal possession was established if an individual was able to produce a medical marijuana ID card when stopped by a law enforcement officer.⁶⁴ The MMP made this presumption rebuttable if an officer suspected “that the information contained in the card is false or falsified, the card has been obtained by means of fraud, or the person is otherwise in violation of the provisions of [the MMP].”⁶⁵

Procedurally, the MMP requires counties to (1) provide applications to individuals seeking to join the ID card program, (2) receive and process completed applications, (3) maintain records of ID card programs, (4) utilize protocols to confirm the accuracy of information provided on applications, and (5) issue ID cards developed by the county health department to approved applicants.⁶⁶

As mentioned above, California’s Department of Health Services suspended the issuance of ID cards for a period to determine whether this would be legal under federal law and *Raich*.⁶⁷ The problem identified by the Department of Health Services was that creating a state-sponsored identification program that required state employees to process and provide ID cards could be viewed as the State of California aiding and abetting medicinal marijuana users in violating federal law.⁶⁸ But after consulting California’s Attorney General, the California Department of Health Services determined that the state-sponsored medical marijuana ID program “would not aid and abet marijuana users in committing a federal crime.”⁶⁹ The California Attorney General came to this conclusion based on the reasoning that federal officials are able to obtain any information that counties receive from applicants in their application for a medical marijuana ID card.⁷⁰ Thus, the Attorney General reasoned, the information could aid federal officials in prosecuting violators of the CSA.

It is against this background that *San Diego NORML* came before California courts. In *San Diego NORML*, the County of San Diego and

64. *Id.*

65. *Id.*

66. § 11362.71.

67. See Press Release, Cal. Dep’t of Health Servs., *supra* note 59.

68. *Id.*

69. *Id.*

70. *Id.*

the County of San Bernardino ("Counties") claimed that because the CSA prohibits cultivation, possession, or use of marijuana for any purpose, California's MMP is preempted by the CSA, and therefore is in violation of the Supremacy Clause⁷¹ of the U.S. Constitution.⁷² The Counties did not challenge whether the CUA was preempted by the CSA.⁷³ Instead, they argued that the MMP posed an obstacle to congressional intent behind the CSA.⁷⁴ The trial court rejected the Counties' claims and held that the MMP did not conflict with—or pose an obstacle to—the CSA.⁷⁵

On appeal, the *San Diego NORML* court looked at three issues: (1) "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";⁷⁶ (2) if a political subdivision may challenge a state law as unconstitutional, may it challenge the entire law, or is it limited to challenging only those provisions that place specific obligations on the local governmental entity;⁷⁷ and (3) whether California's MMP is federal preempted by the CUA.⁷⁸ The *San Diego NORML* court reasoned that a party must suffer an actual or threatened injury to assert that a statute is unconstitutional.⁷⁹ When that party is a local governmental entity, it generally cannot challenge or refuse to enforce the statute without judicial determination that the statute is unconstitutional.⁸⁰

In *San Diego NORML*, the court held that the Counties could challenge the constitutionality of the MMP, but only where the provisions from the MMP impose obligations or inflict injuries upon the Counties.⁸¹ The court held that certain provisions of the MMP do impose obligations on the Counties—specifically, the provisions that require the Counties to implement and administer the ID card system.⁸² Using these guidelines, *San Diego NORML* analyzed the facts under four categories

71. U.S. CONST. art. VI, cl. 2.

72. *County of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 467 (Cal. Ct. App. 2008).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 471.

77. *Id.*

78. *Id.* at 475–76.

79. *Id.* at 474–75.

80. *Id.* at 472 (citing *Lockyer v. City and County of S.F.*, 17 Cal. Rptr. 3d 225, 251 (Cal. 2004)).

81. *Id.* at 474.

82. *Id.* at 475.

of federal preemption⁸³ and held that “the identification card laws do not pose a significant impediment to specific federal objectives embodied in the CSA . . . to combat recreational drug use”⁸⁴

This Note argues that *San Diego NORML* came to the wrong conclusion after analyzing the “four species of federal preemption”⁸⁵ articulated by the California Supreme Court in *Viva! International Voice for Animals v. Adidas Promotional Retail Operations, Inc.*⁸⁶ As California courts have recognized, congressional intent is the ultimate factor in a preemption analysis.⁸⁷ *San Diego NORML* held that the congressional intent behind the CSA was to combat recreational marijuana use.⁸⁸ This interpretation might have been too narrow. If Congress was only concerned about recreational marijuana use, it would have imposed more lenient laws upon those using the drug for medicinal purposes. However, whether a broader view or *San Diego NORML*’s narrow view of Congress’s purpose is accepted, this purpose is in conflict with the demonstrated effects of the CUA. For example, the Department of Justice (“DOJ”) has concluded that marijuana abuse is “rampant” in northern California, partly due to an abuse of the CUA.⁸⁹ Therefore, a program—such as the MMP—designed to increase the ease of access to a drug that Congress has determined to be illegal conflicts with federal law and thus should be preempted under the Supremacy Clause.

