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Regulating Businesses and Personal Conduct

§9.52 e. Other Issues

Medical marijuana advocates have asserted that local regulatory ordinances and ordinances prohibiting dispensaries outright violated various constitutional and statutory provisions. These arguments have not been addressed in any reported decisions, and many decisions suggest these arguments are incorrect.

California's pre-CUA and MMPA statutes criminalizing marijuana use, sale, possession, and other activities in no manner violated constitutional rights of privacy, equal protection, due process, liberty, pursuit of happiness, and protection against cruel and unusual punishment. *National Org. for the Reform of Marijuana Laws v Gain* (1979) 100 CA3d 586.

Similarly, the cases that have addressed claims brought under the CUA and the MMPA have concluded that neither act elevated medical marijuana use to constitutionally protected status. *People v Urziceanu* (2005) 132 CA4th 747, 774 (stating CUA only "created a limited defense to crimes, not a constitutional right to obtain marijuana"; there was no "constitutional right to cultivate, stockpile, and distribute marijuana"); *Ross v RagingWire Telecommunications, Inc.* (2008) 42 C4th 920, 926, 932 (rejecting claim of constitutional privacy rights emanating from CUA and MMPA asserted by employee subjected to drug testing). The CUA did not create "a broad right to use marijuana without hindrance or inconvenience," but rather created only a limited criminal defense to punishment. *Ross*, 42 C4th at 928. Other cases likewise have rejected constitutional claims. See *420 Caregivers, LLC v City of Los Angeles* (2012) 219 CA4th 1316 (rejecting equal protection challenge to city's "grandfather provision" allowing dispensaries before September 2007 to continue while disallowing later-established dispensaries; rejecting claims of right to privacy violations as ordinance record-keeping, and disclosure requirements sought limited and nonintimate information); *County of Tulare v Nunes* (2013) 215 CA4th 1188, 1204 (county's public safety concerns were rational basis for differential treatment of medical marijuana dispensaries); *Conejo Wellness Ctr., Inc. v City of Agoura Hills* (2013) 214 CA4th 1534, 1560 (rejecting substantive due process, procedural due process, and right to privacy challenges to dispensary ban); *County of Los Angeles v Hill* (2011) 192 CA4th 861 (rejecting equal protection challenge to ordinance regulating dispensaries; dispensaries not similarly situated to pharmacies). See also *Phillips v City of Oakland* (ND Cal, Dec. 14, 2007, No. C 07–3885 CW) 2007 US Dist Lexis 94651, *5 (rejecting various constitutional

challenges to city's permitting scheme for medical marijuana dispensaries); *U.S. v Osburn* (CD Cal, Apr. 15, 2003, No. C 02–939 AHM) 2003 US Dist Lexis 8607, *2 (rejecting equal protection challenge to classification of marijuana as a Schedule 1 narcotic under CSA).

One case has ruled that because the use of medical marijuana remains illegal under federal law, the Americans with Disabilities Act (ADA) does not protect against discrimination on the basis of medical marijuana use, even if that use is in accordance with state law explicitly authorizing such use. *James v City of Costa Mesa* (9th Cir 2012) 684 F3d 825.

Several cases have addressed whether parts of the MMPA improperly amend the CUA in violation of the California Constitution. See *People v Kelly* (2010) 47 C4th 1008 (Health & S C §11362.77, adopted by MMPA, burdens defense under CUA and impermissibly amends CUA because it conflicts with CUA's guarantee that qualified patient may possess and cultivate any amount reasonably necessary for current medical needs); *Qualified Patients Ass'n v City of Anaheim* (2010) 187 CA4th 734 (MMPA's provisions concerning collective cultivation were not invalid amendments of CUA); *People v Hochanadel* (2009) 176 CA4th 997, 1013 (MMPA did not amend CUA).

Cases also have addressed whether certain local enforcement actions violated the constitutional rights of qualified patients, collectives, and cooperatives. See, *e.g.*, *Bearman v California Med. Bd.* (2009) 176 CA4th 1588 (agency employees entitled to qualified immunity from liability for damages under 42 USC §1983 for issuing subpoena to review patient's medical records in investigation of prescription for marijuana to treat attention deficit disorder; supervisor did not disregard clearly established law in asking patient to consent to release of records or in obtaining subpoena; marijuana possession still violates federal law, and state law legalizing marijuana is not clearly established); *County of Butte v Superior Court* (2009) 175 CA4th 729 (demurrer overruled; complaint stated cause of action for violation of due process when sheriff's deputy summarily ordered destruction of marijuana claimed to be legally possessed by medical marijuana patient); *City of Garden Grove v Superior Court* (2007) 157 CA4th 355 (police department was required to return lawfully possessed marijuana its officers had seized, even though neither CUA nor MMPA expressly provided for its return).

NOTE™ There is an unresolved question of the effect of Govt C §37100, which prohibits local laws that conflict with state *or federal* law. If the courts were to rule that city regulation of medical marijuana activity that permitted such activity under specified circumstances or subject to specified conditions conflicts with federal law, cities might have to choose between prohibiting such uses altogether (which some cities may be opposed to) or allowing them without any governing regulations.