III. ANALYSIS AND DISCUSSION

A. *Two Underlying Issues in County of San Diego v. San Diego NORML*

In *San Diego NORML*, the Counties asked the court to strike down the MMP as unconstitutional.⁹⁰ The Counties did not attempt to

83. The four areas of federal preemption are express, conflict, obstacle, and field. *Id.* This Note will discuss *San Diego NORML*’s assessment of these four areas and how they relate to the Counties’ claims later in the Note.

84. *Id.* at 482.

85. *Id.* at 475.

86. 63 Cal. Rptr. 3d 50, 52–53 (Cal. 2007).

87. *Jevne v. Superior Court*, 28 Cal. Rptr. 3d 685, 696 (Cal. Ct. App. 2005).

88. *San Diego NORML*, 81 Cal. Rptr. 3d at 482.

89. See Press Release, U.S. Dep’t of Justice—Nat’l Drug Intelligence Ctr., Northern California High Intensity Drug Trafficking Area Drug Market Analysis (June 2007), <http://www.usdoj.gov/ndic/pubs23/23934/drgovr.htm#foot2>.

90. *San Diego NORML*, 81 Cal. Rptr. 3d at 467.

challenge the constitutionality of California's CUA,⁹¹ but instead alleged that the MMP contradicts congressional intent as expressed in the CSA.⁹² To begin the analysis, the court addressed two underlying issues: (1) whether a county of California may ever challenge a California state law as unconstitutional; and (2) if a county may challenge a state law as unconstitutional, may it challenge the entire law, or only those provisions that place specific obligations on the county.⁹³

The *San Diego NORML* court held that "[a]s 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.'" ⁹⁴ Yet the court held that under certain limited circumstances, "a public entity threatened with injury by the allegedly unconstitutional operation of an enactment may have standing to raise the challenge in courts."⁹⁵ *San Diego NORML* further recognized that "[t]he 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."⁹⁶ Thus, *San Diego NORML* held that in order for a local government entity to have standing to challenge the constitutionality of a state law, the entity must have either been charged with certain duties, or suffered a threatened or actual injury. Accordingly, the court held that the Counties could challenge the constitutionality of the provision of the MMP that imposed specific duties upon the counties of California.⁹⁷

The court then analyzed what the Counties needed to do in order to make a satisfactory complaint. The court followed the basic standing principle that a party must demonstrate an actual interest in having the

91. *Id.*

92. *Id.*

93. *Id.* at 471.

94. *Id.* at 472 (quoting *Lockyer v. City and County of S.F.*, 17 Cal. Rptr. 3d 225, 241 42 (Cal. 2004)).

95. *Id.* at 473.

96. *Id.* (citing *Star-Kist Foods, Inc. v. County of Los Angeles*, 227 Cal. Rptr. 391, 396 (Cal. 1986) (reasoning that a county was able to challenge a state law that exempted taxes for business inventories from foreign origins "because . . . the agencies experienced significant revenue loss")); *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656 (Cal. Ct. App. 2007) (assertion by city was affirmed because medicinal marijuana seized from an individual could not be returned because of federal preemption).

97. *San Diego NORML*, 81 Cal. Rptr. 3d at 471.

case adjudicated.⁹⁸ Here, in order for the Counties to challenge the constitutionality of the MMP, the Counties needed to show the possibility of harm if they were required to follow the provisions of the MMP.⁹⁹

The *San Diego NORML* court held that the MMP did impose specific obligations upon the Counties and that the Counties were therefore able to challenge the constitutionality of the provisions of the law that did affect them.¹⁰⁰ This meant that the Counties could not challenge the entirety of the MMP, because there were some provisions that did not impose specific obligations on the Counties—or, in other words, some provisions did not injure, or pose a possible injury to, the Counties. Some of the duties the MMP imposed on the Counties were that every county in California was required to (1) provide applications to those wishing to participate in the voluntary medical marijuana ID program, (2) receive and process applications, (3) maintain records of the ID card program, and (4) issue the ID cards to approved applicants.¹⁰¹ While *San Diego NORML* held that the Counties could challenge these provisions—as well as a few others that imposed obligations—the court ultimately held that the Counties could “not broadly attack collateral provisions of California’s laws that impose no obligation on or inflict any particularized injury to Counties.”¹⁰² This holding is consistent with the requirement that a party must be interested in order to make a claim.

Therefore, the court properly held that the Counties were able to challenge the constitutionality of the MMP because the MMP imposed specific duties that could potentially harm the Counties. Further, the court held that local governmental entities can only challenge the portions of the law that specifically injure or impose duties upon them. Having summarized these preliminary issues, this Note will now focus on how the *San Diego NORML* court addressed the constitutional challenges and the issue of federal preemption.

98. *Id.*

99. *Id.* at 475.

100. *Id.*

101. CAL. HEALTH & SAFETY CODE, § 11362.71(b) (West 2007). A fifth requirement, not relevant to this note, required counties to follow a special set of statutorily-defined protocols. § 11362.71.

102. *San Diego NORML*, 81 Cal. Rptr. 3d at 467–68.

B. The Four Species of Federal Preemption: Express, Conflict, Obstacle, and Field

After *San Diego NORML* determined that the Counties were able to challenge the constitutionality of certain provisions of a state law, the court looked at the main issue in the case: federal preemption. The California Supreme Court has previously dealt with cases involving federal preemption analysis and has identified “four species of federal preemption: express, conflict, obstacle, and field.”¹⁰³

The first category of federal preemption is express preemption. Express preemption arises when Congress explicitly defines the extent to which the statute passed by Congress preempts state law.¹⁰⁴ Congressional intent is the fundamental question of preemption analyses; therefore, courts are better able to determine congressional intent when Congress explicitly states what it desires to preempt.¹⁰⁵

The second category of federal preemption identified by *Viva!*, and used in the *San Diego NORML* court’s analysis, is conflict preemption. “[C]onflict preemption will be found when simultaneous compliance with both state and federal directives is impossible.”¹⁰⁶

The third category of federal preemption—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.’”¹⁰⁷

The final category of federal preemption—field preemption—is the idea that Congress intended to preempt all state laws in the particular area.¹⁰⁸ This applies “where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation.”¹⁰⁹

103. *Viva! Int’l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 63 Cal. Rptr. 3d 50, 53 (Cal. 2007).

104. *Id.*

105. *Id.*

106. *San Diego NORML*, 81 Cal. Rptr. 3d at 476.

107. *Id.* (quoting *Viva!*, 63 Cal. Rptr. 3d at 53).

108. *Id.*

109. *Viva!*, 63 Cal. Rptr. 3d at 53.

1. *Express conflict preemption and field preemption*

Both the State of California and the Counties in *San Diego NORML* agree that neither express conflict nor field preemption arise between the MMP and the federal CSA.¹¹⁰ The CSA states:

No provision of this title 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 . . . *unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.*¹¹¹

This provision of the CSA expressly states that Congress did not intend to preempt state drug laws unless there is a positive conflict between the CSA and a particular state law.¹¹² While both parties agree that there is not an express conflict, this Note argues that the MMP does pose a positive conflict to the CSA.¹¹³ The purpose of a preemption discussion is to look at congressional intent.¹¹⁴ From the statutory language of the CSA, it is clear that Congress intended to prohibit the cultivation, possession, or use of marijuana.¹¹⁵ If the intent is to make marijuana illegal—even medicinal marijuana¹¹⁶—then any state law that promotes or assists in the legal obtainment of marijuana would be in positive conflict with federal law.

Courts have held that the provision quoted above from the CSA is a non-preemption clause.¹¹⁷ However, in *Gonzalez v. Oregon*, Justices

110. *San Diego NORML*, 81 Cal. Rptr. 3d at 476.

111. 21 U.S.C. § 903.

112. *Id.*

113. See discussion *infra* Part III.B.3.

114. See *Vival*, 63 Cal. Rptr. 3d at 53.

115. 21 U.S.C. §§ 812, 841, 843–44.

116. The fact that Congress intended to prohibit medicinal marijuana use can be derived from the classification of marijuana as a Schedule I drug. See *Gonzalez v. Raich*, 545 U.S. 1, 14 (2005). Congress identified Schedule I drugs as those with (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 of the drug or other substance under medical supervision.” 21 U.S.C. § 812(b)(1).

117. See *Gonzalez v. Oregon*, 546 U.S. 243, 289 (2006) (Scalia, J., Dissenting) (“[N]onpreemption clause . . . merely disclaims field pre-emption, and affirmatively *prescribes* federal pre-emption.”) (emphasis in original); *Nat’l Pharmacies, Inc., v. De Melecio* 51 F. Supp. 2d 45, 54 (D.P.R. 1999) (“[E]xpress statement by Congress that the federal drug law does *not* generally preempt state law gives the usual assumption against preemption additional force.”) (emphasis in original); *City of Hartford v. Tucker*, 621 A.2d 1339, 1341 (Conn. 1993) (identifying 21 U.S.C. § 903as “the antipreemption provision of the Controlled Substances Act”).

Scalia, Roberts, and Thomas refer to section 903 as a “nonpre-emption clause”, but state that section 903 “merely disclaims field pre-emption, and affirmatively *prescribes* federal pre-emption whenever state law creates a conflict.”¹¹⁸ Yet *San Diego NORML* only briefly analyzed the last portion of section 903, which explains that the CSA does preempt state law if “there is a positive conflict between [a] provision of this title and [a] State law so that the two cannot consistently stand together.”¹¹⁹ *San Diego NORML* considered the provision a federal non-preemption provision and narrowly construed the “positive conflict” language included in the CSA.¹²⁰

While the court did address the “positive conflict” language, the court interpreted the language extremely narrowly. *San Diego NORML* held that the “positive conflict” language “preempt[ed] only those state laws that positively conflict with the CSA so that simultaneous compliance with both sets of laws is impossible.”¹²¹ Effectively, the court held that only conflict preemption was applicable in this case.¹²² Though the court essentially ended its analysis here, this Note will explore all four categories of preemption in more detail.

As mentioned above, an express conflict arises when Congress expressly states how the federal law preempts state law. Here, Congress did not expressly state how the CSA preempts state law; in fact, the language in section 903 suggests that Congress intended states to have *some* latitude in regulating marijuana and other Schedule I drugs. But Congress did expressly state that the CSA would preempt a positive conflict between the CSA and a state law.¹²³ While this language does not provide enough support for the CSA to expressly preempt the MMP, Congress did provide language that suggests a test for a positive conflict.

San Diego NORML avoids concluding that a positive conflict exists by broadly construing the entire provision as a “non-preemption” provision and narrowly construing the “positive conflict” language. Despite this interpretation, this Note posits that a positive conflict exists because the State of California legalized activity that is expressly illegal under federal law. True, the CSA provides some latitude for states to modify penalties, but California did more than modify penalties; it legalized the activity. Under the CSA, California may be permitted to

118. *Gonzalez v. Oregon*, 546 U.S. 243, 289–90 (2006) (Scalia, J., Dissenting).

119. 21 U.S.C. § 903.

120. *San Diego NORML*, 81 Cal. Rptr. 3d at 476-77.

121. *Id.* at 481.

122. *Id.*

123. 21 U.S.C. § 903.

eliminate punishment for those who use or possess marijuana for medical purposes, but here, California has legalized marijuana and is now requiring counties to provide ID cards to those with medical marijuana prescriptions.¹²⁴ These ID cards assist those with medical marijuana prescriptions in possessing marijuana in violation of federal law.

While the MMP poses a positive conflict with the CSA, *San Diego NORML* was correct in holding that no express conflict exists between the CSA and the MMP. Congress did not include the necessary language in the CSA to give rise to an express conflict. Therefore, the court was able to easily disregard any express conflict challenge. It is not surprising then that the Counties chose not to argue that the MMP was expressly preempted by the CSA.

Similarly, both the State of California and the Counties agree that field conflict was not an issue.¹²⁵ Field preemption only applies when Congress intends to preempt all state law in a particular field.¹²⁶ As discussed earlier, it is clear from section 903 of the CSA that Congress did not intend to prohibit all state laws on controlled substances because the language provides for an exception to non-preemption when there is a positive conflict between state and federal drug laws.¹²⁷ Therefore, field conflict is not an issue in this case. Thus, the only two remaining categories of preemption that could lead to federal preemption are conflict and obstacle.

Even though *San Diego NORML* held that conflict preemption was the only applicable preemption standard under the language of section 903, the court still briefly analyzed obstacle preemption.¹²⁸ The court concluded that the MMP did not pose an obstacle to the CSA.¹²⁹ However, *San Diego NORML* may have approached the CSA provision too narrowly. Therefore, this Note will discuss and analyze both conflict and obstacle preemption because both categories are potentially triggered by the language of section 903.

124. CAL. HEALTH & SAFETY CODE, § 11362.71(b).

125. *San Diego NORML*, 81 Cal. Rptr. 3d at 476.

126. *Id.*

127. 21 U.S.C. § 903.

128. *San Diego NORML*, 81 Cal. Rptr. 3d at 481–82.

129. *Id.* at 480–81.

2. Conflict preemption

Conflict preemption exists “when simultaneous compliance with both state and federal directives is impossible.”¹³⁰ “[I]n 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.’”¹³¹ In *San Diego NORML* the MMP would be preempted by conflict if it could not exist simultaneously with the CSA. As previously mentioned, the MMP requires Counties to process applications and provide identification cards to those that hold a valid medicinal marijuana prescription.¹³² This identification card, issued by the State of California, would assist ill Californians in legally obtaining, cultivating, and using marijuana in accordance with the CUA.¹³³ Conversely, federal law restricts any cultivation, possession, or use of marijuana.¹³⁴

San Diego NORML asserted that “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.”¹³⁵ This language is dicta from *Geier*, but the principles are supported by the holding in *Gonzalez v. Oregon*.¹³⁶ In *Gonzalez v. Oregon*, the State of Oregon passed a law permitting physicians to prescribe a lethal dose of certain Schedule II drugs to Oregon residents with terminal illnesses.¹³⁷ After the passage of the Oregon law, the United States Attorney General “issued an Interpretive Rule announcing his intent to restrict the use of controlled substances for physician-assisted suicide.”¹³⁸ The Attorney General stated that “administering federally controlled substances to assist suicide violates the Controlled Substances Act.”¹³⁹ In response, the state of Oregon, a physician, a pharmacist, and some terminally ill patients, brought an action in federal court to challenge the Attorney General’s Interpretive Rule.¹⁴⁰ The *Gonzalez v. Oregon* Court held that Congress “explicitly contemplates a

130. *Id.* at 476.

131. *Id.* at 477 (quoting *Southern Blasting Serv. v. Wilkes County*, 288 F.3d 584, 590 (4th Cir. 2002)).

132. CAL. HEALTH & SAFETY CODE § 11362.71(b).

133. § 11362.715.

134. 21 U.S.C. §§ 841(a), 844(a) (2003).

135. *San Diego NORML*, 81 Cal. Rptr. 3d at 477 (citing *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872 (2000) (dicta)).

136. 546 U.S. 243, 251 (2006).

137. *Id.* at 249.

138. *Id.* at 253–54.

139. *Id.* at 254.

140. *Id.*

role for the States in regulating controlled substances.”¹⁴¹ Further, the Court held that the CSA did not preempt Oregon’s assisted suicide law.¹⁴²

Gonzalez v. Oregon is easily distinguished from *San Diego NORML* for two reasons. First, the Oregon law allowed physicians to prescribe lethal doses of certain Schedule II drugs. Schedule II drugs are considered less dangerous and receive less severe restrictions on access and use than marijuana and other Schedule I drugs.¹⁴³ As explained in *Gonzalez v. Oregon*, the CSA places controlled substances in one of five schedules “based on their potential for abuse or dependence, their accepted medical use, and their accepted safety for use under medical supervision.”¹⁴⁴ Because *Gonzalez v. Oregon* involved drugs with fewer congressional restrictions, it is difficult to compare it with the outcome in *San Diego NORML*, which involved marijuana, a Schedule I drug.

Additionally, *Gonzalez v. Oregon* can be distinguished from *San Diego NORML* because of the possible outcomes—and harms to the CSA—if both the Oregon assisted suicide law and the California medicinal marijuana ID card law are permitted. *Gonzalez v. Oregon* dealt with a state authorizing a doctor to prescribe a single dose of a controlled substance to assist in suicide, while *San Diego NORML* deals with providing identification cards to those with prescriptions for long-term medicinal marijuana use. The intent of Congress in both situations is to prohibit wide-spread use and distribution of controlled substances (both recreational and medicinal). Yet a direct or positive conflict does not arise out of a single use of a controlled substance that assists in suicide because this item will not inhibit Congress’s intent to stop widespread distribution. Legalization of marijuana along with an identification program to facilitate the cultivation, possession, and use of marijuana does harm Congress’s mission to regulate interstate commerce and to keep those drugs it has identified as harmful out of commercial channels.¹⁴⁵

Under the CUA, patients are permitted to have twenty marijuana plants cultivated outside, and each year the patient can harvest ten of

141. *Id.* at 251.

142. *Id.* at 261.

143. *Id.* at 250. *See also*, *Gonzalez v. Raich*, 545 U.S. 1, 13 (2005).

144. *Gonzalez v. Oregon*, 546 U.S. at 250.

145. *See, e.g.*, *Gonzalez v. Raich*, 545 U.S. 1, 26 (2005) (holding that the CSA is a constitutional use of Congress’s Commerce power, and the Commerce Clause gives Congress the ability to exclude Schedule I drugs completely from the market).

those plants.¹⁴⁶ The DOJ has concluded that marijuana abuse is “rampant” in Northern California, partly due to an abuse of the CUA.¹⁴⁷ The abuse can only stem from two scenarios. Either people without serious illnesses are obtaining medicinal marijuana prescriptions, or twenty plants produce more marijuana than one patient needs. Either scenario results in marijuana leaking into the recreational-use drug market, which Congress is trying to control. Therefore, a program—such as the MMP—designed to increase the ease of access to a drug that Congress has determined to be illegal would conflict with federal law and be preempted under the Supremacy Clause.

Because of the congressional intent behind the CSA, and the purpose and outcome of the MMP, it appears as if the two laws “‘cannot be reconciled or consistently stand together.’”¹⁴⁸ Thus, even if *San Diego NORML*’s narrow interpretation of section 903’s “positively conflict” language is accepted, there is a good argument that the MMP is preempted by the CSA through a conflict standard.

3. Obstacle preemption

The Counties best argument is that obstacle preemption is applicable to the CSA, and that the MMP poses an obstacle to federal objectives. Obstacle preemption, the third category of federal preemption,¹⁴⁹ “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.’”¹⁵⁰ *San Diego NORML* did not grant much weight to obstacle preemption because *San Diego NORML* narrowly construed the “positively conflict” language in section 903 of the CSA. Yet a more in-depth discussion of obstacle preemption is important because the *San Diego NORML*’s interpretation of section 903 is potentially flawed.

It is true that if the Counties obey every provision in the MMP they will not be in violation of the CSA. But it is also true that the intent of

146. See Press Release, El Dorado County District Attorney’s Office (April 2003), <http://www.co.el-dorado.ca.us/eldoda/cua.html>.

147. See Press Release, U.S. Dep’t of Justice—Nat’l Drug Intelligence Ctr., Northern California High Intensity Drug Trafficking Area Drug Market Analysis (June 2007), <http://www.usdoj.gov/ndic/pubs23/23934/23934p.pdf>.

148. *San Diego NORML*, 81 Cal. Rptr. 3d at 477 (quoting *Southern Blasting Serv. v. Wilkes County*, 288 F.3d 584, 590 (4th Cir. 2002)).

149. Field preemption is the fourth category, but field preemption was already addressed along with the express preemption because the Counties did not claim that the MMP was preempted by either express or field preemption under the CSA.

150. *San Diego NORML*, 81 Cal. Rptr. 3d at 476 (quoting *Viva!*, 63 Cal. Rptr. 3d at 53).

Congress is to stop the cultivation, possession, and use of marijuana. If the Counties provide identification cards to medicinal marijuana users, it would encourage, if not directly facilitate, violations of the CSA. The *San Diego NORML* court narrowly construed Congress's intent by stating that "[t]he purpose of the CSA is to combat recreational drug use."¹⁵¹ If the purpose of the CSA is only to combat recreational drug use, why are there not provisions that allow medicinal marijuana use? The Supreme Court has explained that "by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses."¹⁵² Therefore, the unambiguous language of the CSA indicates that Congress's purpose was to restrict and combat both medicinal and recreational use.

Even if *San Diego NORML*'s interpretation of Congress's intent is accepted, recreational drug use is rampant in Northern California, in part as a result of the CUA.¹⁵³ Thus, it would seem apparent that a program such as the MMP, which facilitates and encourages the violation of federal law and puts marijuana into recreational use circles, is an obstacle to federal laws.

*City of Garden Grove v. Superior Court*¹⁵⁴ further illustrates the obstacles posed to the CSA by the CUA and the MMP. In *Garden Grove* an individual was pulled over after running a red light.¹⁵⁵ The individual consented to a search of his vehicle, and the police officer found a little over eight grams of marijuana.¹⁵⁶ The individual claimed that he had a valid medicinal marijuana prescription, but the police officer confiscated the marijuana because the validity of the prescription could not be confirmed.¹⁵⁷ The individual was cited for possession of marijuana.¹⁵⁸ The individual's doctor came forward and verified the validity of the prescription for medicinal marijuana for an undisclosed serious medical condition.¹⁵⁹ After being cleared from illegal possession of marijuana, the individual demanded the return of his property—the marijuana.¹⁶⁰

151. *Id.* at 482.

152. *Gonzalez v. Raich*, 545 U.S. 1, 27 (2005).

153. See Press Release, U.S. Dep't of Justice—Nat'l Drug Intelligence Ctr., Northern California High Intensity Drug Trafficking Area Drug Market Analysis (June 2007), <http://www.usdoj.gov/ndic/pubs23/23934/23934p.pdf>.

154. 68 Cal. Rptr. 3d 656 (Cal. Ct. App. 2007).

155. *Id.* at 659.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

The police officers refused to return the marijuana because it would be a violation of federal law.¹⁶¹ The officers, and the city of Garden Grove, felt that returning the marijuana would be a violation of the CSA.¹⁶² In fact, the court recounted that

[t]he City sees itself ‘caught in the middle of a conflict between state and federal law’—a position with which we can certainly sympathize—on the issue of medical marijuana and does not want to be perceived as facilitating a breach of federal law by returning [the man’s] marijuana to him.¹⁶³

It is difficult to see how a police officer—or a city official—returning marijuana to an individual is not state action in violation of federal law. The *Garden Grove* court acknowledged that the CUA does not mention anything about the return of legally confiscated marijuana after possession charges are dropped.¹⁶⁴ *Garden Grove* ignored conflict issues and instead decided the case under due process principles, requiring the City to return the marijuana to the individual.¹⁶⁵ The facts in *Garden Grove* further show that the application of California state laws—primarily the CUA and the MMP—creates an obstacle to the CSA. Under the Supremacy Clause, this type of action is prohibited.¹⁶⁶

Although *Garden Grove* did not discuss a possible conflict between federal and state laws, it can be deduced that California marijuana laws are an obstacle to the objectives of the CSA. The Supreme Court denied certiorari to the issues of *Garden Grove* implying that, in California, it is required to return marijuana to individuals with a prescription, despite the federal illegality.

As mentioned above, the *San Diego NORML* court identified four categories of federal preemption, but held that only conflict preemption applied to the MMP pursuant to the language of section 903 of the CSA.¹⁶⁷ Clearly, neither express nor field preemption exists between the CSA and the MMP (or CUA). However, the court held that the MMP was not an obstacle to the CSA and therefore the CSA did not preempt

161. *Id.* at 659–60.

162. *Id.* at 660.

163. *Id.* at 659.

164. *Id.* at 679.

165. *Id.*

166. See, e.g., *Gonzalez v. Raich*, 545 U.S. 1, 29 (2005) (“The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.”).

167. *San Diego NORML*, 81 Cal. Rptr. 3d at 480–81.

the MMP through conflict preemption. It appears that the court's interpretation of section 903 of the CSA was too narrow; thus, forcing the Counties to unconstitutionally follow the procedures outlined in the MMP despite federal illegality.

C. San Diego NORML's *Reasoning: Holding That the CSA Does Not Preempt the MMP*

Federal preemption is not a new issue. In fact, several federal preemption cases came before the U.S. Supreme Court during the 2008 term.¹⁶⁸ Of the five cases¹⁶⁹ involving preemption, four were decided in favor of federal preemption.¹⁷⁰ All four cases decided in favor of federal preemption were decided by large margins.¹⁷¹ The specifics of these cases are unimportant for this Note, but it is not surprising that a federal court would generously support federal preemption, while a state court may likely not support federal preemption under the same circumstances. Preemption cases are not uncommon in the Supreme Court, but the number of cases heard and decided by the Supreme Court last term indicates that federal preemption is still hotly contested.

In *San Diego NORML*, the court recognized that the "Counties . . . 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 . . . federal laws."¹⁷² *San Diego NORML* quickly disregards this claim because "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 sanctions."¹⁷³ Here, the Court dodges the Counties' argument. The Counties asserted that providing identification cards to those authorized under California law to possess marijuana would facilitate the card-holder's violation of federal statutes, confirming the card-holder's right to disobey federal laws.¹⁷⁴ But the court strikes

168. See *supra* note 11.

169. There were actually six preemption cases in the October 2007 term but *Warner-Lambert v. Kent*, 128 S. Ct. 1168 (2008) (per curiam) (Roberts, C.J., recusing) came down to a four-four split.

170. See Daniel E. Troy & Rebecca K. Wood, *Federal Preemption at the Supreme Court*, 9 J. FEDERALIST SOC'Y PRAC. GROUPS 7, 7 (Oct. 2008).

171. *Id.* (citing *Rowe*, 128 S. Ct. 989 (9-0 decision); *Riegel*, 128 S. Ct. 999 (8-1 decision); *Preston*, 128 S. Ct. 97) (8-1 decision); *Brown*, 128 S. Ct. 2408 (7-2 decision)).

172. *San Diego NORML*, 81 Cal. Rptr. 3d at 481.

173. *Id.*

174. *Id.*

down this argument by responding to a different issue.¹⁷⁵ The court merely recognizes that holders of the card are notified through the application process that possession of marijuana is still prohibited by federal law.¹⁷⁶ *San Diego NORML* uses these facts to support its holding that there is no positive conflict, when in reality, these facts support a positive conflict because it assists in the commission of a federal offense.

The court acknowledged that the process of giving an individual a medical marijuana ID card notifies the individual that they will not be insulated from federal laws, although the ID card does identify the individual as one California has chosen not to prosecute.¹⁷⁷ This is a direct conflict because the state is compelled to put a disclaimer on the ID cards indicating that the cards' use is explicitly prohibited by federal law. In other words, notification does not negate the fact that a county providing a medical marijuana ID card to an individual would be "confirm[ing] that its bearer may violate . . . federal laws."¹⁷⁸

Additionally, *San Diego NORML* held that "[b]ecause 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."¹⁷⁹ Here, the court is incorrectly identifying California's actions. True, the CSA provides that states do not have to impose criminal penalties to those who violate the CSA. However, by requiring counties in California to process and distribute ID cards to those with medical marijuana prescriptions, the State is going beyond eliminating criminal penalties. Providing ID cards is an affirmative action by the state essentially legalizing the conduct. If California had decided only to eliminate criminal penalties, preemption would not be an issue, but instead California adopted a program to identify those whom the state deemed could violate federal law. This affirmative action creates a positive conflict with federal law.

Finally, *San Diego NORML* holds that even if obstacle preemption was applicable under section 903 of the CSA, the MMP would not be preempted.¹⁸⁰ From the language of the opinion, it is clear that the court believes obstacle preemption is inapplicable.¹⁸¹ Yet the court goes

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 483.

181. "[E]ven if Congress intended to preempt state laws that present a significant obstacle to the CSA, the MMP identification card laws are not preempted." *Id.*

through a brief obstacle preemption discussion to address this important preemption principle: “Displacement 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,’ or the application of state law would ‘frustrate specific objectives’”¹⁸²

San Diego NORML properly analyzes obstacle preemption under a “significant conflict” lens.¹⁸³ The court held that the MMP does not pose a significant conflict with the CSA.¹⁸⁴ But the court recognized that

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]ny 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.¹⁸⁵

Here, the court recognizes that the CUA “arguably undermines the goals” of the CSA, but that a program that furthers the CUA does not undermine the CSA.¹⁸⁶ Granted, *San Diego NORML* is not faced with deciding whether the CUA is preempted by the CSA, but it is a stretch of logic to state in dicta that although an act—the CUA—is in significant conflict with the CSA, an act—the MMP—that operates in furtherance of the CUA is not in significant conflict when the purposes of the two acts are the same.

A close look at the language of the *San Diego NORML* opinion reveals that the court did not adequately refute the Counties’ arguments that the MMP created an obstacle and a positive conflict to the CSA. *San Diego NORML* took a narrow approach to the “non-preemption” clause in the CSA, but even under this narrow interpretation, the MMP should be preempted under the CSA because Congress’s purpose of regulating marijuana abuse is being obstructed by state laws. The State of California should be allowed to create a procedure to identify those whom they believe are exempted from certain laws, but in this particular scenario, the laws creating the procedure (as well as the laws exempting individuals from criminal punishment) are preempted by the CSA.

182. *Id.* at 482 (quoting *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2516 (1988)).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

D. Remedies to Alleviate the Inconsistencies Between the MMP and the CSA

One of the most important considerations in the balance between the MMP and the CSA is the effect on the citizens of California. What happened to the Norton brothers and Charles Lynch is a result of the conflict between California drug laws and federal drug laws.¹⁸⁷ All of these men were conducting legal businesses—under state law—but now are being federally prosecuted, and face lengthy prison sentences.¹⁸⁸ This inconsistency between state and federal law is a problem; not only for enforcement but for the safety of the citizens.

Therefore, a remedy is necessary. There are four possible solutions to this legal quarrel: (1) everything could remain the same to allow the inconsistencies to work themselves out (medicinal marijuana being legal under state law but illegal—and punishable—under federal law); (2) the federal government could decide to stop raiding medicinal marijuana dispensaries; (3) the state could change its laws to eliminate penalties for medicinal marijuana use, rather than legalizing medicinal marijuana by controlling the number of plants a patient can have, providing medicinal marijuana ID cards, etc.; or (4) Congress could change its laws regarding medicinal marijuana enforcement.

Option one is unsatisfactory because it sends mixed messages to law-abiding citizens. Conflicting state and federal law results in further jurisdictional inconsistencies that will harm citizens who in good faith obey the law of one jurisdiction but violate the law of the another jurisdiction. Nevertheless, option one appears to be the current direction. The U.S. Supreme Court denied certiorari of the *Garden Grove* case, requiring state officials to return a federally illegal substance to individuals, and thereby requiring a state official to conduct illegal business.¹⁸⁹ While this may be the current direction, it does not mean that it is the right direction.

Option two is the current direction. U.S. Attorney General Eric Holder Jr. recently announced that he would no longer authorize DEA raids on medical marijuana dispensaries.¹⁹⁰ This is a shift from the Bush

187. See Phillip Matier & Andrew Ross, *Matier & Ross: Feds Go After Wildly Successful Medical Pot Sellers*, S.F. CHRON., Nov. 5, 2007, at B1; Scott Glover, *Morro Bay Pot Dispensary Owner Found Guilty of Federal Charges*, L.A. TIMES, Aug. 6, 2008, <http://articles.latimes.com/2008/aug/06/local/me-pot6>.

188. See Matier & Ross, *supra* note 187; Glover, *supra* note 187.

189. See *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656 (Cal. Ct. App. 2007).

190. Solomon Moore, *Dispensers of Marijuana Find Relief in Policy Shift*, N.Y. TIMES, Mar. 19, 2009, http://www.nytimes.com/2009/03/20/us/20marijuana.html?_r=2&ref=us.

administration's policy of zero tolerance for marijuana.¹⁹¹ However, a DEA spokesman "pointed out that the attorney general's statement indicated that the federal authorities would continue to go after marijuana dispensaries that broke state and federal laws by selling to minors, selling excessive amounts or selling marijuana from unsanctioned growers."¹⁹² Thus, this direction could potentially harm those that legally sell "excessive amounts" of medicinal marijuana.

Option three is unlikely. The people of California voted in support of Proposition 215, and for the courts to rule against the people's voice would be an affront to the people's democratically expressed will.¹⁹³ Also, Proposition 215 was passed more than 12 years ago. The law has been on the books for a decade, and many other states have enacted laws similar to the CUA. Because this inconsistency between federal and state law has remained, it does not appear that California's legislature, or judiciary, is going to make the first move. Furthermore, states maintain control over the police power, and medicinal marijuana is well within each state's police power to maintain the health and safety of its citizens. Therefore, option two is an unlikely result.

The fourth option is likely the best option. As more and more states legalize medicinal marijuana, the inconsistencies become more widespread. Confusion over the law becomes troubling, and punishment and enforcement of federal laws becomes more problematic. A simple modification of the CSA could alleviate this problem. Congress could either (1) eliminate the "positive conflict" language to make the provision a complete non-preemption clause, or (2) just make an explicit exception for medicinal marijuana use.

The regulation of medicinal marijuana appears to fall squarely within a state's police power; therefore, states should have the power to authorize the cultivation, possession, and use of medicinal marijuana. Right now, federal police powers are infringing on California's police power because federal agents are arresting and punishing California citizens that are being told—under California law—that their activities are permitted.

Option three will be most likely achieved through action by Congress. However, the Supreme Court may be able to resolve some of the issues in *San Diego NORML* if it grants certiorari. As more states pass laws legalizing marijuana and more cases arise in which individuals

191. *Id.*

192. *Id.*

193. Although this would not be the first time that the California Supreme Court has gone against the voice of the people. See *In re Marriages Cases*, 76 Cal. Rptr. 3d 683 (Cal. 2008).

are legally obeying state law but being punished under federal law, a congressional change may become more likely.

IV. CONCLUSION

The inconsistencies between federal drug laws and state drug laws remain. Federal and state courts have yet to resolve these inconsistencies. Federal courts have affirmed Congress's right to regulate medicinal marijuana under the Commerce Power, and state courts have affirmed the state's police power to legalize marijuana for medicinal purposes. *San Diego NORML* was one of the few cases to get past the standing issue and affirmatively attack the constitutionality of state laws that contradict and pose an obstacle to federal laws. But because the Counties in *San Diego NORML* were only permitted to challenge the provisions that imposed specific duties, federal preemption was largely avoided.

Currently, the inconsistencies between federal and state law are harming individuals who live on the fence—obeying and disobeying the law at the same time. It is a disservice to the people affected by these laws to allow the inconsistencies to remain. Of all the possible solutions, congressional modification of the CSA faces the fewest impediments and is the most likely to succeed. A simple modification would allow the federal government and state governments to fight the “War on Drugs” together. The DOJ and the State of California are worried about abuse of the CUA and the MMP. If federal drug laws did not conflict with California's laws, a joint effort enforcing these laws would be much more effective.

Peter Tosh may have realized the challenges facing the legalization of marijuana when he encouraged his listeners to “legalize it,”¹⁹⁴ but it is unlikely that he foresaw the battle between federal and state laws. As for now, medicinal marijuana is simultaneously legal in thirteen states and illegal in all fifty states. But California counties are nonetheless required to provide medicinal marijuana ID cards to any person with a valid prescription, even though these ID cards assist Californians in affirmatively violating federal law.

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194. PETER TOSH, *LEGALIZE IT* (CBS Records 1976).

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